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A JUSTIFICATION FOR RIGHTS

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ABSTRACT

A JUSTIFICATION FOR RIGHTS

This thesis provides an argument in favour of there being natural rights. Such rights are rights which creatures necessarily have in virtue of their nature alone. These are to be distinguished from non-natural rights which may or may not be acquired. It is argued that natural rights possess three features: (1) they have correlative duties; (2) they have great strength; and (3) they are exclusively negative. It is argued further that that the strength of some natural rights must be absolute.

One chapter is devoted to arguing against the justifications for rights advanced by Immanuel Kant, Alan Gewirth and John Rawls. Another chapter shows that the problem with utilitarianism is that it cannot satisfactorily accommodate rights.

This thesis claims that morality must be connected to well-being and that well-being should be understood objectively rather than subjectively. Further, it advances the view that since individuals, rather than societies or temporal stages of individuals, are the morally significant units of existence, morality should be connected to the well-being of individuals. It is then argued that a moral tool possessing the features which absolute natural rights possess is essential to moor morality to individual well-being.

Given the great strength of absolute rights, they must protect only the most important objective interests an individual subject has and they must protect against only the most severe violations of these interests. Various scales of harm to the individual are envisaged, including scales of pain, injury and restriction of liberty. The view is advanced that absolute rights come into existence at a particular threshold on these scales, absolutely protecting the individual from having to make a sacrifice of that degree or greater. Although absolute natural rights have this important function they are not seen as being the only principles on the moral landscape or even the only non-derivative ones.

A few chapters are devoted to applying the theory to a number of questions, including what absolute rights there are and what creatures have rights. The thesis also answers a number of common criticisms of natural rights.

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INTRODUCTION

0.1) THE RHETORIC OF RIGHTS

Popular moral and political debate in this half-century is characterized and dominated by talk about rights. This is witnessed at the international level by the numerous international statements about human rights: the Charter of the United Nations (1945); the Universal Declaration of Human Rights (1948); the European Convention for the protection of Human Rights and Fundamental Freedoms (1950); the Covenant on Economic, Social and Cultural Rights (1966); the Covenant on Civil and Political Rights (1966); the Helsinki Accord (1975) and others. At the national level numerous liberation struggles have appealed to a right to self-determination. At the individual level, moral and political conversation is riddled with talk about and claims of rights.

Furthermore, talk about rights has not been characteristic of only one culture during this period. Appeal to rights has not been the preserve of the west. Almost everybody has at least declared support for the concept of rights, although the interpretation of what this means and what rights there are has varied considerably.

Rights are in vogue. Everybody wants them and everybody wants to *say* that they respect them. To say otherwise is to be morally and politically impolite, even boorish. Governments and individuals do not wish to have it said of them that they violate rights. It is regarded as a slur of the worst order to be accused of rights-violation.

The preoccupation with rights over the last five decades is due in no small part to the horrors of Nazism during the Second World War. The planned and methodically executed murder of millions of innocent people for the purposes of racially purifying

Europe shocked the conquering allies and spurred concerns about rights. Hence the numerous declarations of rights in the post-war years.

The reaction to the Nazi atrocities is understandable. However, the pendulum has swung its full arc. So headstrong was the attempt to restore the dignity of persons by recognizing their rights, that these rights have become an obsession. Though rights dominate contemporary popular moral debate, it is a rhetoric of rights, not a coherent theory of rights. The concept of rights has been and continues to be abused. In popular circles this trend is not easily criticised because critics of rights discourse are seen as moral heretics.

As I see it, there are two important manifestations of the abuse of the concept of rights. Firstly, appeals to rights have popularly become a substitute for moral argumentation. Instead of carefully arguing what one ought to do in a particular situation, people simply claim a right. They then believe the moral question settled because, as I shall show in the next chapter, rights are a particularly strong kind of moral consideration. Because rights have such strength, asserting the presence of a right is an argument-stopper. Of course, one can attempt to continue the argument by questioning whether the relevant person really has the right he is said to have. However, in those popular circles where the concept of rights is abused, such questions are not welcomed. To bring a person's rights into question or, worse still, to deny a person his rights, is to commit the moral heresy which I have mentioned.

One example of where rights have become easy alternatives to reasoned moral argument is the problem of abortion. Instead of arguing about the complexities of this problem, many people are prone to simply assert either that the foetus has a right to life (if they are pro-lifers), or that the mother has a right over her own body (if they are pro-choicers).

The second manifestation of the abuse of the concept of rights is the proliferation of rights claims. This is, of course, related to the first manifestation. There are many rights claims, in part because these are an easy substitute for rational moral argument. However, this is not the only reason for the proliferation of rights. Another is the confusion that characterizes the popular conception of rights. Because the conceptual logic of rights is so misunderstood, people are not clear about what a right is. Thus, many more claims can pass as rights. In this way claims of rights have been multiplied. For instance, it has been said that we have a right to tourism[1], a "right to co-existence with nature", and a right to "social transparency"[2]. There is, of course, no limit to the number of such rights claims people can make.

The contemporary spawning of rights has had more and less worrying features. Less worrying is the labelling of numerous desiderata as rights. Everything desired becomes a right. Claims of rights are being made to everything which is wanted. We want education for everybody, health care for everybody. We want paid holidays and fulfilling, creative work. International declarations claim that these are our rights. Feinberg speaks about such rights as "manifesto rights"[3]. No doubt such rights reflect an aspiration or a goal. However, the mere fact that we would like some state of affairs to come about does not mean that we have a *right* to such a state of affairs. I take such rights claims to be the result of conceptual confusion. Why I think so will become apparent in the course of this thesis. Because these claims express aspirations which are benevolently motivated and are intended to benefit us all, I take them to be of relatively little danger (though confused nonetheless).

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1. Claimed by the World Tourism Organization and cited by P. Alston, "Conjuring up new human rights: a proposal for quality control", in *The American Journal of International Law*, Vol. 78, 1984, p. 611.
2. From a UNESCO document cited by P. Alston, "Conjuring up new human rights: a proposal for quality control", in *The American Journal of International Law*, Vol. 78, 1984, p. 610.
3. J. Feinberg, *Social Philosophy*, p. 95.

More dangerous are those rights claims which are blatantly self-serving. I am thinking here of those rights claims which involve individual desires riding roughshod over the important interests of others. An example of this would be a claim that one had a right to live in a whites-only neighbourhood or to drive under the influence of alcohol.

The abuse of the concept of rights has a number of unfortunate consequences. Firstly, rights become trivialized through the overuse and abuse of this concept. To use fairly well-worn imagery, the moral currency of rights is devalued by the overuse of the concept of rights. Part of the significance of rights is that they protect very special interests. By alleging that lesser interests enjoy the same moral protection there is a strong possibility that one will come to minimize the moral protection afforded the special interests. If one has rights both to tourism and to life, then the right to life may well lose stature. It may be argued that the right to life does not lose stature, but that the right to tourism gains stature. However, this is not the case when all interests are alleged to be protected by rights. A right can only afford *special* protection to some interests if it does not protect all interests equally.

To invoke rights claims with regard to ordinary interests is morally irresponsible. It is very much like the fabled little boy who cried "wolf". Many times he cried "wolf" in vain and the townspeople came running to his rescue only to find that there was no wolf. One day there was a wolf and he called for help. The townspeople no longer believed his call, did not respond and the boy was eaten by the wolf. If one cries rights too often to protect ordinary interests, then when one really needs to protect an important interest, the claim is not as potent.

A second consequence of the abuse of the concept of rights is that it itself fosters conceptual confusion among people. Those who would like to see greater rigour in

popular thinking about moral concepts would bemoan the vicious circle of conceptual confusion leading to the abuse of the concept of rights which in turn leads to further conceptual confusion and further abuses.

Finally, those who are sensitive to or disgruntled by the abuse of rights claims may be led to reject rights entirely - to throw the baby's rights out with the bathwater. This is a mistake because, as I shall argue, rights have a valuable role to play in moral thinking. However, to guarantee their effective contribution, we must not extend them beyond their conceptual limitations. In chapter 1 I shall examine the conceptual logic of rights and explain what I think characterizes them.

In this section I have been speaking about the rhetoric of rights - how the concept of rights is abused. Of course, philosophers have devoted more critical attention to theories of rights and have been far more careful in their use of the concept of rights. However, the ubiquity of rights in popular moral and political debate is paralleled in many contemporary philosophical discussions of moral and political problems. This preoccupation with rights is, I believe, also inappropriate. Later (chapter 6.1) I shall show that there is more to morality than rights. One consequence of this is that not all moral problems need to be described and resolved in terms of rights. If we take the abortion problem as an example again, I think that this problem is not essentially one of conflicting rights. For example, one could concede that the foetus has no right to life, that the mother does have a right to govern her own body and yet claim that abortion is wrong under certain circumstances. It would be wrong, on this view, not because it violated rights, but because of other moral principles. Not everything we have to say about morality has to be said in the language of rights.

0.2) A BRIEF HISTORY OF THE CONCEPT OF NATURAL RIGHTS

This thesis is not about the history of rights theory. It will not be concerned with the historical origin or development of the concept of rights. Although a number of important philosophers in the history of rights theory will be mentioned and their views outlined, this will not be in an attempt to trace the history of rights theory but rather to make reference to their conceptual contribution.

Notwithstanding this, there is some place in this introduction for a very brief outline of some of the themes and milestones in the history of the concept of rights. If nothing else, this will facilitate an historical contextualization of those historical figures whom I shall mention.

The idea of natural rights is not of great antiquity. It is often thought to be a feature unique to modern political thought, having its origin in the work of John Locke, the seventeenth century English philosopher. Although Locke is the thinker in whose work rights first appear with the distinctive features of their modern conceptions, the idea and language of rights first appeared and developed during the early and high middle ages[4].

The early roots of this idea do, however, extend even further back in time, most probably to Roman law and its Stoic influences. Two relevant concepts in Roman law were those of *ius* and *dominium*. At first *ius* meant "rightful", but through its association with *dominium* (property) it later acquired, outside of Roman law and probably in the work of William of Ockham[5], a new sense - "a right"[6]. If one had a

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4. R. Tuck, *Natural Rights Theories*, p. 2.
5. M. Golding, "The Concept of Rights: A Historical Sketch" in E. & B. Bandman (eds), *Bioethics and Human Rights*, p. 48.
6. R.J. Vincent, "Human rights in western political thought" in *Human Rights and International Relations*, p. 22.

ius then one had *dominium* over that to which one had a *ius* - one had some moral possession. This moral possession was extended to include not simply possession of property but also, for example, possession of one's life.

Roman law also had a concept of *ius naturale* - natural law. This was viewed as a law which was common to all people and was received by natural instinct rather than by any convention[7]. The prominence of natural law increased during the middle ages under the influence of the Church. However, the Christian idea of natural law differed from that of Roman law. For one thing, natural law was seen by the Church as synonymous with Divine law. Natural law also came to be seen as invalidating positive or human-made law when the two conflicted. I shall explain this further in chapter 10.2.

Since medieval natural law theories gave a place to rights, the increased popularity of natural law led to rights' also gaining prominence. However, the medieval rights theorists were conservative and advocated obedience to the absolute state.

This changed as a result of the Renaissance and the Reformation. During this period the authority of the Church was questioned. Although the early reformers upheld the idea of obedience even to tyrannical rulers, their questioning of the Church had a spill-over effect. If the authority of the religious establishment could be questioned, then so could the authority of temporal rulers. This questioning of authority and the growth of individualism to which it led, set a new revolutionary tone for natural right theories. These theories attacked two kinds of political absolutism[8]:
(1) natural hierarchy; and (2) contractual subjection to absolute authority.

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7. R. Tuck, *Natural Rights Theories*, p. 18.
8. J. Waldron (ed.), *Nonsense on Stilts*, p. 7.

Locke's theory, which I shall mention in chapter 2.4, is the first revolutionary natural rights theory. Political authority was seen as deriving in part from a social contract between the members of the society. The three natural rights about which Locke spoke - rights to life, liberty and property - are all derived from the idea of *dominium* and are, on Locke's view, possessed pre-contractually. They may not be given up by means of the contract. Thus, if a sovereign violates these rights of his subjects they are entitled to revolt against the sovereign. It is thus hardly surprising that Locke's theory underpinned the American and French revolutions and found expression in the American Declaration of Independence (1776), the French Declaration of the Rights of Man and the Citizen (1789), and the American Bill of Rights (1791).

The revolutionary nature of the new kind of natural rights theories was caused in part by their individualism. Firstly, the individual and his rights were viewed as preceding the community and the contract which produced the state. Secondly, the individual's claims were given priority over those of the group.

Although Locke's theory had theological assumptions, G-d became increasingly marginalized in natural rights theories of the eighteenth century. Talk of G-d was not entirely dispensed with in such theories, but it no longer played a central justificatory role. Instead there was increased emphasis on the rational nature of natural law. Natural law was believed to be rationally apprehendable or rationally agreed to. The idea of a rational natural law is central to the thought of Immanuel Kant (1748 - 1832), some of whose views are outlined in chapter 2.2.

Whereas the eighteenth century saw the flourishing of natural law and natural rights theories, the nineteenth century saw their decline. This is attributable in part to the excesses of the French revolution at the close of the eighteenth century. Critics of natural rights, such as Jeremy Bentham (1748 - 1832), were shocked by what they

perceived as the pernicious character of talk of natural rights. They saw ideas of rights as inciting people to revolution. I shall discuss Bentham's views in chapter 10.2.

Another important contributing factor to the decline of natural rights theories was a renewed emphasis on the community or group. This had its origins in the work of none other than Jean-Jacques Rousseau whose own ideas ironically had been very influential in the French revolution. Rousseau's concept of the "general will" weakened the revolutionary, individualistic and rational components of eighteenth century natural rights theories[9]. Karl Marx's criticism of rights, with which I shall deal in chapter 10.5, is one example of a group- or community-centred objection to rights.

The nineteenth century nadir of natural rights theories lasted into this century until the end of the Second World War. It was then, I noted in the previous section, that the popularity of natural rights was restored in the wake of Nazi atrocities. However, twentieth century conceptions of rights are not limited to the negative "civil" rights of the last century - rights to non-interference in one's life, liberty and property. These negative rights have come to be known as "first generation rights". Two new "generations" of rights are now being spoken about. The "second generation rights" - so-called welfare rights - were born with the revival of the "first generation" in the immediate post-war years. They include rights to education, health care and housing. The "third generation rights" are a product of the last two or three decades. These are called "environmental rights". They include rights to a clean planet and to conservation. In so far as these new generations of rights are regarded as natural rights, I believe that they are another manifestation of the current abuse of the concept of natural rights.

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9. R. Vincent, "Human Rights in Western Political Thought" in *Human Rights and International Relations*, p. 26.

0.3) CLARIFYING SOME TERMS

Rights function as protective moral tools. Later (chapter 1) I shall discuss the features that characterize these protective tools, thereby clarifying what exactly rights are. Now I want to deal with some adjectives by which rights are qualified. Rights are sometimes described as being natural, moral, legal, human, inalienable or absolute. Since I shall be using these terms, some of them to demarcate my area of inquiry, it is important that they should now be clarified.

What is meant by *natural rights*? What kind of rights are *natural*?

One way to understand natural rights is to identify them with the rights of natural law theory. In chapter 10.2 I shall explain what is meant by natural law theory and the rights of natural law. This, however, is currently not the most common sense of *natural rights*. Neither is it the sense which I shall be using.

I shall use the term "natural rights" in a sense which reflects in part the most common, and in part what I think is the most accurate usage of the term. Broadly stated, a natural right is a right which a creature has because of its nature. What I mean by this is the following. Any kind of creature has a collection of natural characteristics. Some of these characteristics are morally relevant, others are not. The length of an animal's tail or the colour of a creature's skin or fur, though natural characteristics, are not morally relevant. Characteristics such as sentience and sapience are morally relevant natural characteristics. Needless to say, if creatures have natural rights, the natural characteristics in virtue of which they have them, will be the morally relevant ones. Natural characteristics are common to all (normal) creatures of the same kind. This is not to say that different kinds of creature do not share some natural properties, but only that all (normal) creatures of a particular kind share a specific combination of natural

characteristics. Because of this, if creatures of that kind have any natural rights they will have the same natural rights.

Natural rights are to be contrasted with non-natural ones. Whereas natural rights are rights which creatures *necessarily* have, given their nature, non-natural rights are rights which a creature may or may not come to possess. They are rights which it may acquire, contingent upon certain facts about the world and the creature's relationship with it. These contingent facts are usually taken to include transactions and events such as being promised something - one acquires a right to that which one was promised; becoming a member of a club or society - one acquires the rights of the club members; and being unjustly treated - one acquires a right to compensation. I think that it includes other kinds of contingent facts as well, such as social conditions or circumstances. For example, one acquires a right to a certain level of health care in a society that has sufficient resources to provide that level of health care for its members. I think that social conditions and circumstances of this kind are contingent in the sense that is relevant to the distinction between non-natural and natural rights because I see no reason to distinguish their contingency from that of a promise, a club membership or an injustice.

More needs to be said about the distinction between natural rights - those which are possessed necessarily - and non-natural rights - those which are contingently acquired. Depending on what exactly we understand these terms to mean, the distinction between them may collapse or may be preserved. I think that there is a distinction, and that if we use these terms in a way which eliminates the distinction we do not accurately capture what is meant by each kind of right. I think that the following considerations will show this.

Firstly, there is a sense in which all rights are acquired contingently. Whether or not a creature has any rights - even the alleged *natural* rights - is contingent upon that creature coming into and remaining in existence. Waldron mentions this sense of "contingency" in order to exclude it[10]. Clearly, this is not the sort of contingency that is meant.

Secondly, there is a sense in which all rights - even those which are normally thought to be acquired - are possessed in virtue of a creature's nature and, therefore, are natural rights. After all, it is a creature's nature that determines whether it can acquire rights and if so what rights it can acquire. It is because I have the nature that I have that I acquire rights to that which is promised to me. By contrast, inanimate objects, for example, because of their nature, cannot acquire rights (see chapter 8.1). It seems to follow from this line of thought that contingently acquired rights would be possessed in virtue of a creature's nature.

Since I think that there is a distinction between those rights which I have called natural and those which I have called contingent, the definition of "natural rights" must be refined if the distinction is to be preserved. I believe that such a refinement is possible. Natural rights must be those rights which are possessed in virtue of a creature's nature *alone* and not in virtue of its nature coupled with some further contingent facts about the world. Those rights which are not natural in this sense are contingent. It follows that whereas one can determine what natural rights a creature has on the basis of its nature alone, to determine what contingent or acquired rights a creature has one will need to make reference not only to the creature's nature but also to further contingent facts about the world and the creature's relationship with it.

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10. J. Waldron, *The Right to Private Property*, p. 113.

It seems correct, given what I have said, to identify natural rights with what are called *ab initio* rights - rights which exist prior to the occurrence of any contingent events or circumstances. These are rights which a creature has from its very origin as a creature of that kind. *Ab initio* rights are conventionally contrasted with rights that arise *contingently* or are acquired.

Waldron dismisses a possible objection to the distinction between natural / *ab initio* rights on the one hand and acquired / contingent rights on the other hand, though he uses instead the terms "general" and "special" rights respectively[11]. For the sake of convenience, I shall restate Waldron's discussion using my terminology of *ab initio* and acquired rights.

The objection states that every acquired right can be redescribed as an *ab initio* right, namely an *ab initio* right which is conditional in its content. Consider the following example. Imagine that A promises to pay B R5. We can say that given the promise, B acquires a right to be paid R5 by A. However, we can also redescribe the right by saying that *ab initio* B has a right to R5 from A if A promises to pay B R5, and we can say more generally that each person has *ab initio* a right that promises made to him should be kept. If the objection is valid, then all rights exist *ab initio* and there is no distinction between rights that exist *ab initio* and those that are acquired.

Waldron has a logical argument against the objection. His argument runs like this. He says that from the statements

(1) B has a right to be paid R5 by A if A promises to pay B R5,

and

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2. Ibid, pp. 117f.

(2) A promises to pay B R5,

we need to be able to infer

(3) B has a right to be paid R5 by A

by means of *modus ponens*. However, we can only infer (3) if we read (1) as

(1a) If A promises to pay B R5, then B has a right to be

paid R5 by A.

The trouble with this, however, is that (1a) does not attribute any kind of right to B, but merely states a condition under which B will come to have a right. On the other hand, if we read (1) as

(1b) B has a right [to-be-paid-R5-by-A-if-A-promises-to-pay-

B-R5]

then, although we now have a description of a right, we will not be able to infer (3) from it and (2) because the conditional seems to be bound into the context governed by the operator 'has a right to [...]' and it is not clear how *modus ponens* can detach it from that context.

Waldron does go on to express some doubts about whether his argument is watertight, noting that it might be disputed whether the "has a right to [...]' context is really opaque in the way he claims. However, he clearly thinks that his argument has considerable force and it seems to me that we can conclude that it is at least reasonable to retain the intuitive distinction between *ab initio* and acquired rights. There are no compelling reasons to reject it. To say that we never acquire rights, but only satisfy the conditions of rights we have *ab initio*, does not seem to be a correct description of the moral facts. Moreover, accepting the objection entails a commitment to an unnecessary multiplication of rights ascriptions. It seems far more economical to say that we do not really have any of the "conditional rights" until their conditions are actually satisfied.

It is also worth mentioning that, as Waldron points out, to some extent the objection is "a purely verbal manoeuvre"[12] and the dispute a terminological one. Even somebody who insisted that acquired rights can be redescribed as *ab initio* conditional rights, would be forced to acknowledge that within the class of *ab initio* rights there is an important distinction between rights which are and rights which are not subject to any condition. That important distinction therefore emerges unscathed even if the logic of the view is not (as it appears to be) flawed.

Natural rights are a subclass of *moral rights*. Moral rights are rights of morality and are to be distinguished from the rights of law. Moral rights which a creature necessarily has in virtue of the kind of creature it is are natural rights. Moral rights which a creature does not necessarily have are non-natural. For example, if someone promises to give me a book, then I acquire a non-natural moral right to the book. However, not all rights which a creature does not necessarily have are moral rights. Some are *legal rights* - rights which the law confers upon us. Thus, non-natural rights can be moral or legal. If non-natural moral rights are legally recognized then they are both moral and legal rights.

Natural rights are possessed by their bearers irrespective of the law. Sometimes the law recognizes natural rights. On such occasions natural rights and legal rights are co-extensive. However, sometimes the law does not recognize natural rights, either because it does not protect them or because there exist laws which mandate the violation of natural rights. In such cases natural and legal rights are either simply not co-extensive or they are conflicting.

The terms *human rights* and *natural rights* are often used interchangeably. I believe that this usage is mistaken. Humans are alleged to have certain natural rights in virtue

12. Ibid, p. 118.

of the kind of creatures they are. These rights would then be called "natural human rights" or "human rights" for short. In this thesis I shall argue that there are some such rights. However, it is not necessarily the case that all natural rights are human rights. It is at least conceivable that non-human animals have natural rights. I make this point in chapter 2.5. Whether or not any non-human animals actually have natural rights, specifically absolute ones, is a question which I take up in chapter 8. To treat the terms "human rights" and "natural rights" interchangeably is to presuppose, at the very least, that only humans actually *do* have natural rights, but at the most, that only humans *can* have natural rights.

Natural rights are sometimes claimed to be inalienable. *Inalienable rights* are rights which cannot be given up. It makes sense to think of natural rights, in the way in which I have described them, as being inalienable. If one has natural rights necessarily, in virtue of the kind of creature one is, then one cannot give up that right so long as one remains that kind of creature. Alienating rights is to be distinguished from *waiving* rights. When one waives a right one does not give it up. One simply declines to "stand on" one's right on a given occasion with regard to a specific person or people. One temporarily releases one or more of those who have a duty to respect your right from that duty.

It is sometimes claimed that rights are absolute. I shall understand *absolute rights* to be rights which can never be justifiably overridden. The opposite of an absolute right is a non-absolute or overridable one. Although such a right may be very strong and rarely be overridden justifiably, there will be at least some occasions on which it would be justifiable to override it.

I have clarified what I mean by a number of different kinds of right. In the course of this thesis I shall mention other kinds of rights as well. However, I shall delay explaining them until I have reason to mention them.

0.4) THE AIM OF THIS PROJECT

The primary aim of this thesis is, as its title suggests, to provide a justification for rights. However, some clarification of this aim and what it entails is required.

To justify rights is to show that they exist. It is to show why talk about rights is not fictional talk. In the previous section (chapter 0.3) I distinguished between a number of different kinds of right. Included amongst these were natural moral rights, non-natural moral rights and legal rights. It is not my intention to justify the existence of legal rights. They are justified by the law. If rights are incorporated in the law then legal rights exist. Thus, to determine whether or not legal rights exist in a given society, one simply needs to consult its law.

Neither shall I be seeking to justify non-natural moral rights for reasons which I shall explain in chapter 1.1 . My focus will be on natural moral rights. However, for the sake of brevity, I shall often speak simply about "rights" rather than "natural moral rights" or "natural rights". When I mean to refer to legal rights or non-natural moral rights, I shall do so explicitly.

Many may think that the task of justifying the existence of rights is obviously doomed from the start. They may think that clearly there are no such *things* as rights - that rights are fictional entities just like unicorns, fairies, centaurs and Santa Claus. However, to hold this view is, I believe, to be guilty of a naive reification of rights. It is true that we cannot physically point to something and say that it is a right, in the way

in which we can point to something and say that it is a dog or a lamp or a book. However, a right is not claimed to be a physical thing. It is not a noun, but rather an abstract noun. We do not claim that a particular abstract noun does not exist simply because we cannot provide an ostensive definition of it. I concede that while many abstract nouns - such as joy, grief and relief - cannot be physically pointed to, their instantiations can be empirically discernable. For example, I can point to certain kinds of behaviour at a wedding - such as laughter and dancing - and say that I am witnessing an instance of joy. I cannot do the same for a moral right. However, this too is not alarming. Perhaps the best way to show this is to view a moral right as a particular kind of moral *reason* for acting or failing to act in certain ways. A *moral* reason is a special sort of reason for why we *ought* to behave in a particular way. Rights, duties, rules and other moral concepts can be viewed as being different kinds of moral reasons. If, for example, I have a right not to be killed, then we can say that there is a particular kind of moral reason - or more plausibly, a particular kind of complex web of moral reasons - why I ought not to be killed. 'Reasons', like 'rights', is an abstract noun. Thus reasons and rights are not things that can be physically pointed to, yet we do not deny that reasons exist. We regularly and with justification cite reasons for what we do and for the views we hold.

CHAPTER 1

THE NATURE OF RIGHTS

1.1) HOHFELD'S ANALYSIS AND THE CORRELATIVITY OF RIGHTS

In the early years of this century, Wesley N. Hohfeld discerned four different senses of the concept of rights[1]. Although his analysis is of legal or jural rights, attention must be given to it because it helps to clarify the nature and scope of natural rights.

Hohfeld called a right in the strict sense, a "claim-right". Such a right implies a correlative duty or obligation on the part of some other person or people. To say that A has a claim-right X against B implies that B has a duty to A regarding X. This duty may be negative in that B is merely required not to interfere with A's X-ing. When B's duty is one of non-interference then the correlative right is negative. Alternatively the duty may be positive by requiring active assistance to A to facilitate his doing X. Then the correlative right is positive. The concept of a claim right and its correlative duty is, according to Hohfeld, neutral between these two possibilities. However, I shall argue later (chapter 1.3) that there cannot be positive natural rights.

Claim-rights, Hohfeld observes, may be *in personam* or *in rem*. Rights *in personam* have correlative duties which are incumbent upon a determinate individual (or individuals). Such rights usually arise contingently as a result of promises, contracts or laws. In a promise, for example, one person receives an undertaking from a particular individual or individuals. The latter then have a duty towards the former to do what they promised. Rights *in rem* have correlative duties which are incumbent on everyone. Such rights can either arise contingently or they can exist *ab initio*. An example of the

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1. W. Hohfeld, *Fundamental Legal Conceptions*.

former is my purchasing an object. Everyone else then has an obligation not to use that object without my consent. If there are any natural rights - those rights which are had by particular creatures simply in virtue of the kind of creatures they are - then they are examples of claim-rights existing *ab initio*. If, for instance, a creature has a (negative) right to life, then every moral agent has an obligation not to kill the right-bearer, not because of any contingently acquired rights, but because that creature is the kind of creature it is.

The second sense of a right Hohfeld calls a (bare) liberty or privilege. It implies a correlative lack of claims on the part of another person on the right-bearer. Thus, if A has a liberty-right to X, then he has no duty not to X. In other words, B has a correlative "no-claim" on A not to X. Hart provides the following example of a liberty-right[2]: Two people are walking down the street. Both of them see a ten-dollar note lying in the street some distance away and there is no way of ascertaining who the owner is. The money can be regarded as ownerless. Both of the parties have a liberty-right to pick up and keep the money. In other words, each is entitled to pick up the money, having no duty not to do so, but neither person has a claim on the other not to pick up the money. Thus the correlative of each person's liberty-right is not a duty (of non-interference) but rather a no-claim - that is no claim against the right-bearer not to pick up the money.

It seems to me that a right *as* liberty - that is Hohfeld's second sense - is different from a right *to* liberty. If I have a right to liberty then others have a correlative duty to let me be free. If, however, I have a (right as) liberty, others simply lack a claim that I not perform certain actions. The right to liberty is therefore a claim-right on Hohfeld's account, whereas a (right as) liberty is not.

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2. H.L.A. Hart, "Are there any Natural Rights?" in J. Waldron (ed.), *Theories of Rights*, p. 81.

The third sense of a right according to Hohfeld is that of a (jural) power. An individual who possesses a right in this sense, has the power to alter existing (legal) relations or arrangements. It implies a correlative liability on the part of others. The opposite of a power is a disability. If one lacks the power to alter existing relations, then one has a disability in that regard.

Hohfeld's fourth and final sense of a right is that of an immunity. Someone who possesses such a right is immune to an alteration of legal relations or status. It implies a correlative disability. In other words, other parties have a disability in that they lack a power to alter one's legal position. One is immune to such change.

Not all Hohfeld's senses of a right are of equal importance to an inquiry into moral rights. I shall only be looking at rights in their strict sense, that is, rights which Hohfeld calls claim-rights. Hohfeld's concept of a jural claim-right is easily translatable into the language of moral rights. This is less true of the other senses of a right which he discerns.

Of moral claim-rights, I shall only be concerned with those that exist *ab initio*, in other words, with those which I have identified as natural rights. The reason for this is that natural rights are both the strongest and the most difficult to justify. Moral rights that arise contingently are easier to justify because they have as their foundation those events or circumstances from which they arise. One important reason for their relative weakness is highlighted by cases in which they conflict with natural rights and duties. One might think that because the right contracted into temporally succeeds the natural right, it also supersedes the natural right. However, as a rule, this is wrong. Such a conflict would annul the right contracted into, not the natural right. The reason for this is a general principle about the relationship between earlier and later duties: prima facie it is the case that, if one has a duty to some person A to do (or refrain from doing) X,

then one is not at liberty to contract into duties with another person B, which conflict with and make one unable to fulfil one's original duty to person A. Were this not the case, one would be at liberty to release oneself from duties to others without their consent simply by taking on new duties - including the duty not to fulfil prior duties. This would defeat the point of others' having a claim on one. To have a claim on Joe, from which Joe can release himself without the claimer's consent, is not to have a claim on Joe at all.

Of course, there are some exceptions to the general principle that one cannot take on duties which conflict with earlier ones. For example, an earlier duty may be trivial whereas there is an urgency to take on a far more weighty duty. However, contingent rights that conflict with natural rights do not fall under this important kind of exceptional case. Natural rights are far from trivial. About this I believe there is consensus. There is controversy, however, about just how strong natural rights are and whether they can ever be overridden justifiably. Later (chapter 6.2, 6.3) I shall argue that some natural rights have absolute strength. For present purposes it is sufficient to say that the only conditions under which I believe natural rights can be superseded by contingent rights is when the parties involved in the right producing event and affected by it are autonomous and explicitly provide their informed consent to the new right and its implications for the original one. This is tantamount to a right-waiving. The original natural right is waived (or partially waived) by the right-bearer. One might think that the relative strength of natural rights in relation to contingent rights is diminished because natural rights can be waived. However, this is not so because contingent rights can also be waived.

Given the fact that claim-rights that exist *ab initio* (ie natural rights) are most difficult to justify and that they are stronger than contingent claim-rights (ie non-natural rights),

my argument will focus on the former. It is a justification of this sort of right that I shall attempt to provide.

The idea of a claim-right requires further analysis. Hohfeld regards "claim" and "right" (in its strict sense) as being synonymous. He uses the term "claim-right" to highlight this alleged synonymy. I deny that "claim" and "right" are synonymous. However, a right is one kind of claim. I shall say more about different kinds of claim in chapter 6.1.

I think that some ambiguity exists in the concept of a claim-right. On the one hand, it can mean that a right is a moral claim which a right-bearer asserts *himself.* On the other hand, the concept of a claim-right may refer to a moral claim that is made *for* a creature who is thereby a right-bearer. Which of these interpretations one accepts will determine whether or not on thinks that the ability to assert a claim is a necessary condition for having a right. This is a matter I shall take up towards the end of the next chapter (chapter 2.5).

What has been established so far about the character of natural and non-natural rights is that they entail correlative duties. However, this is not all that characterizes them. I turn now to highlight another feature.

1.2) THE STRENGTH OF RIGHTS

A right is a very strong moral principle. Part of its strength derives from the correlative duty that others have to the right-bearer. These correlative duty-bearers do not simply have obligations, they have obligations to determinate people, namely the right-bearers. This differs from an ordinary obligation where although one may have an obligation, it is not to any determinate individual. For example, I may have an obligation to give

charity, but the obligation is not to give charity to a particular person or people. It follows from this that no person has the *right* (in its strict sense) to receive charity from me. I shall say more about this in chapter 1.3.

Another aspect of a right's strength is its moral power to override, at least to a great degree, other moral considerations including social utility. If a person has a right not to be treated in certain ways, then even if collective goals require that he be treated in these ways, his right not to be triumphs over this consideration, at least in general. It is this function which rights, correctly understood, fulfil. There is consensus that rights have this kind of strength and cannot in general be outweighed by other moral considerations. There is, however, disagreement about just how strong rights are. Some, like Dworkin, believe that while rights generally triumph in competition with collective goals, there are circumstances of emergency in which they will have to yield[3]. Nozick, by contrast, believes that rights are absolute and can never be justifiably infringed.

According to Nozick rights are appropriately viewed as being what he calls "side-constraints"[4] on action. Side-constraints are to be distinguished from goals in the following way. Actions can be directed towards the attainment of some goal. Actions which are so directed have end-constraints. The goal or end constrains the choice of action. This is because not all actions will lead to the given goal. If, for example, one's goal is to maximize utility, then one must act only in the way that leads to this goal. One could have the minimization of rights-violations as a goal and then one would have to act in whatever way would achieve this goal. If, for example, violating a single right

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3. J.J. Thomson is another who believes that rights are not absolute. She distinguishes between *infringing* a right and *violating* a right. A right is infringed if that against which it protects is brought about. A right is violated if it is wrongfully infringed. Infringements of rights may be justifiable, violations are not. See J. J. Thomson "Some Ruminations on Rights" in W. Parent (ed.), *Rights, Restitution and Risk*, p. 51.
4. R. Nozick, *Anarchy, State and Utopia*, p. 29.

would minimize rights-violation overall, then one would have to violate that single right. Here we have what Nozick calls a "utilitarianism of rights". I shall show later (chapter 3) that the moral problem with utilitarianism is attributable to the fact that it cannot adequately account for the true nature of rights. Utilitarianism of rights succumbs to the same problems (chapter 4.1). For Nozick, rights may not be violated even if their violation would prevent other more extensive violations of rights. According to him, rights are properly seen as constraining action not "from the end" but rather "from the side". A side-constraint proscribes or absolutely forbids certain actions. If rights are side-constraints, agents are forbidden to violate them, not simply to minimize their violation.

Dworkin, drawing on a term from the world of cards, views rights as trumps[5]. Rights trump - that is, override, outweigh or outrank, at least in normal circumstances - other moral considerations such as those deriving from social utility. Many moral considerations can be brought to bear on any moral decision, but the presence of a right generally trumps these. Thus if a person has a right to life, then even if his death would serve important collective goals, he may not be killed because his right to life trumps this consideration.

Although Nozick and Dworkin employ different imagery, according to both of them rights are capable of defeating other moral considerations, at least to a considerable extent. However, there is a subtle yet significant difference between the two. A constraint, by its very nature, enjoins the avoidance of certain action. It requires desisting from acting in certain ways rather than positively acting in other ways. In other words a constraint imposes a negative duty. A trump, on the other hand, is neutral between acts and omissions. It can entail either negative or positive duties - duties not to act in certain ways and duties to act in certain ways.

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5. R. Dworkin "Rights as Trumps" in J. Waldron (ed.), *Theories of Rights*, p. 153.

1.3) WHY NATURAL RIGHTS MUST BE NEGATIVE

I shall now argue that there cannot be positive natural rights. I shall show that it follows from the combination of the characteristic features of natural rights that they must be negative. I have already made reference to these characteristic features. They derive from the fact that natural rights are both *rights* and that they are *natural.* In chapter 1.1 I showed that for something to be a right (in the strict sense of a claim) it must have correlative duties. If there are no correlative duties - duties which are owed *to* the right-bearer, then there are no rights - claims which a right-bearer has *against* a duty-bearer. In chapter 0.3 I identified *natural* rights as those which exist *ab initio* in virtue of the right-bearer's nature alone (and not in virtue of the right-bearer's nature coupled with some contingency). To demonstrate why natural rights must be negative I shall show why moral tools possessing this combination of features must be negative. It is important to stress that it is the *combination* of features that makes positive natural rights an impossibility. It is possible, as I shall show, to have positive rights which are non-natural and positive natural obligations which are not correlated to rights.

What are the difficulties involved in identifying the correlative duties of positive *natural* rights? Rather than answering this question in the abstract, I shall answer it with reference to an example of a positive right - the right to food - which would seem to be one of the most plausible candidates for a natural positive right. After all, our very strong interests in food must arise from our nature. A positive right to food is a right to be provided with food, or at least some minimum of food required for subsistence. I shall not dispute that people may have a positive right to food but only that such a right could be natural in the sense of natural rights which I have defended.

If we say that the duty correlative to the proposed natural positive right to food is owed to all starving poor people, then the problem that we face, I want to argue, is one of intolerably strong moral responsibilities. If we have a duty to every needy person to provide them with food, then every moment that we are not engaged in providing food for every starving person we are violating rights. Every moment we spend reading the newspaper, visiting friends, mowing the lawn, doing philosophy and visiting the sick, we violate the rights of some people to food. Even if we work unceasingly (itself an impossibility) to provide food for (some of) the starving people of southern Africa, we would be violating the starving Ethiopians' or Somalians' rights to food.

This seems to me to be an intolerably strong view of moral responsibility. How can we be bound by unreasonable moral obligations that require us to devote our every minute and cent to feeding, clothing and healing people for as long as there are poor people who need food, clothes and health care? It is simply not humanly possible to fulfil one's obligations so understood. If one assumes that "ought" implies "can", then if one is to say that A ought to do X, then it must at least be possible that A do X. To deny this is to assert (a) that A can fail to fulfil his duty because it is impossible to do so, and (b) that he is nevertheless responsible for not fulfilling his duty. If one is held reponsible for that over which one has no control, then the boundaries of moral responsiblity have no limit. The whole point of moral responsiblity is then lost.

In reply to this, it could be argued that our duties to the starving are more limited in scope, and require of us only that we do our fair share in providing assistance. This is, for instance, the argument of Henry Shue in his article "Mediating Duties"[6]. He agrees that the duties correlated to a right to food cannot be owed to everybody. He agrees too that we cannot even be obligated to *contribute* to feeding *each* hungry person because even that is not possible. However, he thinks that it is a mistake to say that the right of

6. H. Shue, "Mediating Duties" in *Ethics*, Vol. 98, July 1988.

starving poor people to food entails universal duties - correlative duties which everybody owes to each starving poor person. He thinks that while a right to food must be possessed by each starving person, there can be a division of moral labour on the side of the correlative duties. In other words we can share the burden of feeding the poor. There are some features of Shue's view of how this burden should be shared that are important. Firstly, it does not involve our contributing to each and every poor person. I have already said that he agrees that such contribution is impossible. Sharing the burden involves contributing (perhaps in conjunction with others) to some poor people, while other contributors provide subsistence for other poor people. Secondly, the duties of contributors would be limited by considerations such as the resources available to them and the effectiveness of their potential contribution[7].

Shue says that the cooperation and coordination required to share effectively and limit each person's obligations can be achieved through the medium of institutions - not only existing ones which will need to be developed but also new ones which we should establish. Institutions ought to mediate our duties to those who have rights to food.

Shue believes that even if duties are mediated in this way they can still be *correlated* to rights. He says that for a duty to be correlated to a right, we need to have a rationale for laying the duty correlative to the right at the feet of an identifiable duty bearer. Where it is impossible or inappropriate to ascribe the correlative duty to everybody, we need special connections between the prospective right bearer, say A, and the prospective duty bearer, say B, in order to justify why it is B and not C or D who owes the duty to A[8]. Where A and B share community and institutions such special

7. It might also be said that one's duties to feed others are limited by one's own claims and those of one's family. It is not clear though how significantly this latter restriction would limit one's duties. Are one's own claims only as extensive and as strong as those to whom one must contribute, in which case one would still be obligated to give up nearly everything one has? Or are one's own claims to one's own resources more extensive or stronger those those of others, in which case one's obligations would be less burdensome?

8. H. Shue, "Mediating Duties", in *Ethics*, Vol. 98, July 1988, pg 701.

connections can be found, Shue says. However, what happens when they do not share community and institutions? Shue has two responses to this. Firstly, he says that there is a danger of building in a catch-22. The catch-22 would be that A and B cannot have correlative rights and duties "because they share neither community nor institutions, but they do not share community or institutions, at least in part, because they do not acknowledge rights and duties to each other"[9]. Secondly, he claims that it is not entirely true that people in different parts of the world do not share any institutions. He thinks that certain modern international bodies such as the International Monetary Fund connect people around the globe in ways of which they may not be aware. He acknowledges, that these connections are crude and primitive. He says, however, that rather than dismissing them accordingly, we could strengthen them by acknowledging reciprocal rights and duties[10].

Now it strikes me that there is something possibly circular in this argument - that we are required to acknowledge reciprocal rights and duties to establish that there are such rights and duties. But in any event, the kind of rights about which Shue is speaking are not natural rights. He admits that the primitive institutions and community which people throughout the world share, and which lay the foundation for the rights he mentions, are "social, not *natural* facts"[11] (my emphasis). If the special connections which ground the rights are not natural facts, then the rights themselves cannot be said to be natural. Moreover, the facts that determine the extent of each individual's duties - such as the available resources and the effectiveness of the potential contribution - are also contingent. We may or may not have sufficient resources. Our contribution may or may not be effective.

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9. Ibid.
10. Ibid, pg 702.
11. Ibid, pg 702.

A similar point can be made about the very premises of Shue's argument. He rests his argument on three assumptions: (1) the world human population is large; (2) the planet is rich in resources; and (3) human control over these resources is extremely uneven. These assumptions seem to be quite correct. However, they are not true as a matter of necessity. It is quite possible that someday the planet's resources will be extremely meagre and that there will be insufficient to feed all its human inhabitants. In such a world, Shue would have to admit, all the starving people would not have rights to be fed. What this shows is that the rights to food which the starving might be shown to have at present, are not rights which exist *ab initio*, but ones which they have contingent upon certain facts about the world. They are not *natural* rights. Indeed, the interests people have in food are grounded in their nature, but this is not sufficient to say that they have a natural right. Natural rights are possessed *ab initio* in virtue of the creature's nature *alone*, and not in virtue of its nature coupled with contingent facts about the world (see chapter 0.3).

Onora O'Neill agrees that the duty to feed the poor cannot be universal, that is owed to all the needy, because nobody can feed all the hungry (or, Shue might add, even contribute an equal share to each starving poor person). She says further that special duties - those owed to specific people - are unable to remedy poverty and hunger because most of those who are hungry have no special relationship in virtue of which others should feed them. O'Neill concludes that rights discourse is inappropriate to the problems of famine and feeding the starving poor. She concludes further that because rights theory cannot accommodate these problems, rights discourse is in some way defective. I, by contrast, do not think that rights discourse, in its entirety at any rate, is inappropriate to the problem of feeding the poor. I want to say that we merely cannot speak about *natural* rights in this connection. Given this, I also want to reject or at least qualify O'Neill's further conclusion about the defective character of rights discourse. Talk about rights (in the broader sense that includes not only *natural* rights) *can*

accommodate to some extent the problem of feeding the poor. Where I have sympathy for O'Neill's claim about the defective character of rights talk is that I do not think that rights are the beginning and end of the problem of feeding the poor. Other important moral tools are correlativeless duties - usually called "imperfect" duties. These are duties which are owed generally, rather than to determinate people who can claim the performance of the duty as their right. They are duties which are uncorrelated to rights.

O'Neill argues that on a rights-approach rights and their correlative duties - usually called perfect duties - have primary importance. Such obligations must as a matter of justice be discharged because they can be claimed as a matter of right. Imperfect obligations, she claims, are merely a "matter of charity or optional beneficence"[12]. She says that "once the discourse of rights is established, generosity, beneficence and help are likely to seem less important"[13]. Perhaps O'Neill is correct if she is saying that people who accept a rights discourse tend to denigrate charity, beneficence and other correlativeless obligations. However, it seems to me to be a mistake to treat such obligations as less important or as morally any less obligatory than obligations correlated to rights[14]. Simply because a duty is imperfect, does not give us license to ignore it and not act on it. Merely because a duty is owed generally rather than to a determinate claimant does not mean that the duty-bearer is at liberty to disregard the duty. Indeed, the duty bearer is at liberty to exercise discretion with regard to *how* he discharges his duty but not with regard to *whether* he will discharge the duty at all. He may feed this poor person or he may feed that poor person, but he is not free to feed no poor people.

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12. O. O'Neill, *Faces of Hunger*, pg 102.
13. Ibid.
14. I do see why a right-*based* theorist would have difficulty accommodating imperfect obligations because they cannot be derived from rights. However, the theory which I shall advance is not right-based and I reject right-based theories in part because they would have such difficulty. I shall say more about right-based theories and how my theory differs from these in chapter 10.3.

The view that there are not positive *natural* rights such as a right to food, should not be seen as being unpalatable. In the first instance, the importance and obligatoriness of correlativeless obligations must not be underrated. Some acts of beneficence or charity may, indeed, be supererogatory, but others are morally obligatory. Sometimes, the state may even be justified in enforcing such moral obligations. Secondly, not all rights have to be natural. People can acquire rights and these rights also have importance. There can be contingent circumstances in which positive rights - including the right to food - can be acquired. These rights will sometimes be against the state, but there are also circumstances in which they can be against particular individuals. For example, if a pauper is dying of hunger before my eyes and I can provide him with the food necessary to save his life, and there are not fifty or a hundred others like him also dying before my eyes, then he acquires a right against me. The special character of the circumstances gives rise to this. This acquired right would not impose an intolerable burden on me. However, it could not be said *ab initio*, without knowledge of all the contingent circumstances that impose the duty upon me to help him, that that victim had a right to my aid. Similarly, if I am the first person to arrive on the scene of an accident and, for example, I am not on my way to a desperately important meeting, I have the ability to help a victim of the accident and there is only one victim, etc, then he would have a right against me. Once again it would be an acquired right, not an *ab initio* right.

We have positive duties to the needy. Under certain contingent circumstances they have positive rights against us. However, these rights cannot be natural.

CHAPTER 2

JUSTIFICATIONS FOR RIGHTS

2.1) INTRODUCTION

There have been many kinds of arguments for justifying rights. A number of important justifications of rights can be grouped together because they share the common characteristic of being based on the rationality of persons, even though they differ in numerous other ways.

In this chapter, I shall examine three important examples of arguments which justify rights by appealing, in some or other crucial way, to the rationality of persons. These are the arguments of Immanuel Kant, Alan Gewirth and John Rawls. Kant's argument centres around the concept of autonomy, Gewirth's around the concept of agency and Rawls's around the notion of contract.

I shall commence with an exposition of each of these arguments, showing the role of rationality in each. This will illuminate the common ground between the arguments. I shall also show where they diverge.

Though separate critiques could be offered of each of these arguments, I shall advance a general criticism of rationality as a justification for rights - a criticism that is applicable to all three arguments.

2.2) AUTONOMY AND KANT

The language of rights is largely absent in the writings of Kant. He is far more concerned with the notion of duty. Duty runs to the very heart of his moral philosophy. For Kant, to act rightly is to do one's duty for the sake of doing one's duty.

Given this, why is Kant, the archetypal *deon*tologist - philosopher of duty - so strongly associated with rights? One might maintain that this association is inappropriate and that Kant himself would have been shocked and displeased to have his theory seen as a justification for rights which are *claims* which individuals make on others. He was interested in duties which are *obligations* which individuals owe to others. However, I think that there are two good reasons why Kant has been construed as advancing a justification for rights.

Firstly, given the correlativity of rights and duties, where there is a duty, there is *often* a right. It is true that I argued in chapter 1 that whereas all rights have correlative duties, not all duties are correlated to rights. Some duties are not owed to determinate individuals and thus do not have correlative rights. However, many duties *are* owed to determinate individuals and thus do have correlative rights. Such duties have a central place in Kant's thinking.

This brings me to the second reason why I think Kant is seen as providing a justificatory argument for rights. Though Kant does not explicitly speak of rights, but rather of duties, rights are implicit in his theory. They are implicit in his theory, not only because of the correlativity of rights and duties - a principle to which he does not refer - but because his theory embodies the view that persons ought to be treated as ends in themselves and never simply as means. This is tantamount to saying that persons have rights, because rights serve to protect their bearers from being treated as

means to the ends of others. Thus, any argument that leads to the conclusion that persons ought to be treated as ends rather than means, is also an argument for persons' having rights.

According to Kant, persons ought to be *treated* as ends (rather than means) because they *are* ends in themselves. To be an end in oneself is to have intrinsic value. Such value is to be contrasted with the instrumental value of a means. Inanimate objects, for example, are instrumentally valuable. Their value derives from the ends to which they serve as means. The intrinsic value of an end in itself is also to be contrasted with a subjective end, that is an end or goal which is chosen by a particular creature as a result of what Kant calls "inclination". An end in itself is not an end that happens to be chosen by this or that person. It has independent intrinsic value. To have intrinsic value is, for Kant, to have "dignity".

However, it is not sufficient to say that persons ought to be treated as ends - that is to say that they have rights - because they are ends in themselves or because they have dignity. Why are persons ends in themselves? Why do they have dignity? Kant's answer is not altogether clear, but it has to do with his view of the autonomy of persons. Persons are ends in themselves because they are autonomous.

Kant's concept of autonomy embodies two features: freedom and rationality. On Kant's account these two features are closely interrelated. They are connected with Kant's dualist view of persons. According to him, persons have both a natural and a rational component. All natural things, he says, are governed by causal laws which are, in his terminology, *external* to those things. Natural things function in accordance with scientific laws. Creatures which are governed in this way are not free. They do not rule themselves. They do not decide how they are going to act. They are determined by an external law. Thus, they are heteronomous.

The natural component of persons is subject to the causal laws of nature and is accordingly unfree. However, because persons have not only a natural component, but also a rational one, they can transcend the causal laws of nature and thus act freely. To act freely is not to act according to no law. It is to act according to no *external* law. In other words, persons are free from the "external" laws of nature. This freedom is possessed in virtue of their rationality. To act rationally is, for Kant, to act according to one's own law - a rationally self-imposed law. This rationally self-imposed law is what Kant calls the categorical imperative. One formulation of this imperative is:
"Act only according to the maxim by which you can at the same time will that it shall become a universal law."

The categorical imperative centres around the idea of moral universalizability which is the idea that if an action is morally right for one person in a particular set of circumstances, then it is right for every other person in the same circumstances. By acting in accordance with the categorical imperative one legislates for oneself. However, one simultaneously legislates for all other rational creatures as well. This may sound as though these other rational creatures are then heteronomous - they are governed by my legislation. However, this is not so. Since self-legislation is a rational legislation, all other rational creatures will impose the same law on themselves (and others, including me). They too will legislate the categorical imperative.

It may appear strange to say, as Kant does, that acting in accordance with Law is to act freely. Surely to act freely is to act according to one's desires? However, for Kant, to act according to desires is to act on inclination which is to act within nature. Since nature is regulated and determined by laws external to one, one's action is thus not free. To be free, one must transcend nature and to do this one must act in accordance with reason. Reason legislates the categorical imperative. Thus, acting in accordance

with the categorical imperative is to act freely. To violate the categorical imperative is to violate reason.

We are creatures who can act free from the determinations of nature. However, why are autonomous creatures such as ourselves considered ends in themselves and thus creatures that ought to be treated only as ends? It is at this point that Kant's argument is least clear. He says that every autonomous creature necessarily conceives of himself as an end in himself on grounds which are valid for all other rational creatures. Thus Kant's view is not only that "rational nature exists as an end in itself"[1], but also that rational creatures necessarily and rationally apprehend their own intrinsic value. This gives rise to the following formulation of the categorical imperative:

> "Act in such a way that you always treat humanity, whether in your own person or in the person of another, never simply as a means, but always at the same time as an end".

This is the formulation which explicitly states that persons ought to be treated as ends, rather than simply as means. The concept of rights, I said earlier, is implicit in this idea. The principle of every rational agent as an end in itself, Kant takes to be the "supreme limiting condition of every man's freedom of action"[2]. Similarly, rights limit the liberty of correlative duty bearers. Given the strength of rights, they could be construed as the *supreme* liberty-limiting conditions.

Autonomous creatures are then conscious of themselves as legislators of universal law, the categorical imperative. As such they are ends in themselves and ought to be treated accordingly. This leads to Kant's idea of a "kingdom of ends". The ends to whom he refers are rational beings, that is persons. By "kingdom" he means "a systematic union of different rational beings under common laws"[3].

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1. I. Kant, *Groundwork of the Metaphysic of Morals*, p. 66.
2. Ibid, p. 69.
3. Ibid, p. 74.

In summary, Kant's view is that all members of the kingdom of ends have dignity. It is because they are ends in themselves and because they have dignity, that they ought to be treated accordingly - never simply as a means, but always as an end. They are owed this treatment because they are autonomous - that is creatures with the capacity for rational self-government who apprehend themselves as such.

2.3) AGENCY AND GEWIRTH

Gewirth rejects Kant's argument - for reasons which I shall outline later. But although there are some crucial differences between their views, there are also some notable similarities. The central idea of Kant's argument, I have said, is "autonomy". Autonomy, on his view, incorporates both the idea of freedom and the idea of rationality. On Kant's view, it is because persons have autonomy thus understood, that they have rights. The foundation of Gewirth's argument is "agency". This too embodies two concepts: freedom and intentionality. The combination of these concepts, Gewirth argues, logically commits the rational agent to the moral conclusion that agents have rights.

According to Gewirth, all actions - including moral actions - have two generic features. Firstly, there is *voluntariness* or *freedom*, the feature that agents have control over their actions. Secondly, there is *purposiveness* or *intentionality*, the feature that an agent aims to attain some goal or end, and that that goal or end constitutes his reason for action. These two generic features of action are the starting point for his argument.

Gewirth makes certain claims about the methodology of his argument. Firstly, he claims that it is *dialectical* rather than assertoric. By this he means that the argument proceeds from the perspective of the agent himself, rather than from objective

statements about agents. Secondly, he says that his argument is *necessary* rather than contingent, in that every agent is logically bound to accept the argument.

Now to the argument itself[4]. Given the two generic features of action, Gewirth claims, whenever an agent A performs an action he must, wittingly or unwittingly, be assenting to the proposition:

1) "I do X for end or purpose E."

This is true, says Gewirth, because in accordance with the two generic features of action all actions are free and are directed to some end. Now, if a person freely chooses to act so as to achieve E, he must hold E to be valuable. Hence, the agent must accept:

2) "E is good."

In other words, A must hold E to be good (whether or not it actually is). Otherwise why would he have freely chosen to act so as to achieve that goal?

Now, in order to act for E, the agent needs certain conditions of action, according to Gewirth. These necessary conditions for action are, he claims, closely related to the generic features of action. He calls them freedom and well-being. Well-being amounts to substantive conditions and abilities which are necessary either to act at all or to act with general chances of success in achieving one's goals. From the agent's standpoint, (2) therefore entails:

3) "My freedom and well-being are necessary goods."

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4. Gewirth's argument is found in a number of places. It is most extensive in his *Reason and Morality*, but is also found in his *Human Rights: Essays on Justification and Applications* and "The Epistemology of Human Rights" in E. Paul, F. Miller (jnr.) and J. Paul (eds.), *Human Rights*.

This he says is equivalent to:

4) "I must have freedom and well-being."

If we take "must" in a strong sense - that is, as indicating genuinely *necessary* conditions of action - it follows from this, says Gewirth, that:

5) "I have rights to freedom and well-being."

The "rights" mentioned here are what Gewirth calls "generic rights" or "prudential rights", rather than moral ones. They are called generic because they are required for the satisfaction of the generic features of action - that is, they make action possible. They are called prudential because their only justification is that they satisfy the necessary conditions for the particular agent's own action. However, these prudential rights do entail moral rights, Gewirth claims. He argues in the following way: It follows from the foregoing that the agent A must accept:

6) "I have rights to freedom and well-being because I am a prospective purposive agent."

Agent A cannot claim that he has these prudential rights only because he possesses some other more restrictive characteristic than being a prospective purposive agent, such as being white or being British. Were he to make such a claim, he would have to concede that were he not to possess that more restrictive characteristic, he would not have the prudential rights. He would then be in the position in which he would have to say "I do not have rights to freedom and well-being". However, that would involve

him in a contradiction with premise (4) which claimed that "I must have rights to freedom and well-being".

It follows from (6) that:

7) "All prospective purposive agents have rights to freedom and well-being."

This follows, Gewirth says, because of the principle of universalization. It is at this point, Gewirth claims, that the rights become moral rights. Finally, he says that since all humans are actual or prospective agents, these moral rights belong equally to all humans.

Gewirth claims that the dialectical nature of his argument - that it proceeds from the perspective of the agent himself - does not detract from the stringency or categorical nature of the rights. This is because his argument is also a necessary one. "Whatever is necessarily justified within the context of agency is also necessary for morality", he claims[5].

I said earlier that Gewirth rejects Kant's argument for the rights of persons. Now that I have provided a brief outline of Gewirth's own arguments for rights, I shall say why he is not satisfied with Kant's.

Autonomy, on Kant's understanding of it, is not an empirical feature of persons. The natural component of persons is empirically discernable and observable. However, the autonomy of persons is not connected with the natural component of their existence but with their rational component. This rational component is not empirically observable.

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5. "The Epistemology of Human Rights", in E. Paul, F. Miller (jnr.) and J. Paul (eds.), *Human Rights*, p. 21.

Things which are not (empirically) observable are not things as they appear, but rather things in themselves. They are, in Kant's terminology, noumena not phenomena.

Gewirth takes the non-empirical nature of Kantian autonomy to be a defect. In his view, any justificatory argument for rights should satisfy a "condition of empirical reference"[6]. Kant's argument fails to do so, while Gewirth's does not because it proceeds from empirically discernable agents and actions.

Notwithstanding this, Gewirth provides a re-interpretation of Kant along the lines of Gewirth's own view, but in a way that seeks to satisfy the condition of empirical reference. Again he starts from the generic features of action. By virtue of the voluntariness or freedom of an agent's actions, he has autonomy. By virtue of his purposiveness or intentionality, an agent takes his aims or ends to be valuable. He goes on to say that the worth of the agent's ends entails the worth or dignity of the agent himself. Since the agent is the locus of the ends which have value and since he is the source of value attribution, *a fortiori* the agent himself has value. If his ends have value or worth, and he is the source of their worth, then they only have worth if he has worth himself.

Gewirth concedes, of course, that this is a re-interpretation of Kant. I suspect, though, that this re-interpretation is sufficiently drastic to sever it from Kant. The empirically discernable ends of purposive action are the equivalent of subjective ends in Kant's theory. They are ends which some agents have and other do not. Their value is thus relative to the agent. They are not objective ends - ends which all rational agents must have - which are valuable in themselves. Now, because they are subjective ends, we cannot derive the worth of persons from them, or so Kant would say. We can concede that the particular agents that have these ends do value them and are the source of their

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6. Ibid, p. 10.

value, but that does not entail that the valuers are valuable. It appears then that the arguments of Kant and Gewirth constitute distinct and incompatible justifications for rights of persons.

2.4) CONTRACTUALISM AND RAWLS

Traditionally, rights have featured prominently in contractualist thought. However, their precise character and function varies from one contractualist theory to the next.

Locke, for example, believes that in the state of nature one has three negative claim-rights: to life, liberty and property. Locke takes these rights to be part of the law of nature, which he regards as synonymous with the law of reason and divine law. Thus, these rights are rationally apprehendable. He also takes them to be inalienable, which means that they cannot be discarded by contractual bargaining. Therefore, all three rights are taken into civil society - that is, into the society governed by the contract.

Locke's contractualist view does not constitute a justification for rights. Rights are theoretically prior to the contract. They do not arise from, and are not justified by the contract. Since, in this chapter, I am examining contractualism as a justification for rights, I shall not devote further attention to a contractualist view of this kind.

Rights have a different role in Hobbes's contractual theory. His view of the nastiness of the state of nature is well known. In it, one is free to do whatever one wants. There are no moral constraints, only practical ones. One is at liberty. One has liberty-rights. However, such liberty is not satisfactory, because everybody else also has it, and one lives with the constant dread of robbery, rape, maiming and violent death. Thus, rational agents agree to forgo many of their liberties because the mutual agreement to do so ensures a level of security. In both Locke's and Hobbes's theory rights exist pre-

contractually. Because these rights exist in the state of nature, they are natural rights. However, whereas the rights in Locke's state of nature are claim rights, the rights in Hobbes's state of nature are liberty-rights. Furthermore, Hobbesian natural rights are with one exception not inalienable. You can give them up. The one right that you do not give up, on the Hobbesian view, is the right to preserve your own life. You retain this liberty right in the contract. On Hobbes's view of the contract you also acquire a claim-right to life as well as a number of other claim rights. Since Hobbes's natural rights are liberty rights and are not justified by his contract, and since his claim rights are all non-natural, I shall not consider Hobbes's contract. Rather I shall consider Rawls's theory of justice, in which natural rights do not precede the contract and which justifies natural claim rights.

My construal of the place of rights in Rawls's theory is not uncontroversial. Dworkin for one, believes that there is a right that underlies the very bargaining conditions of Rawls's contract. I shall explain and respond to Dworkin's argument later.

Rawls is concerned with justice. He regards justice as the first virtue of social institutions. The subject of justice, therefore, is the basic structure of society. Since it is this basic structure that distributes certain primary goods which are at its disposal - rights and liberties, powers and opportunities, income and wealth - Rawls is concerned with the justice of this distribution.

Rawls describes a hypothetical position in which agreement about a choice of moral principles is to be reached. He calls this position the original position. Rawls does not believe that there ever was an historic original position in which moral principles were chosen. Rather he sees it as a hypothetical device for arriving at just principles.

Parties in the original position must be both free and equal. However, there is much in an ordinary bargaining situation that would compromise the freedom and equality of the parties. Different people are subject to different social circumstances. Some are rich while others are poor. Different people have different natural aptitudes. Some are strong and others weak. Some are clever and others not. Furthermore, different people have differing conceptions of the good. All these factors generate biases that would preclude a fair agreement.

The equality of the parties in the original position is ensured by depriving them of certain knowledge, so that they are forced to choose from behind a "veil of ignorance". Rawls claims to impose only those constraints on that knowledge which are necessary for free and equal choice. In constructing the original position he claims not to assume more than he has to. In other words, he claims that he does not make unnecessarily strong assumptions.

The restrictions that are placed on parties in the original position are designed to prevent them from knowing certain kinds of *particular* facts. Knowledge of general facts about society, such as principles of economic theory and general psychological laws, is not restricted in any way. I shall mention the facts which the veil of ignorance conceals and explain why access to these facts would, according to Rawls, compromise the circumstances of equality required in the original position.

First, and most obviously, a person in the original position is not allowed to know the place in society which he occupies. The justification for this is quite straightforward. Were he to know this information, he might well choose principles to favour those occupying such a position. This is exactly the chief obstacle to agreement in actual situations. If any kind of fair agreement is to be reached, parties to it will have to be deprived of knowledge of their social position.

Allied to this restriction is the restriction against knowing one's natural talents and endowments. Were parties in the original position to know these facts about themselves, they could again choose principles to favour those possessing such features. Having talents, just as belonging to a certain class or racial group, is accidental. There is no reason, Rawls claims, why having them should benefit one in the way in which it would were parties in the original position to choose under conditions of knowledge about their particular circumstances. The same applies to the generation to which one belongs. Therefore, knowledge of this is also eliminated.

Rawls also denies parties in the original position knowledge about their own conception of the good. He says that if this restriction were not imposed, people in the original position could choose principles that favoured their particular view. A communist, for example, could choose principles that favoured state control of the means of production and a capitalist could choose principles that favoured free enterprise. Under these conditions, agreement would not be attainable.

Each party in the original position is also barred from knowing the special features of his psychology such as whether he has a brave temperament or an optimistic disposition. Rawls says that this knowledge may also prejudice them in the choice of principles.

In addition to these restrictions, a party in the original position may not know the particular circumstances of his own society. For example, he does not know whether he lives in a very rich society in which only a few people live below the breadline or in a very poor society in which only a lucky few have enough to eat. This prevents him from calculating the probabilities of his being in any particular position in society and the conditions of that position, which Rawls thinks would be unfair.

Knowledge constraints are not all that characterize the original position. Certain assumptions are also made about the motivation of parties in this position.

Parties in the original position reason so as to advance, as far as possible, whatever system of ends they will turn out to have. Given the knowledge constraints operative in the original position, the assumption of altruistic or benevolent motivation - that parties in the original position will pursue systems of ends which *others* will turn out to have - is simply not required. Thus, in accordance with his policy of not assuming more than necessary, Rawls does not make the assumption that parties in the original position are benevolent.

Parties in the original position are also not malevolent in that they are not motivated by envy at all. This may seem to be an unnecessarily strong assumption, but Rawls provides justification for it. One line of argument is his claim that parties in the original position would realize that it would be collectively disadvantageous to allow any envious motivations in the selection of principles. Their position in an actual society would be jeopardized if that society were subject to principles selected under the influence of envy.

Rawls is not clear about who the parties in the original position are. He asserts that the original position is not a meeting of all actual or possible persons. Sometimes he asks us to consider it rather as a gathering of representative persons, that is persons representing different strata of society. On other occasions he speaks about a rational person. He is concerned with the free choice of a rational person in an original position of equality. He fluctuates between speaking about a single or plural number of rational persons. I do not think that this makes a difference. If there is a purely rational choice

to be made in the manner in which Rawls assumes, then any number of rational people would make the same choice.

The characterization of the parties in the original position as rational persons is relevant to my inquiry here into rationality and rights-justificatory arguments and is particularly clear where Rawls argues that the original position is a procedural interpretation of Kant's ethics and where he provides a Kantian interpretation of his own theory.

Rawls claims that it is not generality or universality that is central to Kant's ethics, but rather the idea that moral principles are the object of rational choice. Moral principles are chosen under conditions in which persons are free and equal rational beings, that is, as noumenal rather than phenomenal agents. Suitably deprived of knowledge, the parties behind the veil of ignorance choose under such conditions. Acting "autonomously" for Kant is to act according to principles which are the expression of one's nature as a free and equal rational being. Thus, because Rawls sees the original position as being occupied by free and equal rational beings, the parties in the original position, he claims, cannot choose "heteronomous" principles. The principles chosen in the original position must be categorical imperatives because they apply to a person in virtue of his being a free and equal rational person.

Rational persons are the occupants of the original position. They choose their principles rationally. Rawls understands rationality in much the same way as other contractualists have done[7] - as the ability to take the most effective means to a given end. However, as we have seen, persons in the original position do not know their particular ends. They do not have what Rawls calls a "thick" conception of the good. However, they do have what he calls a "thin" conception of the good: they know that they prefer more rather than less of the primary social goods. The basic primary social goods are, I have

7. This point is made by L.W. Sumner, *The Moral Foundation of Rights*, p. 153.

said, rights and liberties, powers and opportunities, and income and wealth. The parties in the original position know that they prefer more of these goods because these goods are, according to Rawls, all-purpose means to any ends, whatever the latter may be. That is to say, whatever "thick" conception of the good a person may turn out to have, he will require primary social goods to attain it. Thus, the primary social goods are things that any rational man would want and would want more of. The desire in the original position for these primary goods does not render the chosen principles hypothetical rather than categorical imperatives. This is because it is rational, Rawls claims, for the parties to desire those primary goods. Rawls has a theory of moral personality which illuminates why it is rational for the persons in the original position to want the primary social goods which Rawls says they want. His view of moral personality is a view of what it means to be a moral person. He claims that a moral person is moved by two highest-order interests which are interests to realize and exercise two powers of moral personality. Rawls claims that persons in the original position are moved by these interests.

One of these is the capacity for a sense of right and justice. This is the ability to honour fair terms of co-operation. The implication is that since the persons in the original position are moral persons, as Rawls claims, they will adhere to the principles which they choose from behind the veil of ignorance. It would simply be unjust to agree to principles when deprived of knowledge in the original position and then, when placed in society, to renege because one could advance one's own position by doing so. It would be unjust because justice is decided in the original position. The public knowledge of everyone's commitment to those principles chosen in the original position is what gives them the strength to be collectively chosen. In other words, it is the knowledge that all are agreeing to the principles that makes them worth agreeing to. The condition of publicity is suggested by the concept of a contract.

The second power of moral personality is the capacity to decide upon, revise and rationally pursue a conception of the good.

Given this, one can see that of the primary social goods, basic liberties and freedoms are required for the rational pursuit (and revision, if desired) of a conception of the good, and for the development and exercising of a sense of right and justice. Powers and opportunities are necessary to give scope to various self-governing and social capacities of the self. Income and wealth are all-purpose means to achieving many ends. The social bases of respect, which are also primary social goods even though less basic, are necessary for persons to have a well-developed sense of their own worth as moral persons and to be able to realise their highest-order interests and advance their particular ends with self-confidence.

It can be seen, Rawls says, that it is not necessary for persons in the original position to have the same conception of the good in all its details. It is sufficient that they are moved by the two highest-order interests of moral personality, and that they therefore all need the same primary social goods. Claims to these goods are known as "appropriate claims".

Much has now been said about the original position and its conditions. What principles would be chosen by rational parties in this position? According to Rawls, they would choose the following two principles, which he calls the principles of justice:

1) Each person has an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for all.

2) Social and economic inequalities are to be arranged so that they are both:

a) to the greatest benefit of the least advantaged; and

b) attached to positions and offices open to all under conditions of equality and fair opportunity.

The first of these principles is known as the principle of equal liberty. The second principle has two parts. The first of these is called the difference principle, and the second is the principle of fair equality of opportunity.

One reason why parties in the original position would choose the second principle of justice, Rawls claims, is because it is rational for them to "maximin". To maximin is to maximise the minimum, that is, to make the position of the worst-off members of society as good as it could be. According to maximin we rank alternative choices of principles by their worst possible outcomes. We consider the worst that could happen as a result of a proposed choice and avoid that choice if the worst outcome of another choice is less bad.

The decision to maximin would not necessarily lead a person to opt for an equal distribution of the primary social goods because inequalities might improve the position of the least advantaged members of society. This could happen in the following way. Additional social resources might be generated as a result of incentives that would be created by a relaxation of stringent and enforced equality. The one barrier that would lie in the way of this would be the presence of envy, but this has been shown not to be operative in the original position.

However, as far as rights are concerned it is not the second principle but the first one which is most important. When the first principle speaks about a right to a scheme of equal basic *liberties*, it is not referring to liberty rights, but to claim rights to liberty. This is evident from the list of liberties which Rawls provides. These include the right to vote and to be eligible for public office, the right to freedom of speech and assembly

and the right to freedom from arbitrary arrest[8]. These are claim rights. Unlike liberty rights, they have correlative duties of non-interference.

There is a redundancy in Rawls's formulation of the first principle. This is made explicit when one highlights that the liberties to which the first principle refers are in fact rights. We see then that the first principle states that each person has an equal *right* to the most extensive scheme of equal basic *rights* compatible with a similar scheme of *rights* for all. It is redundant to speak of having a right to a right[9]. However, the redundancy in the first principle does not amount to a substantive problem. Alternatively phrased, the first principle could avoid it.

The purpose of the principles of justice is to determine the distribution of the primary social goods. Of these primary goods, rights and liberties are distributed according to the first principle. According to this principle rights are to be distributed in a strictly equal manner. The remaining primary social goods - powers and opportunities, income and wealth - are distributed according to the second principle[10].

Furthermore, the first principle is, in Rawls's words, "lexically" prior to the second. This means that the first principle must be satisfied before the second principle except in very poor economic conditions. There can be no compromise in the egalitarian distribution of rights, as prescribed by the first principle, for the purposes of achieving greater social and economic benefit, which is distributed according to the second principle.

So far I have outlined Rawls's original position and shown why Rawls takes the nature of its conditions to justify the chosen principles it yields. However, this is not

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8. J. Rawls, *A Theory of Justice*, p. 61.
9. Rex Martin makes this observation: R. Martin, *Rawls and Rights*, p. 29.
10. J. Rawls, *A Theory of Justice*, p. 61.

uncontroversial. Dworkin argues that the original position is not the foundation of the justificatory argument, but rather "one of the major substantive products of the theory as a whole"[11]. There is, he says, a "deeper theory" that provides philosophical arguments for the conditions of the original position. According to Dworkin, this deep theory must be one that, to use his famous phrase, takes rights seriously[12]. This is because the very idea of a contract accords each party in the bargaining position a power of veto which can be used to protect interests and rights. Since agreement must be unanimous, if a particular party does not agree then there is no contract. Dworkin discusses what the basic right could be and concludes that it must be a right (of all persons) to equal concern and respect[13].

If Dworkin is correct, there is a right that does not arise from the contract and thus is not justified by the contract. Rather it is precontractual. If this is so, then it appears that Rawls's theory is not unlike Locke's in the way in which I have suggested.

However, there are two responses to this: one less bold than the other. Firstly, one could accept Dworkin's view and also claim that Rawls's contractualism justifies rights. To concede that there is a right that is pre-contractual does not preclude the possibility that the contract justifies further rights, even if it does not justify the basic right to equal concern and respect. By contrast, the contractualist views of Locke and Hobbes do not justify any new natural rights. One problem might appear to remain on this interpretation, however. Dworkin takes a "natural" right to be one that is not the "product of any legislation, or convention, or hypothetical contract"[14]. Accordingly, the only natural right could be the basic right - that is the pre-contractual right. Any right that was justified by the contract would, on Dworkin's view, not be a *natural* right. But I do not share Dworkin's conception of a natural right. I agree that a right

11. R. Dworkin, *Taking Rights Seriously*, p. 158.
12. Ibid, p. 169.
13. Ibid, pp. 179, 180.
14. Ibid, p. 176.

that arises from law or convention is not natural, but a hypothetical contract, such as Rawls's, is not a law or convention. It is precisely because it is not an actual contract, but rather a rational tool or expository device for arriving at principles of justice, that it can justify natural rights.

That then, is the meeker reply to Dworkin's challenge to the justificatory function of Rawls's theory. The bold response is to deny that Dworkin is correct or, more accurately, to deny that his arguments for that conclusion are correct.

When he says that the original position is some mid-point between deep theory and principles, rather than being itself the foundation of the principles, is he ascribing this view to Rawls himself, or is he saying that this is what is in fact the case? I think that Dworkin is making both claims.

In support of his claim that Rawls does not view the original position as a foundation for his argument, he quotes the following description by Rawls of the original position:

> I have emphasized that this original position is purely hypothetical. It is natural to ask why, if this agreement is never actually entered into, we should take any interest in these principles, moral or otherwise. The answer is that the conditions embodied in the description of the original position are ones that we do in fact accept. Or if we do not, then perhaps we can be persuaded to do so by philosophical reflection. Each aspect of the contractual situation can be given supporting grounds. ... On the other hand, this conception is also an intuitive notion that suggests its own elaboration, so that led on by it we are drawn to define more clearly the standpoint from which we can best interpret moral relationships. We need a conception that enables us to envision our objective from afar: the intuitive notion of the original position is to do this for us.[15]

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15. Ibid, pp. 157, 158. Quoted from J. Rawls, *A Theory of Justice*, pp. 21, 22.

Apparently Dworkin understands by the statement that we are persuaded to accept the conditions of the original position by *philosophical reflection*, that there is an underlying deep theory that leads us to accept the said conditions. However, I disagree with this reading of Rawls. When he makes the claim about philosophical reflection persuading us of the need to accept the conditions of the original position, I understand him to be referring to the kinds of argument for each condition of the original position which I have already mentioned. Thus, for example, we are persuaded to accept the condition that parties in the original position do not know their place in society *because that would lead to bias*. Reflecting on this reason is a philosophical ground for accepting the condition of ignorance about one's social standing. This is what Rawls means when he says that '"each aspect of the contractual situation can be given supporting grounds"[16].

I think, therefore, that Dworkin misconstrues Rawls's own view of the function of the original position. Rawls, I think, does not take it to be the mid-point between a deep theory and the principles of justice. This is sufficient to justify my classification of Rawls's theory as a contractualist view that purports to justify rights. I am claiming that Rawls is attempting to defend a contractualist view that does not presuppose, but rather seeks to justify rights.

However, to understand Dworkin clearly we need to ask why he thinks that Rawls's original position is actually a mid-point between a deep theory and the principles of justice. The starting point of Dworkin's argument is that a "hypothetical contract is not simply a pale form of an actual contract; it is no contract at all"[17]. The question then arises, why one should abide by principles one would agree to but did not actually

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16. J. Rawls, *A Theory of Justice*, p. 21. Quoted by R. Dworkin, *Taking Rights Seriously*, p. 157.
17. R. Dworkin, *Taking Rights Seriously*, p. 151.

agree to. This is what Rawls meant when he said: "It is natural to ask why, if this agreement is never actually entered into, we should take any interest in these principles"[18].

The obvious response, and one which Dworkin anticipates[19], is that the original position is intended to model conditions of fairness and this is why we should accept the principles it justifies. However, Dworkin claims that the conditions of ignorance in the original position do more than simply set boundaries within which rational calculations of self-interest can be made. They actually affect the calculations themselves. This he takes to be unacceptable. He says that if people were to know their talents, some might prefer different principles which would allow them to take advantage of their talents. Thus, the ignorance enforced on the parties in the original position affects their calculations themselves. Rawls's response to this is that it is precisely because knowledge of one's natural talents could lead to a biased choice of principles, that parties in the original position should be denied such knowledge. This, Rawls claims, is what fairness dictates, even if the nature of the calculations themselves are altered as a result.

Dworkin goes on to consider the role of moral "reflective equilibrium" in Rawls's theory and its significance for the original position. There is often a tension between our moral intuitions on the one hand - our specific judgements about what we take to be right and wrong - and our moral theory or principles on the other. According to Rawls's idea of reflective equilibrium, this tension is not properly resolved by blindly following either one's intuitions or one's principles. Rather, one must attain a reflective equilibrium between intuitions and principles. This means that, on the one hand, our moral theory or principles must take account of our moral intuitions, but at the same time, our intuitions should be sensitive to our theory. Thus, we need both to ammend

18. J. Rawls, *A Theory of Justice*, p. 21.
19. R. Dworkin, *Taking Rights Seriously*, p. 153.

our theory to suit the intuitions and also to adapt our intuitions to suit our theory. The balance that is achieved is called reflective equilibrium.

Dworkin argues that it is not clear what the connection is between the original position and reflective equilibrium. The original position is neither part of our moral intuitions or judgements, nor part of our moral theory or principles. He alleges that reflective equilibrium is operative between the two principles of justice and our particular judgements. The implication of this is that the original position is obsolete as a justificatory device.

However, it seems to me that Rawls does account for the justificatory significance of the original position. In his book *A Theory of Justice*, he has a section entitled "The original position and justification", which title is itself illuminating. In it he seems to propose a two-prong idea of justification. Firstly, justified principles are those which are chosen under conditions of fairness which Rawls believes characterizes his original position. Secondly, the principles chosen in the original position must "match our considered convictions or extend them in an acceptable way"[20] - that is, they must be in a state of reflective equilibrium with our moral intuitions or judgements.

Dworkin does consider something like the first of these justificatory features. He suggests that perhaps "it is one of the conditions we impose on a theoretical principle, before we allow it to figure as a justification of our convictions, that the people the principle would govern would have accepted that principle, at least under certain conditions ..."[21]. He rejects this view because it "is certainly not part of our established political traditions or ordinary moral understanding that principles are acceptable only if they would be chosen by men in the particular predicament of the

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20. J. Rawls, *A Theory of Justice*, p. 19.
21. R. Dworkin, *Taking Rights Seriously*, p. 157.

original position"[22]. That, however, is beside the point. It is precisely this criterion that Rawls is suggesting we adopt in keeping with the contractualist tradition. Other theories have other notions of justification. There is no one notion of justification which is part of our "ordinary moral understanding". There are a variety of competing ideas of what counts as justification. The contractualist idea of choice under certain circumstances and by the parties concerned is one such idea. It *may* be a weak idea but to show this it is not sufficient to state that it is not part of our "established political traditions" or "ordinary moral understanding", because no other idea of justification is either.

I have argued against Dworkin's arguments that Rawls's original position constitutes a mid-point between a deep theory and the principles of justice. Other critics of Rawls have argued for a similar conclusion to Dworkin's, but in different ways. Nagel[23], for example, has argued that the original position is not neutral. It models rather than justifies the conclusions which it yields. Thus, it presupposes, even if unwittingly, a particular view - a brand of liberalism.

To an extent, Rawls can concede that the original position is modelled to produce the particular principles which it does. This is part of the idea of reflective equilibrium. Thus, whether the criticism is damaging to Rawls depends on whether the original position is *illegitimately* tailored to yield the principles it does. I shall not consider the specific arguments of Nagel and others that the original position is illegitimately tailored. Rawls's justificatory enterprise may or may not succumb to these arguments, but they are not of primary interest here. In this section I have simply wanted to provide an account of Rawls's theory and to point to one important kind of criticism - one that attacks the justificatory power of the original position. I focused on Dworkin

22. Ibid.
23. T. Nagel, "Rawls on Justice" in N. Daniels (ed.), *Reading Rawls*.

in this regard because he ascribes to *Rawls* the view that there is a deep theory underlying the original position. This ascription, I argued is mistaken.

In the next section, I shall offer a criticism that is applicable to Rawls's as well as Kant's and Gewirth's arguments for justifying rights.

2.5) CRITIQUE

The rationality of persons is central to each of the justifications for rights discussed in this chapter. For Kant, it is the rationality of persons that makes them ends in themselves who ought to be treated accordingly. Rights ensure that they are treated as ends and not simply as means. For Gewirth, an agent is logically committed to the proposition that all agents have rights. Only rational creatures can be genuine agents. For Rawls, principles of justice - including an equal distribution of rights - would be chosen by rational persons in an original position of equality.

I have not attempted to evaluate each of these justifications in turn, to determine whether or not they succeed in justifying rights. Rather, I want to offer a criticism that attacks the very starting point of each of these justifications. I want to show that their starting point - the rationality of persons - is wrong.

By taking the rationality of persons as the relevant starting point, these arguments make the assumption that rationality - or, in Rawls's case, being a member of a rational species - is essential for having rights. If rationality is the basis of an argument for rights, then where rationality - or membership of a rational species - is lacking, rights are lacking. For Kant, a non-rational creature cannot be autonomous and therefore cannot have rights. For Gewirth, non-rational creatures cannot be genuine agents and therefore cannot have rights. When agents universalize their prudential rights, thus

yielding moral rights, they universalize their rights to all other agents. Agents are logically committed to the rights only of other agents. For Rawls, non-rational creatures are not parties in the original position. The principles that parties in the original position choose govern the treatment of rational creatures. Rawls does think that parties in the original position will choose a principle of paternalism "to insure themselves against the possibility that their powers are undeveloped and they cannot rationally advance their interests, as in the case of children; or that through some misfortune or accident they are unable to make decisions for their good, as in the case of those seriously injured or mentally disturbed"[24]. However, there are simply no principles governing the treatment of non-human non-rational creatures. This is not only the case in the original position, but also in the other stages of Rawls's sequence: at the hypothetical constitutional stage, the legislative stage and the judicial stage. No later stage is constrained by principles concerning the treatment of non-rational animals and rational non-benevolent parties in each stage have no reason to give a thought to non-rational animals, except in so far as it affects them. This is not to say that at one of the later stages - perhaps at the legislative stage - rules governing the treatment of non-rational animals will not be enacted, but there is nothing that necessitates this.

Rawls acknowledges this deficiency in his theory. He maintains that "it is wrong to be cruel to animals"[25] and that there are requirements about how they should be treated. However, he admits that the contractarian idea does not tell us how "to conduct ourselves towards animals"[26] and that "it does not seem possible to extend the contract doctrine so as to include"[27] animals.

I am not saying at this stage that non-rational creatures, such as animals, do have rights. I am only saying that we cannot assume from the outset that they do not. By

24. J. Rawls, *A Theory of Justice*, pp. 248-249.
25. Ibid, p. 512.
26. Ibid, p. 17.
27. Ibid, p. 512.

using rationality as the starting point for the justification of rights, we make just this assumption. It is possible that rationality is a sufficient condition for having rights, but it cannot be assumed that it is a necessary condition, that if one is not rational then one necessarily lacks rights. One could possess some other relevant characteristic.

There is nothing about the nature of a right that entails that it can only be possessed by a rational creature. In the previous chapter, I highlighted an ambiguity in the concept of a "claim-right". I said that it could mean that a right is a moral claim which a right-bearer asserts. If this is so, then being able to assert a moral claim is a necessary condition for having rights. I imagine that only rational creatures could assert a moral claim. Therefore, if we adopted this interpretation of "claim-right", being rational would be a necessary condition for having rights. However, "claim-right" may also refer to a moral claim that is made either by or on behalf of the right-bearer. If this is so, then being rational is not a necessary condition for having rights. I see no reason why we should opt for the former, more exclusive interpretation of the idea of a claim-right. Why should only those creatures that are capable of asserting a moral claim have a moral right? It is in the nature of moral claims that they can be asserted on behalf of others, for instance, in the context of the treatment of animals, infants, unconscious adults and senile geriatrics, as well as slaves and prisoners. In doing so we do not violate the conceptual logic of a claim. There is no reason why the same could not be true of rights which are *trumping* moral claims. The notion of a trumping moral claim does not imply that only rational creatures can have such claims, though they *may* in fact be the only creatures that have them. In other words, it may be the case that moral claims as strong as rights can only be made *for* creatures that happen to have the ability to make claims. However, it would not be because of this ability that they have rights, but for some other reason, perhaps because they have certain higher-order interests.

Whether rationality is a necessary condition for having rights is related to an important distinction between two types of rights theories: Choice or Will theories, on the one hand, and Interest or Benefit theories, on the other. Choice theories see rights essentially as powers to exercise claims. The right bearer has a power over the correlative duty bearer. He can either demand that the duty be fulfilled or he can release the duty-bearer from the duty. Interest theories see rights as essentially guaranteeing certain benefits for the right bearer.

Clearly, choice theories will treat rationality as a necessary condition for having rights. It is only rational creatures which have the capacity to choose whether or not to exercise powers over duty bearers. Interest theories can accommodate the view that rationality is not a necessary condition for having rights, but they are not committed to this view. There are no conceptual barriers to a non-rational creature being benefited as there are to a non-rational creature exercising discretion over the fulfilment or release from duties. At the same time, the fact that non-rational creatures *can* be benefited by the possession of rights, does not entail that they *must* be so benefited. Thus, interest theories are neutral with regard to whether or not non-rational creatures have rights.

Benefit theories of rights have been criticized because they make the notion of a right redundant. If there is a correlative duty which must be fulfilled and this duty benefits the creature to whom the duty is directed, then what conceptual work does a right do? In choice theories, both the correlates - right and duty - do conceptual work. The duty captures what is owed by the duty-bearer to the right-bearer. The right is the power to enforce the duty - morally or legally, as the case may be - or to release the duty-bearer from the duty.

Benefit theories can, I believe, respond to this. For them, the right is the ground of the correlative duty. It is the important interest which the right-bearer has in whatever the

right is protecting that gives rise to the correlative duty. Not all duties arise in this way. Many duties are not correlated to rights. In the previous chapter I mentioned the duty to give charity as an example. This duty is not correlated to any right to receive charity. Thus, the important conceptual work which rights do, is that they (1) ground *some* duties and (2) distinguish those duties which are owed to determinate creatures from others which are not.

Criticism has also been directed against choice theories. In the legal domain, choice theories are better suited to rights in civil and contract law. Here, the right-bearer does exercise powers over the duty-bearer. He can stand by his right and demand the fulfilment of the correlative obligation or he can extinguish the correlative obligation. However, there are also legal rights protected by the criminal law, such as rights not to be killed or maimed. In most legal systems, the right bearer does not have the choice whether or not he wishes to enforce those rights. One is rarely permitted to waive them. Those who violate them are prosecuted irrespective of whether the right-bearer lays charges[28].

Choice theorists could respond. They may say, for example, that their view is not a descriptive one - that they are not purporting to reflect current legal concepts of rights. Instead they are making a conceptual claim about what rights essentially are rather than how they are interpreted - a claim which should be heeded by all who engage in rights discourse, including legistators and judges, to attain conceptual clarity.

I think that the choice to enforce or waive a correlative duty can constitute an important feature of some rights. However, I believe that there is a more basic value from which the importance of choice stems. That value is the interest of the right-bearer. Some right-bearers have deep interests in having a power over the correlative duty. It is

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28. H.L.A. Hart acknowledges this problem. See H.L.A. Hart, "Bentham on Legal Rights" in A.W.B. Simpson (ed.), *Oxford Essays in Jursiprudence*, Second Series, p. 197.

important for them to be able to waive the duty. In fact, it is sometimes just as important to be able to waive the duty as it is to enforce it. For example, many people think it valuable to have a right to life. This is because we have a deep interest in living. However, sometimes it is not in your interest to continue living. You might say this if you were suffering excruciating pain from a terminal disease. In such cases, it may be equally important to you to be able to waive the correlative negative duty not to kill you. Failing to have this choice makes rational creatures slaves to their rights, when rights are actually intended to serve their bearers. However, not all creatures have interests in having or exercising powers over the correlative duty bearers. Some creatures lack the cognitive equipment that makes this valuable to them. It is because they have no interest in choice, that choice cannot be an important feature of any rights which these creatures may have.

Thus, I am suggesting that interest or benefit is more basic than choice. Rights protect interests, though some creatures will have interests in choice *in addition to other interests*. My view then could be construed as a benefit view or alternatively as some kind of hybrid view. Either way, it can accommodate the possibility that non-rational creatures may be capable of having rights.

Kant, Gewirth and Rawls take the rationality of persons as the starting point for their justifications of rights. I have argued that this starting point is mistaken because it excludes, by assumption, non-rational creatures as possible rights bearers. All that this shows is that rationality is not necessary for having rights. However, it *may* be the case that rationality is a sufficient condition for having rights. Whether or not the arguments of Kant, Gewirth and Rawls succeed in showing that it is, is a question which I have not addressed.

CHAPTER 3

UTILITARIANISM AND RIGHTS

3.1) WHAT IS UTILITARIANISM?

Consequentialist moral theories judge the moral character of an action by the kind of consequences it produces. Good actions are those that have only good consequences, or whose good consequences outweigh the bad ones. Similarly, a bad action is one with exclusively or overall bad consequences. The consequences considered include both immediate and distant ones. No consequence of an action, if indeed it is a consequence of that action, can be considered too distant to be excluded from consideration.

Consequentialist, or goal-based theories (as they are sometimes known), prescribe actions that maximize good consequences and minimize bad ones. The concern with the maximization (of good) follows from the focus on consequences. If an action is judged by the kind of consequences it produces, then the better the consequences the better the action. Therefore, the action with the best (that is, maximum good) consequences is the best action and the one which one ought to perform. Consequentialists claim that moral actions have a goal - the production of the best consequences. Thus they say that one's choice of action ought to be determined by what will best attain this goal.

Utilitarianism is one form of consequentialism. Since it is the most influential form, I shall consider it alone. The kind of consequence which utilitarianism seeks to maximize is the production of utility. Utilitarianism seeks the maximization of utility (and minimization of disutility).

Utility has been variably understood. Some, such as Bentham, have viewed it as pleasure (and the absence of pain). More popularly and plausibly, it has been taken as the satisfaction of desires or preferences. The latter interpretation, which will be the view which I shall explore, is more plausible simply because we think that there is more to good than pleasure alone. We want more than mere pleasure. I shall say more of this later (chapter 5.1). Sometimes we do not even want pleasure.

Thus utilitarianism is a goal-based theory that seeks to maximize utility. In utilitarian calculations of the utility of possible outcomes, everybody's preferences count equally. That is to say, nobody's preferences count for more or less simply because they belong to a particular person. However, strong preferences or intense desires count proportionally more than weaker ones, irrespective of whose are whose. The satisfaction of a desire which is more intense and / or is shared by more people will have a greater impact on the total utility, which consists of the sum of all satisfied desires (minus the disutility of frustrated desires).

Needless to say, the above description of utilitarianism is very terse. However, it captures the essential features of such a view. There are many forms of utilitarianism, but my intention is not to provide a description and examination of each. Rather, I shall discuss utilitarianism very generally, showing why it must fail. I shall mention forms of utilitarianism which attempt to overcome the problems which I shall raise, but shall argue that these too must fail.

3.2) PROBLEMS WITH UTILITARIANISM

Utilitarianism has a number of problems of considerable importance. For example, it has a maximal view of responsibility. On the utilitarian view, responsiblity for an act implies responsibility for all its consequences. Whereas non-consequentialist theories

may be concerned with some consequences, one characteristic feature of consequentialist theories (including utilitarianism) is that they are concerned with *all* the consequences of one's actions. The more consequences of one's actions for which a theory holds one responsible, the greater the scope of responsibility. Since utilitarianism holds one responsible for all the consequences of one's actions it has a maximal view of responsibility.

However, there is more to utilitarian responsibility than this. One is responsible not only for one's own acts and their consequences, but also for one's omissions and their consequences. Williams calls responsibility for one's omissions "negative responsibility"[1]. Furthermore, one is responsible for the consequences of one's actions and omissions even if these include the acts or omissions of others[2]. Thus, on a crude utilitarian view, if a terrorist threatened to kill ten innocent people unless I killed one, I would be responsible in a strict sense for the death of nine people if I failed to obey his ultimatum.

It is evident from this that related to the utilitarian's maximal view of responsibility is what Nagel has called[3] an agent-neutral perspective. From such a perspective, what is of ultimate importance is not what an agent *does*, but rather what *happens*.

Another type of problem for utilitarianism is epistemological. How can one know what the consequences of one's actions are going to be? While it is true that we often have a very good idea what the immediate consequences will be, this is not always the case and the more distant the consequences the less sure we can be of them. Yet the utilitarian must, I believe, acknowledge that even these consequences count. If only those consequences of which we can be reasonably sure, can count, utilitarianism will

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1. J.J.C. Smart & B. Williams, *Utilitarianism: For and Against*, p. 95.
2. Ibid, p. 93.
3. T. Nagel, *The View from Nowhere*, pp. 152, 153, 158 -163 and chapter IX.

end up considering very few consequences. The consequences of an action include not only those of which we can be sure in advance, but all others as well. Accordingly, they must all bear on determining the utility of the action.

Another epistemological problem pertains to the measurement of utility. How does one compute the strength of opposing desires? It is all very well to say that we count everybody's preferences of equal strength equally, and that proportionally stronger desires weigh more, but how exactly does one apportion weight? How does one measure quantity of desires against intensity of desires? It is the indeterminacies in these areas that have allowed utilitarians to circumvent, at the practical level, a number of embarrassing implications of their theory. Consider, for example, the band of nazis whose desires would be satisfied were they to kill their Jewish prisoner. On a crude utilitarian view, utility would be maximized were the Jew killed. However, a utilitarian seeking to avoid this consequence of his theory might exploit the indeterminacies I have mentioned, by claiming that the intensity of the Jew's desire to live is so strong that it overrides even the sum of desires of all the nazis to have him killed. This may be plausible when the band of nazis is relatively small. The bigger it gets, the less plausible such an approach becomes.

I do not intend to discuss any of the above problems. While I think that they are very signficant problems that pose serious threats to utilitarianism, they are not closely related to the question of rights. The problem which I wish to examine is, as I shall show, closely connected to the concept of rights.

This problem is most obviously faced by utilitarianism in its "direct" or "unrefined" form. This form of utilitarianism, which is known as act-utilitarianism, assesses the utility of individual acts and omissions. The problem is that it justifies and requires

actions which our deepest intuitions tell us are immoral. It can, for example, require us to kill one person for the benefit of a group of others. Consider the following situation.

A doctor has six patients in a ward. Five of these require vital-organ transplants if they are to survive. The sixth patient is in hospital for a simple appendectomy. He is otherwise in perfect health. By some miracle, their tissue types are all compatible. There are no (brain-) dead donors and so the doctor's only (or best) chance of saving the lives of the five patients is to use the organs of the sixth. This would, of course, entail killing the sixth patient. Utility would be maximized were five lives saved, even if one other person had to be killed. Therefore, it would seem that an (act-) utilitarian would have to prescribe killing the one patient to save the other five. (A utilitarian may try to confound this example by saying that the five prospective organ recipients are all childless, bachelor tramps, while the sixth patient is an important scientist with a family. Such considerations may equalize the utilities, but in constructing our example we can easily suppose that it is the sixth man who is a childless bachelor tramp while the other five are all scientists with families. A utilitarian may also try to avoid the problem by pointing to unfortunate consequences of killing the one. For example, one consequence is that people will feel insecure about entering hospitals for minor surgery. However, once again we can construct the example in such a way as to exclude such consequences or have them overridden by others.)

It seems quite clear that in appropriately described circumstances, the act which would maximize utility would be to kill the one to save the five. To leave the five to die, while successfully performing the appendectomy would not produce the maximum utility. The utilitarian's course of action would, therefore, have to be to kill the one. It is this kind of moral judgement which violates our deepest moral intuitions. Moral theory and moral intuitions often conflict and while our intuitions should not be the sole determinants of our behaviour, we cannot ignore our most deeply rooted ones.

An act-utilitarian would contest this. He would say that the utilitarian theory is correct. If our intuitions - even our most deeply rooted ones - conflict with utilitarianism, then it is our intuitions and not the theory that must be discarded. Intuitions that conflict with utilitarianism are irrational superstitions which we have as a result of our non-utilitarian upbringing.

I do not think that we are in a position to be so bold as to simply discard our most deeply rooted intuitions in favour of utilitarian (or any other) theory. The utilitarian must concede this. After all utilitarianism is based on other intuitions - about aiming for more, rather than less, of what is good, that is, of utility. How can the utilitarian be so sure that the intuitions which clash with utilitarianism are faulty and that those which inform his theory are not? Like it or not, our moral theories are informed by our intuitions and, in turn, affect our intuitions or moral beliefs. I agree with Rawls that rather than tailoring intuitions to theory or tailoring theory to (often contradictory) intuitions, we should seek a "reflective equilibrium"[4] of theory and intuitions, whereby both are altered and adapted so as to take account of each other. In pursuing such a task, we can say, using an analogy with Quine, that "peripheral" intuitions are more likely to be discarded than "central" ones. The problem with utilitarianism is that it discards the most central ones, rather than more peripheral ones.

We can exemplify this moral problem of utilitarianism in another way. Some philosophers have, by way of a thought experiment, conceived of a utilitarian monster. This is a creature which derives immense degrees of utility (perhaps, but not necessarily, in the form of pleasure) from inflicting pain and suffering. Because the amount of utility which it derives is just so large, it swamps the disutility of the pain of those on whom it is inflicted. There are no such things as utilitarian monsters (certainly

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4. J. Rawls, *A Theory of Justice*, p. 20.

not any of which I know), but it is only a contingent fact that there are not. If there were, the utilitarian would be forced to prescribe that this creature inflict pain, no matter how terrible this pain may be for the person or people who suffer it.

What is it about utilitarianism that causes it to give rise to such unacceptable moral judgements? What, in this regard, is the underlying problem of utilitarianism? There have been a number of explanations.

Some argue that utilitarianism is unconcerned about the *distribution* of utility. It does not attach any weight to considerations of desert, merit or equality. In the case of equality, it is observed that utilitarianism is neutral between (roughly) equal and (radically) unequal distributions, quantities of utility being equal. When I speak here, and after, of "distributions", I am referring to the distribution that *results*, say, from the utilitarian calculation. I am not referring to any distributive components of the calculation itself, such as the equal consideration of all desires by the utilitarian calculation.

If the achievement of maximum utility required a radically unequal distribution of utility, it would still be the utilitarian choice. From this, some conclude that utilitarianism conflicts with justice and equality.

However, this conclusion is only true on one interpretation of justice and equality - one on which equality is assumed to be a matter of achieving a substantively equal distribution of goods. Nagel has argued that different theories (utilitarianism, rights, egalitarianism) can all value equality and maintain that people should be treated equally, and yet disagree about *how* people should be treated equally[5]. For example, utilitarianism treats people equally in that it counts everybody's preferences equally.

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5. T. Nagel, "Equality" in *Mortal Questions*, p. 111.

Rights theories treat everybody equally in that they deem everybody to have equal rights. Both treat people equally, but in different ways.

Hare takes a stronger view than Nagel. He says that the utilitarian interpretation of justice and equality is the best one. He says that when asking how one is to be just between competing interests of different people, "it seems hard to give *any other* answer other than by giving equal weight, impartially to the equal interests of everybody"[6] (my italics). And this, he says, is what yields the utility principle. I am not convinced that this is the *only* just way of handling conflicting interests of different people, but it does appear to be one kind of just way. However, it is not necessarily a *distributively* just way. Hare himself acknowledges that the resulting distribution may not be equal[7]. He does argue, however, that because of various empirical facts, utilitarianism would not justify gross distributive inequalities. For one thing, inequality, especially extreme inequality, tends to produce envy, hatred and malice. Since these have disutility, it is better to avoid them. Hare also points to the principle of diminishing marginal utility which states that, with many commodities, an increase means less to - that is, it has less utility for - someone who has more than to someone who has less. The consequence of this is that equalizing distribution tends to produce greater utility[8]. Of course, as Nagel observes, there are also utilitarian reasons against pursuing equal distributions. Most obvious would be decreased incentive which results in less overall utility[9]. Even if we accept that in general there are good utilitarian reasons to aim at more equal distributions, there will, of course, be cases where maximum utility requires unequal (and even radically unequal) distribution. There will be *actual* cases of this kind, but even if it were only *possible* that there could be circumstances in which radically unequal distribution was *required*, this would be

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6. R. Hare, "Ethical Theory and Utilitarianism" in H. D. Lewis (ed.), *Contemporary British Philosophy*, p. 117.
7. Ibid.
8. Ibid, p. 118.
9. T. Nagel, "Equality" in *Mortal Questions*, p. 107.

problematic for utilitarianism. Later (chapter 3.3) I shall discuss further the matter of hypothetical cases.

It seems then, that the failure of utilitarianism cannot be attributed to its unequal or unjust treatment of people. As I have indicated, it does treat people equally and justly, on one interpretation of these concepts. However, its failure may lie in the *way* in which it treats people equally, in the kind of justice it promises. In other words, it may employ an incorrect interpretation of justice and equality. However then the problem with utilitarianism would not lie in its injustice or inequality, but in something deeper which made its view of justice the wrong view.

According to the Kantian view, this problem is that utilitarianism treats persons as means rather than ends. However, I prefer to say that utilitarianism fails to take account of what has been called the "separateness of persons" or the "distinction between persons". This is the terminology of Nozick[10] and Rawls[11]. Later (chapter 4) I shall argue in some detail that separate individual persons are the significant units of existence and show why they ought to be treated accordingly. For now, I shall simply say that utilitarianism uses a method of moral calculation which is appropriate within a single life, but not between separate lives. For example, it is rational and appropriate for me to incur some minor suffering now, if this will avoid greater suffering for me later. However, when it comes to the societal level, it is inappropriate to reason in the same way. We cannot say that a life of suffering for one man is justified by the benefits it brings to the rest of society. This is because in the interpersonal case we are dealing with *separate* persons. One cannot calculate as if one were dealing with a single person. As Nozick says, there is no such thing as a "*societal entity*[12] with a good that undergoes some sacrifice for its own good"[13].

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10. R. Nozick, *Anarchy, State and Utopia*, p. 33.
11. J. Rawls, *A Theory of Justice*, p. 27.
12. I prefer the term "societal creature".
13. R. Nozick, *Anarchy, State and Utopia*, pp. 32, 33.

I shall show later that what is needed to ensure that people are treated as separate entities are absolute rights. These must restrict the way in which people can be treated *even if* utility would be maximized were those constraints not present. These constraints on action take the form of rules (prescribing what may and may not be done). A right entails a rule - a rule about how the right-bearer may be treated.

It is precisely because utilitarianism, properly understood, cannot account for and incorporate sufficiently strong rules and rights that it leads to the kind of unacceptable moral judgements I have described.

As I have indicated, hard-nosed utilitarians - that is, thorough-going act-utilitarians - would accept the judgements that result from their theory. They would say that while it is true that these judgements offend our intuitions, we must simply adapt our intuitions to utilitarianism because it is the correct moral theory. However, some utilitarians have realised the importance of rules and rights and have sought to incorporate them in refined versions of utilitarianism. These attempts to solve the moral problem with utilitarianism, I shall now argue, have been unsuccessful in one way or another.

3.3) RULE-UTILITARIANISM

Rules and rights are incorporated in a number of refined versions of utilitarianism. Not every form of utilitarianism which gives a place to rules is a rule-utilitarianism. In fact, even act-utilitarianism can accommodate rules, though the kind of rules it incorporates are very weak. These are rules of thumb, or, as Lyons calls them, cautionary rules[14]. Since an understanding of the nature of these kinds of rules is important for my

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14. D. Lyons, *Forms and Limits of Utilitarianism*, pp. 119ff.

discussion of the relationship between utilitarianism and rights generally, and of rule-utiltarianism specifically, I shall now devote some attention to them.

Simple act-utilitarianism can justify rules of thumb. A simple act-utilitarian seeks to maximize the utility of each act. Whenever he is faced with a choice about how he should act, he must choose the option that will maximize utility. Now there are a number of problems for a person who seeks this goal.

Firstly, there is a great deal of time that would need to be devoted to making each decision about how one should act. Spending this time has considerable disutility and so an act-utilitarian may reason that the best way for him to maximize utility is to follow certain rules of thumb rather than painstakingly reflect on each situation. The utility that is lost on the few occasions when reflecting on the situation would yield a prescription at variance with the rules, is more than made up by the utility that is generated by not wasting time in all other situations.

Secondly, there is the problem of insufficient information. Often one will lack the information required to make the best utilitarian decision. This includes knowledge of the consequences of one's prospective actions. Similarly, there is the problem that one might reason erroneously. Both these problems can cause one to choose actions that do not maximize utility. Following a rule of thumb would avoid these pitfalls, or so some utilitarians claim. Of course, it will sometimes happen that acting according to the rule of thumb will not maximize utility, but it is in the nature of the problems that one is seeking to overcome by acting on the rule, that they are not always identifiable in advance. While I can see how the problem of insufficient time can be overcome by employing rules, I cannot say the same for problems of insufficient information and faulty reasoning. If these latter problems prevent us from knowing which *action* will

maximize utility, they should also prevent us from knowing which *rules* will maximize utility.

The point about a rule of thumb is that it is simply that - a rule *of thumb*. It is not a firm rule, but only a guide. Given the reason for its adoption, the act-utilitarian will have to keep a "utilitarian eye" open for exceptional circumstances in which utility would not be maximized by following the rule of thumb. If one spots an exception, one must not act in accordance with the rules. Now it is exactly in these kinds of exceptional cases when the considerations of utility conflict with our rules that the moral problems of utilitarianism arise. Of course, they do not arise in cases when utility and rules offer the same prescription. It is in the nature of a utilitarian rule of thumb that when it is known to clash with the maximization of utility, it must defer to utility. We see from this, the weakness of an act-utilitarian rule - a rule of thumb. The incorporation of such a rule into utilitarianism does not solve our problems. A stronger kind of rule is required. I shall turn now to discuss rule-utilitarian rules, which are purportedly sufficiently strong to overcome our problem. If they turn out to be equivalent to rules of thumb, then the distinction between act- and rule-utilitarianism will be collapsed and the utilitarian will be back where he started.

Rule-utilitarian theories are classically two-tier theories. The two tiers are rules and acts. The rules are justified by utilitarian considerations much like the ones I mentioned above. The rules which are chosen are those whose general acceptance would maximize utility. However, utilitarian considerations of any sort are excluded from the level of casuistry - that is, in the application of these rules to particular acts. The rules, but not the individual acts, are justified by utilitarian considerations. Thus the rightness or wrongness of actions is *determined* (not merely efficiently pursued) by the rules. The result of this is that even when utility would be maximized by breaking the rules, the rules are still followed.

Hare is one writer who advocates a two-tier theory[15]. He speaks of level-1 and level-2 principles[16]. Level-2 principles are those arrived at as a result of moral thought under ideal circumstances: without time-constraints; with full knowledge of the facts; and untainted by self-interest or some other "defective" reasoning. These are the principles of an archangelic act-utilitarian. However, given the fact that circumstances are usually far from ideal, these level-2 principles cannot guide our every action. Furthermore, it is not possible, at the earliest stages of moral education, to inculcate the kind of thinking that produces level-2 principles. It is for this reason that level-1 principles are needed. They are for use in practical moral thinking, especially under conditions of stress. These principles are much more easily taught to those, such as young children, who are incapable of the higher-level thinking that produces level-2 principles. Level-1 principles are not, Hare insists, mere rules of thumb that can be broken without compunction. In choosing level-1 principles, the aim of the archangelic act-utilitarian is to choose those level-1 principles "whose general acceptance will lead to actions in accord with the best level-2 principles in most situations that are actually encountered"[17].

Hare charges that opponents of utilitarianism employ the "trick" of taking "fantastic cases" and "highly unusual situations" and confronting "them with what the ordinary man would think"[18] - that is, confronting them with level-1 principles. This, he says, makes the utilitarian, who reasons with level-2 principles, look like a moral monster. However, he says that utilitarians should not be concerned about this. Since the level-1 principles of the ordinary man were not chosen to deal with fantastic cases, but with "most situations" that these principles would encounter, it is, he says, unfair to wield

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15. R. Hare, "Ethical Theory and Utilitarianism" in H.D. Lewis (ed.), *Contemporary British Philosophy*.
16. In his *Moral Thinking* he calls level-1 the intuitive level and level-2 the critical level. See pp. 25, 26.
17. Ibid, p. 123.
18. Ibid.

his intuitions as a weapon against the judgements utilitarians would make in fantastic or unusual cases. Thus, for example, it would be highly unusual for a doctor to be in the position where he was faced with a clear choice between killing a healthy patient to save the lives of five sick patients and allowing the five to die by not killing the one. Accordingly, his level-1 principles need not be geared to such a situation. Similarly, a utilitarian monster, though logically possible, is a fantastic case. Level-1 principles need not be able to cope with it.

I think that Hare's defence against such examples is inadequate. We may ask how an archangelic act-utilitarian would act were he faced with such a case. Of course, he too would have level-1 principles (for stress situations). However, imagine that in the comfort of his arm-chair, pondering the finer points of act-utilitarian reasoning, he gave thought - cool, unstressed thought, the kind that produces level-2 principles - to exactly the situation of the doctor which I have described. It does not seem implausible that he would have given such thought to a whole host of such examples. Imagine then that he was faced with an actual case like this. How would he act? Hare may object to this. He may say that one can never know, in the heat of the moment, whether the situation at hand is like the case about which one previously thought. I think that at least on some occasions this would not be a difficulty. However, for argument's sake we can imagaine that we can *never* know. All we need to do is ask our archangelic act-utilitarian to give unstressed thought to our example and tell us how one ought to act in such a situation. The point about his (act-) utilitarian reasoning is that it will produce level-2 principles that would require the doctor to kill the one to save the five - the kind of judgement which has caused utilitarianism the moral problem which I have been discussing. Even if a utilitarian would never *actually* do this because of uncertainty - and this is itself implausible - the very fact that this is what he ought to do (*if*, without needing time to think, he knew the nature of the situation, etc), makes utilitarianism morally unacceptable. If a moral theory is unacceptable and is only made palatable by

our inability to act in accordance with it, this does nothing to strengthen the theory itself.

So much for Hare's particular two-tier theory and why I think it fails. I shall now discuss rule-utilitarianism more generally to show why I think all forms of this theory must fail.

The real incentive to restrict utilitarian considerations to the level of rules is, I believe, that in this way an apparently utilitarian account can be given of rules which are sufficiently strong to avoid the moral problem that has been highlighted. This is the utilitarian's *incentive*, but is such a rigid distinction between two levels justifiable from a utilitarian point of view? Why should a utilitarian confine his maximizing principle to one level of his theory?

If he is a genuine utilitarian then he must have a utilitarian reason for doing so. If, like Hare, he does, then the absence of utilitarian considerations at this level is itself justified by utilitarianism. This has the implication that in all known exceptional cases - that is, in all cases where it is *known* in advance that utility would be maximized by violating the rules - violation of the rules will be prescribed. Of course, there may be exceptional cases which are not known to be such, or where there is considerable doubt about their exceptional nature. In such cases, the rules may still be followed for reasons that I have outlined earlier. However, in situations which present themselves unequivocally as exceptional - and I believe that there must be at least some such situations - violation of the rules will be prescribed. There does not even have to be complete certainty. If one is more confident that breaking the rule will produce greater utility than not breaking it, then breaking the rule seems rational and justified even if one turns out to be wrong. In cases where the violation of rules is prescribed, this is because the original utilitarian reasons for restricting utilitarian considerations from the

level of casuistry will, in these cases, require that they not be so restricted. This poses a problem for the rule-utilitarian who sought to insulate utilitarian considerations from the level of casuistry. This is because he would now be subscribing to the principle:

> Act according to the rule that maximizes utility except where deviating from the rule maximizes utility[19].

I do not see how this principle differs substantively from the principle which governs the act-utilitarian's behaviour:

> Act so as to maximize utility[20].

A rule-utilitarian who has a utilitarian reason for restricting utilitarian considerations to only one level of his theory subscribes to a principle that is indistinguishable from that which governs act-utilitarian behaviour. It seems that two-tier, refined versions of utilitarianism lose their refinement if there is a utilitarian justification for the two tiers (as genuinely distinct levels).

However, what if the rule-utilitarian does not have a utilitarian reason for confining his maximizing principle to one level? This is, from a utilitarian point of view, an impossibility because it would indicate that the rule-utilitarian's primary concern is not consequences. He would have a more basic interest. Thus, fundamentally, he would not be a utilitarian. His theory would not be goal-based. Rule-utilitarianism is, therefore, not an option for a genuine utilitarian. It appears that the extent to which a utilitarian can accommodate the kind of rules which are necessary to treat people as separate persons is the extent to which he is not a utilitarian.

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19. Some formulations of the rule-utilitarian principle may differ. For example, they may speak of "set of rules" instead of "rule". However, these differences do not, I think, provide a way to avoid my point.
20. Once again, there may be various formulations of this principle so as to accommodate, for example, the differences between simple and generalized utilitarianism (see D. Lyons, *Forms and Limits of Utilitarianism*). However, once again these differences do not, I think, defeat my point.

I have said that rule-utilitarianism usually takes the form of a two-tier theory. It need not always be formulated in this way. Mill, for example, had a three-level theory[21]. However, a close examination of it reveals that it is simply another description of the same idea. For Mill, the most basic, concrete level is the level of particular acts. The middle level is that of moral principles, including rights and obligations. The highest level is that of values. These values - in Mill's case, utility - establish the moral principles at the intermediate level. These principles determine the rightness or wrongness of particular acts - which constitute the bottom level. According to Mill, each level has a direct relationship with its adjacent one(s), but each is insulated from non-contiguous ones. In Mill's picture, utilitarian considerations are seen as a distinct, third level, whereas in the two-tier theories they are not seen as constituting a third level, but still as informing the second level - the level of rules. This is not a substantive difference, but only a descriptive one, and the criticism I levelled at the classical two-tier rule-utilitarianism applies equally to Mill's theory.

Scanlon has a two-tier theory which he argues is immune to these criticisms[22]. I shall outline his view and say why I think that it too is mistaken. Scanlon suggests that the view that there is a certain kind of moral right is justified by a conjunction of three claims:

1) An empirical claim about what things would be like were the right/s in question absent.
2) A moral claim that this would be unacceptable.
3) An empirical claim about how the proposed right/s would yield a different outcome.

These three claims which Scanlon takes to justify rights make reference to the consequences of having those rights. Thus rights are justified by the consequences they

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21. See D. Lyons "Utility and Rights", in J. Waldron (ed.), *Theories of Rights*, pp. 134ff.
22. T. M. Scanlon, "Rights, Goals and Fairness" in J. Waldron (ed.), *Theories of Rights* p. 138.

yield. If the consequences of having certain rights are better than the consequences of not having them, then the rights are justified. This view is consequentialist in that it appeals to consequences. It is two-tier because it appeals to the consequences of having *rights* rather than the consequences of individual *acts*. To show why Scanlon thinks that his view is immune to the problems with rule-utilitarianism which I have mentioned, an account must be given of which consequences he believes should be considered when evaluating outcomes. He rejects the conventional utilitarian view that we should aim to satisfy subjective preferences. Instead, he says, we should aim at producing certain objective benefits and avoiding certain objective burdens. These benefits and burdens which, he says, are of varying degrees of importance[23] "must include not only things that may happen to people but also factors affecting the ability of individuals to determine what will happen"[24]. He maintains that it is objectively beneficial for us to have some control over what will happen to us. Rights enhance and ensure an equitable distribution of such control over important factors in our lives. This equitable distribution of control is not only instrumentally valuable, he says. It also has independent value[25]. For this reason the rights which ensure this equitable distribution of control "are supported by considerations which persist even when contrary actions would promote optimum results"[26]. Even if better consequences could be produced on a particular occasion by violating the rights, this would not be justified because of the independent value of the state of affairs which is produced by upholding the right. It is this feature of Scanlon's view which allegedly explains why his two-tier theory does not collapse into act-utilitarianism and its moral problems.

However, rights are not absolute on Scanlon's view and may on some occasions be overridden, although not simply to produce "optimum results"[27]. The reason why

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23. Ibid.
24. Ibid, p. 139.
25. Ibid, p. 143.
26. Ibid, p. 145.
27. Ibid.

rights may on some occasions be overridden is that although the equitable distribution of control which they ensure is an objective good to be aimed at, it is not the only objective good[28]. According to Scanlon, there are other objective benefits at which we must also aim. Rights are justifiably overridden when the intrinsic goods which they protect are sufficiently outweighed by other more intrinsically beneficial states of affairs. However, merely having better consequences is not in itself intrinsically more beneficial.

The problem for Scanlon is this. Although the equal distribution of control which rights morally guarantee is very important and is not usually outweighed, it can sometimes be outweighed by other benefits[29]. However, Scanlon is not clear about what the competing benefits are, or how important these would have to be to outweigh the benefits protected by rights. Presumably, if the competing benefits are sufficiently strong, then the individual's control over what happens to him can be sacrificed entirely. In other words, even an individual's important interests can and must be sacrificed for greater goods. Scanlon may decide to stipulate a particular list of benefits and their relative importance, such that the equal distribution of control may very rarely be outweighed. However his theory is like utilitarianism in allowing that the benefits protected by rights can in principle be overridden, and this, as I shall show later, is problematic.

3.4) DWORKIN: UTILITY AND THE RIGHT TO MORAL INDEPENDENCE

I turn now to another view about how utilitarianism may be made palatable by the inclusion of rights. This is the view which Ronald Dworkin expresses in his "Rights as Trumps"[30] and in *Taking Rights Seriously*[31]. The essence of his claim is that equality

28. Ibid, p. 139.
29. Ibid, p. 145.
30. R. Dworkin, "Rights as Trumps" in J. Waldron (ed.), *Theories of Rights*.
31. R. Dworkin, *Taking Rights Seriously*, pp. 234 - 238.

is a more basic value than utility, and furthermore, that equality not only gives rise to utilitarianism, but also yields a right to moral and political independence (from which other rights can be derived). He argues in the following way.

He claims that the appeal of utilitarianism is its "egalitarian cast"[32] - that it counts everybody's preferences equally. He says, quite correctly, that were a version of utilitarianism to count some people's preferences for less than those of others (because these people or their preferences were less worthy) this version of utilitarianism would have no appeal. He then goes on to say that if utilitarianism is unchecked by something like a right to moral independence it disintegrates into exactly such a version of utilitarianism. To illustrate this he asks us to consider a community of many people including Sarah. Were the constitution of that society to require Sarah's preferences to count twice as much as those of others, it would be a non-egalitarian, and therefore unacceptable version of utilitarianism. As it happens, the constitution does not require this. However, everyone likes Sarah very much and wants her preferences to count for twice as much as theirs. Dworkin claims that if these Sarah-loving preferences were counted, it would defeat the egalitarian cast of utilitarianism. Thus, he says, an apparently neutral utilitarianism (that is, one that would include Sarah-loving preferences) is a self-defeating utilitarianism. Properly understood, utilitarianism is not neutral between preferences for equal and non-equal calculation. It cannot allow preferences for non-egalitarian calculation of utility.

Dworkin concludes that utilitarianism must be qualified so as to restrict the preferences that count. The kinds of preference that he wishes to rule out are what he elsewhere[33] calls "external" preferences. These are preferences which one has for others. They are preferences one has that others receive some benefit or harm. External preferences are

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32. R. Dworkin, "Rights as Trumps" in J. Waldron (ed.), *Theories of Rights*, p. 154.
33. R. Dworkin, *Taking Rights Seriously*, pp. 234ff.

constrasted with "personal" preferences. Personal preferences are preferences one has for one's own benefit.

Dworkin asserts that "one very practical way to achieve this restriction"[34] of preferences is provided by the idea of rights as tools to overrule unrestricted utilitarianism. Therefore, utilitarianism, properly understood, yields a right to moral independence (from the preferences of others affecting how one's own preferences are counted).

Dworkin's argument may have some plausibility when we consider preferences that the desires of others count for either more or less. This is because we appear to face a formal clash between an egalitarian way of counting preferences (that is, all counting equally) and a non-egalitarian way. However, even if we concede that, the matter is not as straightforward as Dworkin's description makes it seem. Imagine that in the Sarah-loving society, instead of everyone wanting Sarah's preferences to count for twice as much as the sum of their personal preferences, they simply desire for Sarah that which she prefers for herself. This is formally very different from the scenario which Dworkin describes, but substantively it is identical. Sarah's preferences do not count for any more than anybody else's, but yet what she wants will have greater weight in the utilitarian calculation simply because everyone else prefers for her that which she prefers for herself. Now it is not a matter of someone's preferences formally counting twice as much as everyone else's, but the effect is the same.

Now these preferences which everybody has for Sarah are also external preferences because they are preferences others have for Sarah. However, I think that it is more difficult to justify not counting *them*, without the risk of sacrificing equality. Why should preferences be excluded simply because they are preferences for other people?

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34. "Rights as Trumps" in J. Waldron (ed.), *Theories of Rights*, p. 158.

By not counting such preferences, are we not treating unequally those people whose preferences they are?

Hart[35] charges that not counting people's external preferences is to treat them unequally. Dworkin responds to this charge. In doing so he draws a distinction between votes and preferences. Votes, he says, can be used up. If one votes for the success of another, then one could not, for example, also vote for one's own. Not to count people's vote (even if they are for others) would be to treat people unequally, but in the case of preferences it is different, he claims. One can have (many) preferences for others and for oneself. In fact, the more preferences one has, the more one increases the role of one's preferences overall[36]. This is because the more preferences one has the more preferences one has to be counted in the utility calculation. Thus not to count someone's preferences, unlike not counting someone's vote, is not, Dworkin maintains, to treat him unequally.

I think that Dworkin misses the point. I do not think that the distinction between votes and preferences is that tight. We are all free to have many preferences. It is like having many votes. Now imagine two people: Al and Sally. Al, an altruist, has few personal preferences. He is such a thorough-going altruist that the overwhelming majority of his preferences are for the well-being of others; they are external. Sally, by contrast, is very selfish. She has few, if any, external preferences. Most of her preferences are for her own well-being. According to Dworkin's utilitarianism, most of Al's preferences will not count, whereas most, if not all, of Sally's will. If, as Dworkin says, having more preferences which *are* counted in the utility calculation increases the overall role of one's preferences, then decreasing the number of preferences which count must

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35. H.L.A. Hart, "Between Utility and Rights" in J. Waldron (ed.), *Theories of Rights*, pp. 92, 93.
36. R. Dworkin, "Rights as Trumps" in J. Waldron (ed.), *Theories of Rights*, p. 160.

decrease the overall role of one's preferences. Any version of utilitarianism that does *that*, treats people unequally.

Of course, Al could increase his influence by having more personal preferences, but he simply does not have these, nor does he want to. He does not desire that which benefits him but rather that which benefits others. If others are not discriminated against because of *what* they prefer - an important point in the egalitarian nature of utilitarian calculation - then why should he be? Why should his only way of having an equal say be to change his say?

Dworkin's first premise was that it is the egalitarian nature of utilitarian calculations that gives utilitarianism its appeal. He stresses that it is the egalitarian nature of the *calculation itself*, not the outcome of the calculation, about which he is concerned (though he seems temporarily to slip from the former to the latter in one place, where he says: "If these special [Sarah-loving] preferences are allowed to count ... Sarah will receive much more in the distribution of goods and opportunities than she otherwise would. I argue that this defeats the egalitarian cast of the apparently neutral utilitarian constitution ..."[37].) Dworkin's professed concern for the equal calculation rather than the equal outcome is indeed in keeping with utilitarianism. However, I hope that I have shown that the very restriction he wishes to place on utilitarianism to preserve its egalitarian calculation, compromises its egalitarian calculation. External preferences cannot be excluded from calculation in order to preserve equality in utility calculation.

There is a further problem with Dworkin's view. His view rests on the idea that both utilitarianism and rights arise from a more basic value - equality. However, I referred earlier to Nagel's point that equality can play an important part in diverse theories. Having equality as one's basic concern does not entail being a utilitarian. In other

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37. Ibid, p. 155.

words, if one's basic value is equality, this does not require one to understand equality in the way utilitarianism does. One could adopt an interpretation of equality that conflicts with utiliarianism.

I have argued now at quite some length for the failure of utilitarianism. I have shown how this failure results from its inability to provide an adequate account of rules and rights. In dispensing with utilitarianism and goal-based theories, I am not proposing a rights-based theory in their place. Later (chapter 6), I shall show how both utility and rights play an important role in morality. My theory, however, will not be subject to the criticisms raised in this chapter because it will not be goal- or utility-*based*, but will incorporate these considerations in another way.

CHAPTER 4

INDIVIDUALS AND SOCIETY

4.1) INDIVIDUALS AND UTILITARIANISM

One of the failures of utilitarianism is its inability to account for our deeply held intuitions that there are certain things that may never justifiably be done to individual persons. I shall still argue for why these intuitions are correct. (The argument will commence in the remainder of this chapter and will continue in chapters 6 and 7.) According to utilitarianism, individuals may be sacrificed if overall maximum utility is thereby achieved. While an adequate moral theory may contradict some of our intuitions, it should at least remain moored to the most basic and deeply held ones.

Rights - especially absolute ones - appear to be one important moral tool which restrict the way individuals may be treated. It is for this reason, I think, that refined versions of utilitarianism seek to incorporate rights. However, as I have already argued, such versions, often known as rule-utilitarianism, are doomed to failure. A similar fate is shared by what Nozick calls a "utilitarianism of rights"[1]. Such a theory has the non-violation of rights as its goal. It seeks to maximise the non-violation of rights. Such a theory does not *guarantee* that rights are not violated because if the non-violation of rights can be maximised by the violation of *some* rights, these rights are justifiably violated.

Rights cannot fulfil their real role within a utilitarian framework, which, of necessity, overlooks the individual in the interests of securing maximum social utility. This is one reason why utilitarianism is ill-fated as an adequate moral theory.

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1. R. Nozick, *Anarchy, State and Utopia*, p. 28.

Utilitarianism has strong prima facie appeal, but I think that this is because it connects morality with benefit, well-being, or interest. Morality must be about furthering well-being. It appears to me that there is a straightforward, almost self-evident connection between morality and well-being or benefit. If (morally) good actions are not those that further well-being, then I do not think that it can be clear what good actions are. Now, of course, the well-being of different creatures can and does conflict. As a result, moral action sometimes may not serve the well-being of a particular person at a particular time. However, this is inevitable where conflict exists, and it does not mean that morality is not founded on well-being. In the case of conflicting interests, those which have the most justification to be fulfilled should be served. Because this justification is a *moral* justification, it too would be rooted in well-being. Thus, if, for example, someone has committed a crime, his punishment may be justified even though it will not further his well-being.

My view that morality is founded on well-being alone stands in oppostion to the view of some philosophers, such as Isaiah Berlin[2] and Bernard Williams[3], that there is an irreducible plurality of sometimes conflicting values. I am not able to engage in a lengthy discussion of this question. I shall simply provide a very brief defence of my view. I have said that there is a near self-evident connection between "good" and "benefit". I do not think that anything else connects as obviously with "good". One who wishes to claim that there is an irreducible plurality of values has to accept both (a) that these are not reducible to well-being; and (b) that they can still be justified or still have plausibility as moral values. Let us take as a complicated but illuminating example, the principle of autonomy. Speaking in a non-Kantian sense, we can say that we sometimes act autonomously against our own interests. However, I think that the value we attach to autonomy can still be justified by its connection to well-being. One

2. B. Williams, "Conflicts of Values", in A. Ryan (ed.) *The Idea of Freedom*, p. 222.
3. B. Williams, "Ethical Consistency" in *Problems of the Self*.

of our interests is to act autonomously, even if acting in this way sometimes conflicts with other interests we have. If one denies that autonomy is founded on well-being, then one has to provide some other reason why it should be valued. The connection between "good" and "autonomy" is far less clear than that between "good" and "well-being" or "benefit". If autonomy is not beneficial, why should we value it? Should we not reject it as irrational?

It is, of course, always possible for the sceptic to ask the same question of benefit or well-being: Why should we value that which is beneficial? What is so good about benefit? I think, however, that this question is not very profound. There is as close a connection between "good" and "beneficial" or "well-being" as we can possibly hope for. The very meaning of the words makes this so. There does not appear to be anything intrinsically good about autonomy, but there does seem something intrinsically good about well-being.

If we accept that morality is about furthering well-being, then, since more well-being is better than less, it is not much of a jump from here to the utilitarian thesis of maximising utility. This jump is, however, an illicit one. While utilitarianism is correct in connecting morality to well-being, it should not be connected to total or average well-being but rather to the well-being of individuals. The reason why individual well-being is what is morally most significant, is that it is individuals and not society that are the significant units of existence. This view is subject to criticism from two sides.

4.2) NON-REDUCTIONIST VIEW OF SOCIETY

On the one side there is the view that it is society and not the individual which is the unit of existence. We can, following Parfit, call this view the non-reductionist view of society, or, following Popper and Quinton, the ontological collectivist view. It takes

social groups to be "mass-persons"[4] or "super-organisms"[5] which are not reducible (without remainder) to the individuals that constitute them. Societies are viewed in the same way that we ordinarily view individuals. In extreme cases of this view, such as that of Hegel, social groups are deemed to be more real than the individual humans they contain. Hegel speaks of an Objective Mind. He takes the state to be a self-conscious ethical substance. As a living mind it is an organized whole, not simply a collection of individuals. It has a rational, *universal* will. This is not a mere sum of "individual" wills.

Quinton notes[6] that Hegel's theory clearly affirms three propositions: 1) that man is essentially social; 2) that the group is more real than its members; and 3) that groups are themselves minds or persons. Quinton explains why Hegel might have believed each of these and argues against them.

In providing an explanation of the first proposition, he says that man is characterized by his rational and moral capacities. To become rational beings and moral agents requires incorporation into a linguistic and moral community. These communities are human communities. The individual person is thus taken to be dependent on a society or community for his personhood. This is evidenced, for example by the few cases of "wild children" who have been reared by non-human animals. More precisely, a person is dependent on society for the *formation* of his personhood because, after all, it is possible for a person (such as Robinson Crusoe) to be cut off from society without losing his personhood.

However, against this argument it can be said that there is not an asymmetrical dependence of persons on society. Just as there cannot be persons without society, there

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4. T. Nagel, *The Possibility of Altruism*, p. 134.
5. D. Parfit, *Reasons and Persons*, p. 331.
6. A. Quinton, *Thoughts and Thinkers*, p. 79.

cannot be society without persons. Such a view was expressed by Popper who claimed that even though *in a certain sense* man is a product of his society, society is also a product of man[7]. Man can shape his society, at least to some extent. (While Popper does not specify that he is speaking about individuals, his arguments are true of individuals and their relation to society.) Thus society is at least as dependent on persons as persons are on society. Society may even be more dependent on individuals than individuals are on society if it is the case that personhood without society is not logically impossible and a memberless society is logically impossible[8].

The dependence of individual persons on society is taken by those who hold a non-reductionist view of society to be analagous to the dependence of attributes on (Aristotelian) substance, or the dependence of states of mind on conscious subjects. This is the purported justification for society being more real than the individuals that comprise it - the second proposition which Quinton claims Hegel's theory affirms. An attribute has no real existence without the substance of which it is an attribute. A state of mind similarly cannot exist other than as a state *of* mind, and that mind is a subject.

However, these analogies fail. Individual people are not attributes of society. This becomes clear even if we look at something like the population of a society. A society can have the attribute of a large population, but no individual people are the attribute "a large population". Similarly, people do not stand to society in the way mental states do to conscious subjects. It is much easier to conceive of individual persons existing independently of society than it is to conceive of a mental state which is a mental state unattached to any mind.

Quinton says that it is the analogy between society and persons, on the one hand, and the mind and its states, on the other, that facilitates the conclusion that societies *are*

7. K. Popper, *The Open Society and Its Enemies*, vol. 2, p. 208.
8. A. Quinton, *Thoughts and Thinkers*, pp. 84, 85.

minds. This is the third proposition which Quinton says Hegel's theory affirms. Whatever its source, the identification of society and mind is clearly wrong. I am not denying that it is possible for there to be a group creature with a mind of its own - a mind independent of the minds which constitute it. Such a group mind is *possible*[9]. I am simply denying that societies are in fact (group) minds. It is ontological facts and not ontological possibilities that determine what we ought to do.

The version of ontological collectivism which I have described and rejected is a radical one. It takes social groups to be more real than the individuals that constitute them. According to Quinton, a moderate version of ontological collectivism need only claim that social objects, for example groups, are not analysable in terms of the individuals who compose them[10]. This moderate doctrine does not pose a problem for the view I am advocating. It does not claim that a group is a creature with a mind of its own. It simply claims that a group is not reducible without remainder to the individuals that constitute it. If a group is not a creature with a mind of its own, then, as I shall argue later, its ontology has no intrinsic moral significance. That is, what is morally right and wrong is not connected to the well-being of such entities because they cannot care about their own well-being.

4.3) REDUCTIONIST VIEW OF INDIVIDUAL PERSONS

Opposed in a different way to the ontological view I am advocating, there is the view that it is not individuals, but temporal stages of existence that are ontologically and morally significant. According to this view, temporal stages stand to individuals in the way I have claimed individuals stand to society. The existence of continuous

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9. D. Brooks, "Group Minds" in *Australasian Journal of Philosophy*, Vol. 64 No. 4, December 1986.
10. A. Quinton, *Thoughts and Thinkers*, pp. 77, 78.

individuals is regarded as a fiction. All that there are are many short-lived phases of existence.

This is the view of Derek Parfit[11]. Parfit argues against the conventional view that personal identity has a special nature - this nature being that unlike clubs and nations, for example, persons are "separately existing entities". A separately existing entity, not being a construct, is not the kind of entity about which one can be a reductionist. One consequence of Parfit's view is that an answer to a question about personal identity may be indeterminate. In other words, it can happen that there is neither an affirmative nor a negative answer to some questions of personal identity. In such cases, it is neither the case that personal identity obtains, nor that it does not obtain. It is a matter of degree. However, Parfit argues further that it is not the existence of persons over time that is important, but rather psychological continuity and psychological connectedness (of temporal stages of existence).

In arguing for his views, Parfit imagines a number of cases. These include teletransportation; non-sexual meiotic reproduction by humans; and brain transplants. I shall consider the last kind of case. If my brain were "transplanted" into another body, most of us would agree that, strictly speaking, what had happened was not that my brain was transplanted, but rather that I had had a body transplant.

The brain consists of two cortical hemispheres and a brain stem. If one hemisphere is damaged, the other often takes over its functions. Imagine that the compensatory powers of the brain were such that even if only one hemisphere and half the brain stem were transplanted into a new body, I would still survive. Now imagine that my body is mutilated in a car accident and a talented neuro-surgeon decides to bisect my brain and "transplant" each half into two bodies previously housing irreparably damaged brains.

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11. D. Parfit, "Personal Identity", in J. Glover, *The Philosophy of Mind*; D. Parfit, *Reasons and Persons*, part 3.

(Perhaps he does this because he hopes that he might increase my chances of survival in case the one transplant does not work; or because he has an insatiable and perhaps ruthless interest in personal identity.) There can be one of four possible consequences to this operation:

1) I do not survive.

2) I survive as one of the two resulting people.

3) I survive as the other.

4) I survive as both.

Parfit rejects the first possiblity for the following reasons: Since it is the case that I survive if only one half of my brain is successfully transplanted, then I cannot fail to survive if two halves are successfully transplanted. A double success cannot equal a failure. Parfit also rejects the second and third possiblities because we have no greater reason to say that I survive as one rather than the other. We are left then with the final possibility - that I survive as both.

This may appear absurd but Parfit argues in the following way that it is not: One treatment of epilepsy was the surgical severence of the corpus collosum which connects the two cerebral hemispheres. The procedure (cerebral commissurotomy) had the effect of terminating inter-hemispheric communication and led to the creation of "two separate spheres of consciousness"[12]. Parfit then imagines what it would be like if one could voluntarily split and reunite one's consciousness. He speaks, for example, of his physics examination during which he divides his mind for fifteen minutes. In such a temporary case of split consciousness, we have little doubt that I survive with a divided mind. If we extend this to the case of hemi-brain transplants, we see that it is not absurd to think that I survive as two people.

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12. R.W. Sperry, quoted by D. Parfit, *Reasons and Persons*, p. 245.

However, there are problems even with this option. When we speak of surviving the operation, do we imply (strict) identity? If we do, then the fourth possible outcome must also be rejected since it makes no sense to say that I am (strictly, ie numerically) identical with two people. If survival does not imply identity then it is not a solution to our dilemma, which is about personal identity.

Parfit responds to this latter problem by arguing that it disappears if we give up our beliefs in the special nature of personal identity and in the determinate nature of answers to all questions of personal identity. Imagined cases such as that of hemi-brain transplants encourage us to give up these beliefs.

Parfit argues that the forfeiture of these beliefs is not serious. Contrary to the popular view that important questions hinge on the question of personal identity, he claims that that which really matters is dependent on psychological continuity or psychological connectedness. Psychological contintuity is a relation that holds between any points on the same path in a psychological history - whether branching or otherwise. Consider the following example in a non-branching case: Today I have certain memories, intentions, ambitions, etc. Tomorrow my set of memories, intentions and ambitions will be much the same as it is today though, for example, I shall probably have a few new memories and perhaps have forgotten a few old ones. In twenty years' time I shall have a significantly different set of memories, intentions, etc. Yet my mental state then will be psychologically continuous with my present mental state. If A is psychologically continuous with B and B is psychologically continuous with C then A is psychologically continuous with C. Thus psychological continuity is transitive. Psychological connectedness, by contrast, is not transitive. It is the relation that holds between *significantly* overlapping selves in a psychological continuity. If A is psychologically connected to B (because they have a significant intersection) and B is psychologically connected to C (because they have a significant intersection) one cannot conclude that

A and C are psychologically connected. Both psychological continuity and psychological connectedness, unlike personal identity, are relations of degree. (Parfit shows by means of his exposition of quasi-memory, quasi-intention, etc, that these relations of degree do not presuppose personal identity.)

The apparent importance of personal identity arises from the contingent fact that it coincides with psychological continuity and connectedness. However, thought experiments such as the double hemi-brain transplant show that it is at least logically possible for personal identity and psychological continuity to become unhinged from each other. When we are faced with such a case, we realise, Parfit argues, that it is not personal identity - the separate existence of persons over time - that is important, but rather psychological continuity and survival. These, being matters of degree, are appraised in terms of short-lived temporal selves. Individual persons are thus not basic. They are reducible to a series of these short-lived temporal selves.

4.4) UTILITARIAN IMPLICATIONS

Both the rival theories of ontology which I have described, have been claimed to lead to, or, at least, support utilitarianism. Parfit denies that this claim is true of the first view - the view that society is the unit of existence[13]. He says, however, that the other view - reductionism about persons - makes utilitarianism more plausible, even though it does not entail it. I shall now argue, contra Parfit, that the non-reductionist view of society (as I have described it) does lead to utilitarian reasoning. I shall then argue that (extreme) reductionism about persons is neutral between (i) utilitarianism and (ii) a view that applies distributive principles to temporal stages within lives. Which moral conclusion one draws from reductionism about persons depends on what premise one adds to this reductionist thesis. (I shall argue that Parfit suppresses the additional

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13. D. Parfit, *Reasons and Persons*, p. 332.

utilitarian premise.) Finally in this subsection, I shall make the more significant claim that even if Parfit is right that personal identity is not as deep as we think it is, he has nevertheless not shown that it is so shallow as to eliminate the need for interpersonal distributive principles.

Parfit's argument that the non-reductionist view of society does not lead to utilitarianism is as follows. He cites Hegel as one example of someone who holds the non-reductionist view of society. The kind of group or society about which Hegel spoke was the nation. He and his followers regarded the nation as a super-organism. This, Parfit observes, conflicts with utilitarianism, which ignores national boundaries. I agree, but the non-reductionist view of society may more accurately be taken to focus on Society rather than a society, on mankind rather than on nations or groups. This view, I think, does lead to utilitarianism. If Society is the unit of existence - if it is a mass-person possessing a single mind - then well-being should be connected to it and no attention need be paid to distributive principles applicable between individual lives that comprise it. Similarly, since there is only one Society (with a capital "S") there is no problem of distribution between it and "other" societies.

Parfit sees the non-reductionist view of Society not as an explanation of utilitarianism, but rather as an objection to it. He argues that since this view of Society is so clearly false, utilitarians are unjustified in rejecting the said distributive principles on these grounds. However, I believe this argument begs the question. *If* one accepts this view of Society, *then* one will be led to utilitarianism. It is a distinct question whether this view of Society has any merit, and I have argued that it does not.

On Parfit's reductionism about persons, the divisions within lives are taken to be like the divisions between lives. Therefore, they ought, Parfit points out, to be treated similarly. This, he notes, may be done in one of two ways[14]:

a) we can apply the distributive principles previously applied between lives, within lives as well.

b) we can desist from applying these distributive principles between lives in much the same way as we ordinarily desist from applying them within lives.

If we adopt (a) we extend the scope of distributive principles, thus leading us away from utilitarianism which is characterized by a lack of concern for distributive principles. If we adopt (b) we reduce the scope of distributive principles, thus leading us closer to utilitarianism.

How do we choose between (a) and (b)? Reductionism about persons does not favour one over the other. Whether one proceeds from reductionism about persons to (a) and to a non-utilitarian view, or alternatively to (b) and to utilitarianism, depends on what premise one adds to the reductionism. If the premise one adds is utilitarian, then the utilitarian conclusion will be produced. If a distributive premise is added, a non-utilitarian conclusion will be reached. But the addition of these premises would be question-begging.

In providing an argument which he claims is *for* the adoption of (b), Parfit seems to me to import a utilitarian premise[15]. His argument goes as follows: He asks why it is that within a single life we usually ignore distributive principles and opt for maximization. He suggests that some people answer that maximization is only justified because it is within *one* life. He notes that utilitarians would object to this answer. They would say that suffering is bad and pleasure is good and it is better to have more of what is good

14. Ibid, p. 334.
15. Ibid.

and less of what is bad. This, and not the unity of a life, is the justification for maximization. It is because of this view, Parfit says, that the utilitarian can justify maximization over different lives without assuming that humankind is a mass-person. Parfit argues that the reductionist view of persons supports the utilitarian here because if the unity of a life is less deep than we thought, then it is less likely to be the unity of a life that justifies maximization within a life.

I would suggest that Parfit is conjoining the reductionist and utilitarian theses to show how the former leads to the latter. He is invoking a utilitarian argument to yield a utilitarian conclusion. He looks to uncontroversial maximization - that which is within one life - settles on a utilitarian justification for this, and then applies this justification to highly controversial cases. Unaided by such an argument, reductionism about persons does not lead to utilitarianism. The reverse may occur, however. Utilitarians may be led to reductionism because the view I have advocated - what Parfit calls non-reductionism about persons - is incompatible with utilitarianism.

It seems that there is no way of choosing between (a) and (b) without begging the question. However, *if* it could be shown that it made no difference whether one adopted (a) or (b) because both led to utilitarianism, then it would not matter that we are unable to choose. Whatever we chose, we would be led to the same moral conclusion. But, I have already said that to adopt (a) is to extend the scope of distributive principles - the opposite effect of adopting (b). Parfit notes, however, that if the extension of the scope of the distributive principles were accompanied by a reduction of their weight or importance so that they counted for nothing, the net result would be utilitarianism. Impotent principles, no matter how extensive their scope, remain impotent. Some attention must therefore be given to Parfit's arguments about how the distributive principles lose their weight.

Broadly, Parfit's argument is that distributive principles are often held to be founded on the separateness of persons and since, on the reductionist view, this fact is less deep, it is more plausible to give them less weight. He says that "if we cease to believe that persons are separately existing entities and come to believe that the unity of a life involves no more than the various relations between the experiences of this life, it becomes more plausible to be more concerned about the quality of experiences and less concerned about whose experiences they are"[16].

I would argue, by contrast, that the weight of distributive principles is not founded on the separateness of persons. It is only the conventional scope of these principles that is fixed by the separateness of persons. The weight of distributive principles is based on separateness of existence, irrespective of whether these existences are temporal stages, persons or societies. Distribution is important so long as at least two separate existences can be discerned. The "size" of these existences does not matter (though their nature - including their degree of sophistication - may matter). The scope of distributive principles is fixed by one's determination of what entities have separate existence - of where the boundaries of existence are. If, like Parfit, one wishes to claim that personal identity is less deep, then one can change the scope. It should not have any effect on the weight. This is a point made by Nagel[17]. Parfit responds:

> Why should the effect be only on the scope? A change of view about the facts often makes it plausible to give to a moral principle a different weight. If this cannot be plausible in the present case, this needs to be shown. I believe that it could not be shown. ... Nagel talks of the *unit* over which a distributive principle operates. If this unit is the whole of a person's life ... a Principle of Equality will tell us to try to make better, not the lives of the people who are worst off, but the worst states that people are in.[18].

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16. Ibid, p. 346.
17. T. Nagel, *Mortal Questions*, p. 124, footnote 16.
18. D. Parfit, *Reasons and Persons*, pp. 343, 344.

One might agree that "a change of view about the facts often makes it plausible to give a moral principle a different weight" without having to accept that the change of view for which Parfit has argued is one that makes it plausible to change the weight of distributive principles. If the unit of existence is a temporal stage, then our distributive principles will require us to make better the worst off temporal stages. Parfit believes that this makes distributive principles *less plausible*. Citing Haksar, he says the reason why this is so is that, although suffering is bad, it is worse when the same individual keeps on suffering. If the temporal stage is the unit of existence, then one individual cannot keep on suffering. There is, on this view, no such thing as a continually existing individual that could be suffering on and on[19]. Because there is no possibility of compensation at one time for suffering at another, Parfit believes that distributive principles have less weight on a reductionist view of individuals. However, I think that this is wrong. Distribution is not primarily about *intra*-personal compensation, though this may play some role. It is primarily about *inter*-personal, or, on the reductionist view, *inter*-temporal stage apportioning of benefits and burdens. Thus the fact that intrapersonal compensation becomes less plausible on a reductionist view does not entail distributive principles becoming less plausible and therefore losing weight.

It seems that Parfit is relying on his claim about personal identity *both* to extend the scope *and* reduce the weight of distributive principles. One can, in my view, quite easily accept Parfit's claims about personal identity and yet accord equal weight to distributive principles, simply by extending their scope so that they apply to temporal stages rather than merely individuals.

Parfit, I think, realizes the relative weaknesses of his claims throughout, and thus keeps drawing weak conclusions. For example, he says that accepting the reductionist view about persons makes utilitarianism *less implausible*[20]. He says that on his view

19. Ibid, p. 345.
20. Ibid, p. 346.

distributive principles are less plausible and contrasts his "cautious" view with that of Wachsberg - that distributive principles lose their plausibility (altogether)[21].

It seems then that we cannot choose between (a) and (b) and that it does make a difference which of these views we adopt. I wish to turn now to what I take to be a more significant criticism of the conclusions Parfit tries to draw from his views about personal identity.

Parfit argues that the separateness of our existences is less deep than we thought, that persons are reducible to series of temporally fleeting selves. He argues that psychological continuity is more important than personal identity. On this reductionist view of persons, our experiences are not unified and not sharply differentiable from those of others, he claims. What I wish to point out is that even if it is the case that the unity of our lives is compromised by Parfit's arguments, there are still stronger connections between intra-life experiences than between inter-life experiences. Parfit would certainly not deny this in the case of strong psychological connectedness between contiguous or even close "selves", yet he often seems to ignore it and moves subtly from modest claims that the separateness of persons is less deep, to the very bold position that it has no depth. It is this that enables him to draw utilitarian conclusions. I think that even if Parfit is right that personal identity is not as deep as we think it is, he has nevertheless not shown that it is so shallow as to eliminate the need for interpersonal distributive principles. Personal identity is sufficiently deep to justify our linking morality to the well-being of individuals rather than to the well-being of their temporal stages. I shall say more about why this is so in the next section.

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21. Ibid, p. 344.

4.5) THE MORAL SIGNIFICANCE OF INDIVIDUALS

I want to go one step further and claim that even when only weak psychological continuity exists between the experiences of successive "selves", the unity of these is still significant and differentiable from the experiences of others. I think that the inescapability of this fact is evidenced, for example, by Parfit speaking of experiences *"within"* and *"between"* lives. These expressions only have meaning if one accepts that our separate existences have *some* unity. Now Parfit may retort that his terminology reflects the common usage and is, in fact, inaccurate. I think that he would be unable to express his views adequately in any other meaningful way. But rather than pursue this particular point, I wish to say more about the unity of successive temporal stages and the moral significance of this.

I said earlier that morality must be connected to well-being. While we can conceive of the well-being of non-conscious (rather than unconscious) things such as cars and trees, this well-being cannot compare to that of conscious beings. The well-being of non-conscious things makes no difference to them. They could not, cannot, nor will be able to care about their own well-being or the lack thereof. The well-being of conscious beings, by contrast, makes a very real difference to them. The sort of well-being to which morality must be connected, is the kind which makes a difference, otherwise morality would make no difference. Thus it is the well-being of conscious creatures, (or at least creatures which are capable of consciousness), which counts. This is not to say that we cannot have obligations concerning the treatment of non-conscious objects. However, these obligations are founded on the interests of conscious beings. Thus, for example, I have an obligation not to vandalize a car because it belongs to someone else and his interests would be harmed if I damaged his car.

While it is true that there are different temporal stages to an individual's life, there is much that binds these together. One example is our awareness, as conscious subjects, of our existence over time. One temporal stage feels connected to others. This is the

"feeling of connectedness". It is a consciousness of continued existence. Memory links the present temporal stage with prior ones. Anticipation is a future-orientated analogue of memory, linking the present temporal stage with future ones.

The consciousness of continuous existence is itself a strong argument for our existence over time. Consciousness of continuous existence is, I think, supported by some kind of Parfitian psychological continuity - though I am not sure whether it is psychological continuity (in its narrow sense), psychological connectedness, or something in between. Whichever it is, consciousness of continuous existence has some foundation in Parfit's analysis. This is one phenomenon which gives *some* depth to the unity of lives on Parfit's reductionism which, I have claimed, is a relatively moderate thesis. On an extreme reductionist account (which I believe is indefensible), our feeling of existence over time would be taken to be an illusion. This, I think, is radically counter-intuitive.

However, even if we were to grant that our existence over time is an illusion, its illusory status would not detract from the moral significance of the *feeling*. It is the feeling of connectedness, of a continuous self, that is morally significant. Now someone who accepted Parfit's arguments might object that the feeling of continuous existence cannot be morally significant because the belief in continuous existence is irrational. But I am arguing that whether or not the belief is irrational (say from an ontological perspective), it is neverthelss morally significant - or rational from a moral perspective.

Let me now say why it is morally significant. I have already said that the kind of well-being to which morality must be connected is the well-being of conscious creatures because the well-being of such creatures matters to them. In other words, it is the fact that their well-being matters to them that gives their well-being an intrinsic moral status. Now, when such creatures are concerned about their well-being, it is, as a matter of fact, their well-being as consciously existing individuals rather than their well-being as temporal stages, about which they are concerned. Thus, for example,

when one temporal stage makes prudential calculations knowing that although *it* may not experience the benefit and harms, pleasures and pains, that result from its decision, the self that decides and the self that experiences will be *subjectively* indistinguishable. It is *this* that will matter. It certainly does not seem irrational to undergo some discomfort now in order to secure pleasure or to prevent greater pain for a subjectively indistinguishable entity that exists at a latter time.

A society exists as a collection or construction of individuals. Societies, unlike individuals, have no subjectivity. A decision taken by one constituent member can have beneficial or harmful consequences for subjectively distinguishable co-members of that society. Since it is the subjective feeling of identity that counts in morality, the distribution of benefits is important.

Since individuals are the significant units of existence, morality should be attached to individual well-being rather than to the well-being of society. A theory, such as utilitarianism, that overlooks individuals and focuses on fictitious creatures they collectively constitute, or on arbitrary time-slices of individual existences, is not appropriately recognizing the metaphysical reality and its moral significance. A moral theory that ignores the facts, morally relevant facts, does so at its own expense.

CHAPTER 5

WELL-BEING

5.1) PLEASURES, DESIRES AND NEEDS

I have argued that morality should be connected to individual rather than social well-being. What, however, is well-being? Some people have sought to reduce well-being to one or other basic kind of state, such as pleasurable mental states, the state of having one's desires satisfied, or the state of having one's needs fulfilled. What is meant by "pleasures", "desire satisfaction" and "need fulfilment"?

Pleasurable mental states are simply subjectively pleasurable conscious states. The concept of a pleasurable mental state does not make any reference to extra-mental phenomena, including how or why the mental state arose. The feel of the mental state is the sole determining feature of whether it is pleasurable or painful.

To desire something is to want it. A desire is satisfied when the state of the world which is wanted comes about. It is not necessarily accompanied by a *feeling* of satisfaction. Amongst desires, I include both short term instrumental desires (such as a desire for a haircut or some entertainment), as well as far reaching goals and life's aims (such as bringing up intelligent, well-mannered and well-adjusted children, composing a symphony or winning a gold medal in the Olympics).

Whereas mental states and desires must be predicated of conscious creatures, needs are not necessarily ascribed to subjects of experience alone[1]. A need is, near tautologically, a necessary condition. If X is a need then it is a necessary condition *for something*, Y.

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1. J. Griffin, *Well-Being*, p. 41.

If Y is to be, then X must be. Need fulfilment, like desire satisfaction, is a state of the *world* rather than a state of mind. It is not the feeling that one's needs have been fulfilled. It is the objective fact that they have been fulfilled.

Well-being, I shall argue, cannot be reduced to any *one* kind of state, whether it be pleasure, desire satisfaction or need fulfilment. Each plays at least some role in a person's well-being.

On some interpretations of utilitarianism, well-being is identified with pleasurable mental states and the absence of pain[2]. The action whose consequences produce the greatest amount of pleasure is the right action. Robert Nozick has shown, however, that we value more than just our experiences. He does this by means of a thought experiment in which he imagines an experience machine[3]. This is a marvelous piece of technology which can give one any experience or series of experiences one desires. One is given the opportunity of choosing the (presumably pleasant) experiences one wants and is then plugged into the machine, (perhaps for only a limited time after which one can choose another series of experiences). Nozick asks whether we would plug ourselves in. It seems, he argues, that for at least three reasons we would not. Firstly, we want to actually *do* certain things and not just have the experience of doing them. We want to run the race, draw the picture, write the poem, go to the party, and not simply have the experience of doing these things. Secondly, we want to actually *be* a certain way, without simply having the experience of being that way. We want to be rich, or famous, or strong, or tall, and not simply have the experience that we are any (or all!) of these. Finally, with the experience machine, we have no actual contact with any deeper reality than the man-made reality of the machine. Nozick suggests that our reluctance to be plugged into the experience machine indicates that something more

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2. Theories that identify well-being with pleasurable mental states are often called Hedonist theories. See D. Parfit, *Reasons and Persons*, p. 493; A. Buchanan & D. Brock, *Deciding for Others*, p. 31.
3. R. Nozick, *Anarchy, State and Utopia*, pp. 42 - 45

than the way our lives feel from the inside, matters to us. We value more than just pleasant experiences.

While one is plugged into Nozick's experience machine, one does not know that one's experiences are "artificial". Thus the fact that the experiences originate in something man-made would not concern those who were plugged in. Though we believe that we are not presently plugged into such a machine, we cannot be sure that, in fact, we are not. Imagine that we currently are in a plugged-in state and are faced with the experience of being offered the choice whether or not we would like to be plugged in. The fact that even if this were to be true we would choose not be plugged in shows that if we found out that our experiences were from a machine we would be very disappointed. We would value at least some of our pleasurable experiences that much less.

Nozick's argument shows us that our well-being is not reducible simply to pleasurable mental states. His argument does not, nor does it purport to, show that our mental states are irrelevant to our well-being. Clearly the nature of our mental states constitutes part of our well-being. Pleasant rather than painful mental states have both intrinsic and instrumental value.

To a large degree, we regard pain as bad because of the way it feels. It is no consolation to learn that one's pain was caused not by hitting one's thumb with the hammer, but artificially by a machine which gave the (false) impression that one had hit one's thumb. Similarly, pleasurable mental states have some intrinsic worth. Consider, for example the pleasure of eating well-seasoned brussels sprouts[4]. Imagine that one found out that one had not eaten these little vegetables, that all one was "fed"

4. A pleasurable experience for me, but evidently not for many people, especially many children who have to be coaxed into eating their brussels sprouts by a dubious argument about starving children in Ethiopia.

was the experience of eating them. Knowing that the pleasure one had was caused artificially would not eliminate the actual experiential pleasure.

(However, it is possible for this pleasure to be compromised. Imagine a gourmet who knows *while* he is having the experience of eating brussels sprouts, that his experience is artificially induced. He may well be so depressed by this knowledge that his actual experience is altered for the worse. Clearly this is only possible if the knowledge and the experience are concurrent. Once one has had a pleasurable experience, this cannot be compromised by later knowledge. Certainly one may then view one's earlier experience in a different light, evaluate it differently and be disappointed, but the pleasant nature of the experience itself, once lived, cannot be altered.)

In addition to their intrinsic harm or value, painful and pleasurable mental states can also have instrumental harm or value. Firstly, pain and pleasure are often (though not always) indications of whether other components of a creature's well-being are being served. Thus injury, which, as I shall show, is adverse to well-being, usually results in pain. The pain draws our attention to the injury in such a way as to encourage us to avoid it, or to seek repair. Similarly, the satisfaction of needs and the fulfilment of desires often result in pleasant mental states. For example, filling our stomachs with food gives us pleasure. This is one of the reasons why we fill our stomachs with food, something which, pleasure aside, fosters our well-being. Were pleasure and need fulfilment to become disconnected from each other there would be less incentive to pursue the satisfaction of our needs. I am told of the scientific experiment in which electrodes were attached to a rat's brain. Pleasure could be artificially stimulated every time the rat pushed a bar in its cage. The rat soon sought all its pleasure in this way and starved to death.

There is a second way in which pain and pleasure have instrumental harm and value. Painful mental states can debilitate. A person who is compromised by pain is unable to pursue his desires and needs satisfactorily. Positive mental states, or at least the absence of negative ones, better equip one to satisfy one's needs and desires.

So much for the importance of mental states to well-being. Satisfying desires is another important component of well-being, not only because we desire pleasure and the absence of pain, and not only because we desire much that we need, but also because the satisfaction of desires is in itself valuable to us. Sometimes we desire things which are not good for us. Sometimes satisfying these desires brings pleasure (or relief), as in the case of the drug addict's desire for another dose. On other occasions, satisfying non-beneficial and harmful desires brings no pleasure. Consider, for example, the case of the political prisoner on a hunger-strike. Doing without food is neither pleasurable nor good for him, and yet he desires to go without food. Satisfying this desire is, for him, a very important component of his well-being[5]. This desire satisfaction has an importance which is independent of the pleasures it may bring and the needs it may fulfil.

Needs also play a vital role in well-being. Needs, I said earlier, are necessary conditions for something or other. They are not necessarily desired. There are a number of kinds of needs. Griffin distinguishes two kinds of needs: instrumental ones - those we have because of the particular ends we happen to have; and basic ones - those we have simply because of the kinds of creatures we are[6]. Both kinds are important to well-being. Because Vladimir Horowitz wanted to be a pianist, he had an instrumental need for a piano. I, on the other hand, have no desire even occasionally to tinkle on a piano, so I have no need for a piano. However, given our nature as social beings, both

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5. This example is not unproblematic. It raises the question of objective and subjective views of well-being - a matter to which I shall turn later in this chapter.
6. J. Griffin, *Well-Being*, p. 41.

Horowitz and I have basic needs for friendship and communication. We do not have these needs because of the particular ends we happen to have but rather because we are the kind of creature we are.

I should like to make an alternative distinction between three different kinds of needs: essential needs, non-essential needs and instrumental needs. I use the term "instrumental needs" in Griffin's sense. By essential needs I mean those needs which must be satisfied if the bearer of that need is to continue existing. If our essential needs are not satisfied, we simply cannot live. Given our biological makeup, all mammals, including Horowitz and I, have a need for oxygenated air, a minimal amount of food, water, and perhaps clothing and shelter. Without these, we die. By contrast, if non-essential needs are not satisfied we do not drop dead, or even die slowly, though we may, as a result, live a deprived life. Most of us could live on far less food and less expensive food. None of us has an essential need for more than one set of clothes (and perhaps a change for wash days). However, simply because the "excess" that we have is not essential does not mean that it is not needed. The excess can be classified as a non-essential need until a particular threshold of excess is reached. After that point, further increments may be desired, but cannot be said to be needed, even non-essentially. Similarly, one does not have an essential need for one's spouse's fidelity. One can survive without it, but yet one does still need it in a non-essential way.

It may be objected that there is an incoherence in speaking about a non-essential need. If a need is a necessary condition then a non-essential need is a non-essential necessary condition, and that sounds like a contradiction. However, this is not so. When I speak of an essential need, I mean a need which must be satisfied for the very continued existence of the bearer of that need. The bearer of a non-essential need can survive if the non-essential need is not fulfilled, but in a "sub-satisfactory" condition. Thus, a

non-essential need *is* a necessary condition - not for survival but for survival under "satisfactory" conditions.

Essential needs are the bedrock needs. Less basic, but also important are our non-essential needs and our instrumental ones. I believe that there is a difference between non-essential needs and instrumental ones, though they may intersect. Some non-essential needs are not instrumental. Oliver Twist's hoped-for extra bowl of gruel was a non-essential need. Without it he would not, indeed did not, die. However, it was not instrumental in Griffin's sense. It was not a need that arose from particular goals or desires that Oliver had. It was a need which anyone of us would have in Oliver's nutritional state. Needless to say, there is no clear divide between essential needs and non-essential ones, and between non-essential needs, on the one hand, and instrumental needs and some desires, on the other.

Very often we have desires for that which we need. However, the satisfaction of needs is important to well-being whether or not what we need is also desired, and whether or not the satisfaction of our needs gives us pleasure. In fact, it is usually the case that need satisfaction is *more* important to well-being than the occurrence of pleasurable mental states. Consider, for example, the biological need for nourishment. It is conceivable for one to receive nourishment without the feeling of satisfaction (as in the case of one fed by an intravenous drip) and it is conceivable for one to have the feeling of satisfaction without actually receiving the nourishment (as in the case of someone who eats well, but suffers from a severe gastro-intestinal absorption problem). Nourishment is more central to well-being than the *feeling* of gastronomic satisfaction. Without nourishment one dies. It is quite possible to survive without the *feeling* of a full stomach.

We can conclude from the preceding discussion that pleasurable mental states and the satisfaction of desires and needs all contribute, to various degrees, towards well-being. We have also seen that pleasure, desire and need converge to a significant degree.

Generically, we can refer to the pleasures, desires and needs as interests[7]. These particular interests are to be distinguished from a person's overall interest, or well-being. Particular interests are the building blocks of well-being. However, particular interests of a single individual often conflict. Different pleasures can conflict with each other, just as desires can conflict with each other, and just as one need can conflict with another. There can also be conflict between each kind of interest: between desires and needs, pleasures and desires, etc. Solving the conflict is a matter of weighing up the interests. Consider the following example. Pavarotti may have an interest in cheering for his favourite soccer team because he has a desire to show his support in this way. However, it may not be in his overall interest, because it will damage his voice, thus adversely affecting his singing. Since the interests he has in singing are so much more important to him than his interest in cheering for his favourite soccer side, his overall interest is not served by pursuing his interest in soccer cheering. This is an example of an uncomplicated conflict - a straightforward conflict between a strong interest and a weak one. Sometimes it is more difficult to weigh the interests, as in the case where Pavarotti has the choice of singing in either one of two prestigious operas, but not both. Another complicating consideration is that in different circumstances different aspects of well-being can be ranked in different ways. In other words, what is more important to one's well-being in some circumstances can be less important in others. Thus the determination of which interests take precedence over which is dependent, in part, on the precise nature of the circumstances.

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7. This usage of the word "interest" differs from that of Feinberg, for example. For him interests are a narrower class. They exclude some desires for example. See J. Feinberg, *Harm to Others*, chapter 1.

Having said this, though, we can give some examples of what ordinarily benefits a creature and fosters his well-being. I am not suggesting that the important examples which I shall provide benefit creatures without exception. There are certainly occasions on which that which usually benefits can impair well-being. I shall mention some such examples, but I deny now that their existence poses any problem to the concept of well-being. If, in a particular instance, something does not benefit a creature, then in that instance it is not part of his well-being. The fact that it is usually beneficial is significant and will be important to my discussion of what rights there are.

Perhaps most central to a creature's well-being is its life. Speaking in the first person, I can say that my (continued) life is in my interests for two reasons. Firstly, the intrinsic importance of my life to me: in an important sense, anything is important to itself, because without itself, it is not. Without me, I am not. Thus, my life is very important to me. *I* cannot have a greater interest than my own life. Whatever other interests I have, they are interests of my life. Secondly, most other interests which I might have are dependent on my living. I cannot have pleasurable mental states or pursue my desires or life's plans unless I am alive. It is in the interests of a creature capable of enjoying pleasant experiences and desirous of attaining certain goals to continue living. He needs to live if his well-being is to be advanced in these important areas. Thus, to summarize both these reasons, I have an interest in my life because my life is a necessary condition not only for pursuing most of my other interests, but also for merely having them. Interests are not ownerless. They have to be interests *of* something.

I said that *most* of my other interests are dependent on my being alive. I say this because some of one's interests can be served or frustrated if one is no longer living. Feinberg has shown that posthumous interests are possible[8]. Some of a person's

8. J. Feinberg, "Harm and Self-interest" in P.M.S. Hacker and J. Raz (eds.), *Law, Morality and Society*, pp. 299ff; J. Feinberg, *Harm to Others*, pp. 79f.

interests do not survive his death. These are the interests which Feinberg calls "self-confined"[9] interests. They are based on desires such as the desire to be a self of a certain kind or the desire for self-respect. However, we also have interests in states of affairs that extend beyond our experience and to some time in the future. For example, we have interests in having a good reputation. These interests are not limited to our experiences or even to our lives. If we are defamed and do not know about it, either because we are alive but unaware of it or because we are dead, we are still harmed. That which can harm or benefit one can extend beyond the bounds of one's subjective experience and of one's life itself. Posthumous interests are those interests that can still be served or frustrated by posthumous events. Aristotle also accepted that posthumous events can affect the interests of the deceased, (though he denied that these could be sufficiently influential to render a "happy" man "unhappy"[10]).

Not everyone agrees that posthumous interests are possible. Lucretius is one who maintained that evil cannot befall the dead because they do not exist to suffer any evil[11]. One cannot suffer harm, he says, if one does not exist. Thus, death and posthumous events cannot constitute harms. Lucretius's argument is similar, though not identical, to those who argue against the possibility of posthumous interests by claiming that the dead cannot be harmed or benefited because they cannot know about it. However, as we have seen, one can be harmed without knowing that one is harmed, as in the case where sombody besmirches my reputation without my knowledge. If knowledge is not a necessary condition for harm before death, it is not a necessary condition for harm after death[12].

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9. J. Feinberg, "Harm and Self-Interest" in P.M.S. Hacker and J. Raz (eds.) *Law, Morality and Society*, pp. 304, 305; J. Feinberg, *Harm to Others*, p. 86.
10. Aristotle, *Nicomachean Ethics*, book 1, chapter xi.
11. Lucretius, *On the Nature of Things*, book III 822-871.
12. J. Feinberg, "Harm and Self-Interest" in P.M.S. Hacker and J. Raz (eds.), *Law, Morality and Society*, p. 306.

Even though posthumous interests are possible, death itself in not usually in one's interests. It is living that is in one's interests. Many of our interests do not survive death. Those that do are resilient interests, but they remain the interests of the life that was.

Although life is usually in one's interests, we can conceive of some kinds of case in which it is not so. Some people who suffer prolonged unbearable pain, perhaps as a result of a terminal disease, often say that it is not in their interests to continue living, that death is preferable to the excruciating pain they suffer. In some of these cases continued life might well not be in their interests.

Health and the absence of injury or maiming are other states which we need and desire. They are required for the effective avoidance of pain and for optimal functioning in order to pursue the satisfaction of needs and desires. In so far as a creature's health is impaired, its well-being is adversely affected.

Once again, we can think of counter-examples. To avoid a 25- year conscription of young boys into the Tzarist army, many parents chose to cut off a finger of their sons so as to render them exempt. These parents believed, not without at least some justification, that they acted in their sons' interests by inflicting this injury on them. Just as injury is not always harmful, so healing is not always beneficial. This is what the "ex-leper" in Monty Python's *Life of Brian* claims. He complains to Brian that once he was a leper with a trade - begging. He was cured of his leprosy, but then he had no income (because people give alms to lepers, but not to ex-lepers). This did not strike him as being a good deal. He wanted a disability bad enough for him to beg, but not so bad that he suffered excessively. However, these exceptional cases aside, we are justified, I think, in claiming that health is usually in a creature's interests.

Living creatures have certain essential biological needs such as for food and oxygen. The satisfaction of these needs is required for the preservation of health and life.

The satisfaction of more sophisticated needs and desires, such as for friendship and belonging, good wine and philosophy, as well as the realization of one's conception of the good, are also components of well-being.

There is much that goes into well-being and there may well be more to it than I have mentioned, but I think that I have pointed to its main features. However, these require further exposition to highlight an important problem. This is the problem of subjective and objective views of well-being. It is a problem which takes on particular significance when we connect well-being to morality.

5.2) SUBJECTIVE AND OBJECTIVE VIEWS OF WELL-BEING DEFINED

There can be more than one kind of conception of a particular individual's well-being - a "subjective" one and an "objective" one.

An objective conception of well-being maintains that there is some objective standard of well-being which we can sometimes fail to recognize because we are irrational. On an objective view there need not be only one objective standard of well-being which is true of all creatures or even all creatures of a particular kind. There may be a different objective standard for each individual. For example, acquiring a good quality violin may be in Yitzchak Perlman's interests, but not in mine. However, it seems to me that these variations will usually only concern what I shall call the *details* rather than the *general structure* of well-being. The general structure of a creature's well-being consists of the constellation of *general* features of its well-being that it shares with other creatures of the same kind. It is not easy to give a complete account of the

general structure of the well-being of a particular kind of creature or object, but an outline can be attempted. I have already described the kinds of features that characterize human well-being. Some of these features are shared by non-human animals. Such creatures also have interests in pursuing pleasure and avoiding pain, they have essential as well as non-essential needs, and they have some desires. One general feature of the well-being of humans that distinguishes human well-being from the well-being of other animals is that humans have more sophisticated desires. By more sophisticated desires I do not mean more important desires, but desires such as those that concern music, art, literature, and the long-term future. The particular kinds of sophisticated desires and the instrumental needs they yield will vary from individual to individual. Amongst those who have a desire to play a musical instrument, some will choose the piano, others the violin, others the oboe or the guitar. Amongst those who choose the violin, some will prefer one make and others another. These are all the details of well-being. The general features shared by all humans are that they have sophisticated desires and attendant instrumental needs and these are related to the other features of their well-being in characteristic ways.

A subjective view is one in which the subject's evaluation of his own desires and needs is granted authority. In other words, a subject is taken to be the best judge of his own interests. A subjective view can allow that we can be uninformed or misinformed and, as a result, fail to recognise our interests. For example, I may desperately desire to lay my hands on a particular book because I believe that it contains some information which I need. Imagine, however, that my belief that the book contains the requisite information is false. I may then think that it is in my interests to obtain the book, but clearly it is not. The subjective view can account for such cases. It would simply claim that were I to be correctly informed, my desire would be amended accordingly. The objective view, by contrast, maintains that I may be correctly informed of all the facts and yet still have irrational desires.

5.3) SUBJECTIVE AND OBJECTIVE VIEWS OF WELL-BEING EVALUATED

I shall now argue in favour of the objective view of well-being. Since I think that rights are best linked to well-being objectively conceived, it is important to argue for the objective view of well-being as a prelude to my discussion in the next chapter of how rights can be linked to and grounded in well-being.

The objective view reflects the common sense view that there are different levels of well-being and that some are objectively more basic than others, even if some individuals think otherwise. For example, the satisfaction of basic biological needs such as the need for water seems to be objectively a more basic level of well-being than the desire to contemplate philosophical problems. A philosopher who values philosophy above water, taking the former to be more basic to his well-being, will not be a philosopher for long after he is faced with a choice for one or the other. It seems that he is wrong about what is most essential to his well-being. Yet the subjective view would claim that he is not wrong.

On the subjective view the achievement or at least the pursuit of one's own conception of the good is itself an important part of a rational creature's well-being. One has strong interests in acting according to one's desires. If, according to one's conception of the good, philosophical reflection is more valuable than life because a life without philosophy is not worth living, then one's well-being *would*, in an important way, be compromised, were one to opt for a life without philosophy.

The objectivist can respond to this in one of two ways. One way would be to deny that the pursuit of one's conception of the good is more basic than the satisfaction of biological needs. He could argue that by looking at less sophisticated creatures which

lack a conception of the good it becomes apparent that one's conception of the good occupies one of the most sophisticated levels of well-being, objectively speaking. If only sophisticated creatures which have sophisticated desires have a conception of the good, then such a conception would appear to have to occupy a sophisticated level of well-being. Thus biological needs *are* more basic and any attempt by a conception of the good to suggest otherwise is an illegitimate attempt to make itself the most basic level of well-being.

The other way an objectivist could respond to the subjectivist is more plausible in my view. This way would be to agree that an important part of a rational creature's well-being is the achievement or, at least, the pursuit of his own conception of his well being[13]. Such creatures desire that their perceived interests be served. (This is what pursuing one's conception of one's own well-being is about.) The objective view can take account of these desires. It can say that the satisfaction of a subject's perceived interests is relevant to his well-being, viewed objectively. The objective view can consistently hold that while it might have been best of all if the subject had not had certain perceived interests, the fact that he does have them is relevant to an objective appraisal of what constitutes his well-being. In other words, all things being equal, those interests which he mistakenly perceives he has, would not be his interests, objectively viewed. However, since he does perceive these to be his interests, all things are not equal and they are objectively relevant to his well-being.

There are two ways in which a subject's conception of his own well-being can be recognized. One way is to accord it supreme importance so that in any conflict between a perceived interest and an interest which, one's perceptions aside, one objectively has,

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13. Buchanan and Brock seem to treat self-determination and well-being as competing values, at least at a certain level. (See A. Buchanan & D. Brock, *Deciding for Others*, p. 40). While I agree that self-determination can conflict with *other* aspects of well-being, it is part of well-being itself. Just as desires, needs and pleasures, which are all part of well-being, can conflict, so can self-determination conflict with other aspects of well-being, without having to be distinguished from well-being.

the perceived interest is given priority in determining what the person's well-being is. If this is the case then one's perceptions of one's interests conclusively determine what one's interests are. This way is not open to the objective view because it would then be equivalent to the subjective view. The alternative way is to say that, although perceived interests are *relevant* to an objective view of well-being, they are intrinsically no more important than other interests. Thus, in a conflict between perceived interests and interests which, one's perceptions aside, one objectively has there is no rule about which should predominate in determining what the person's well-being is. All the interests of both kinds will have to be weighed up in a given case in order to make such a determination.

Take the example of the hunger-striker which I raised earlier. His perceptions aside, his hunger-strike is objectively not in his interests. Without food his health will become impaired and he will then die. However, he has a desire to achieve certain political aims by starving himself, until he dies if necessary. Since he has an interest in satisfying this desire, it is relevant to determining his well-being, objectively viewed. However, to say that this desire is *relevant* to his well-being is not to say that it conclusively determines that his overall interest is served by starving himself to death. It is simply that this desire must be considered in an objective appraisal of what constitutes his well-being. It is conceivable that his political goals are so important to him and are such a crucial part of his life that for him to be prevented from dying for the sake of achieving these goals would be to thwart his overall interest objectively viewed. Although this is conceivable, it will rarely be the case. Usually interests in continued life will override the interest in dying for one's cause, but even then the interest in dying will be *relevant* to an objective appraisal of his well-being. In such a case, an objective determination of his well-being will have to weigh his interest in being a martyr and while it can be acknowledged that it has some weight, it will have to be shown that this is outweighed by other interests.

The same considerations apply to the philosopher who values philosophy above life itself. The fact that he values philosophy above his life is a relevant consideration in objectively determining what constitutes his well-being, though it would not - except perhaps in rare circumstances - be a conclusive consideration.

To highlight the fact that perceived interests do have objective importance for well-being, imagine a person with many misperceived interests. If none of these interests were satisfied, then even if many of the interests which, his perceptions aside, he objectively had were satisfied he would regard himself to be in a sorry state and might be miserable about it. There seems little doubt that such a person's well-being would then be in a compromised state, though perhaps he would not be as badly off as he would think.

Furthermore, it seems to me that sometimes our perceived interests play a vital role in filling a gap in cases where there do not exist interests which, perceptions aside, are objectively had. Consider the following example: Two people are diagnosed as having terminal cancer. Both are correctly informed of all the relevant facts. Neither of them have had their rationality impaired by the suffering, this not having set in yet. One decides that the anticipated pain and suffering is not worth the relatively minimal pleasure that he can obtain in the few months he has to live, so he decides to end his life. The other decides that notwithstanding the suffering he must face if he continues living, it is worth enduring this for the extra time he will have. It seems that in such a case it cannot be said of only one of the options that, perceptions aside, it is in the sick person's objective interests. His subjective preference is all that goes towards determining what, under the circumstances, would serve his well-being objectively viewed.

One of the alleged advantages of the subjective view is that it provides an easy and appealing answer to the question about who is to decide what is in each individual's interests. Each person decides for himself. By contrast, the objective view does not provide such an easy answer to this question. Who, on the objective view, should decide what is in each individual's interests or in everyone's interests? Is it the government or the religious leaders? Is it Marx or Freud (both of whom expounded objective views of well-being)? If no person can set himself up as an authority on his own interests, then how can anyone be so bold as to decide about the interests of others? Perhaps there are *some* people who can decide both about their own interests and about those of others, but who decides who these people are? Part of the appeal of the subjective view, then, is that it says that each person should decide what his interests are, and that no person should decide for another (except in obvious cases such as small children). The reason why this is appealing is that it rules out coercing people to do something or refrain from doing something which is purportedly in their interests but against their will. Since the objective view claims that what a person wants is not always what is good for him it is claimed that this opens the way to coercion. It is this that is found to be an obnoxious implication of the objective view. However, I deny that this is an implication of the objective view. There is a difference, after all, between an objective view of well-being - which claims that there is an objective standard by which an individual's (true) interests can be judged - and the moral claim that this ought to be pursued even against his will.

An objectivist could be opposed, for epistemological reasons, to coercing a person even for his own good. We find coercion so morally unattractive because we cannot be sure, even if there is an objective account of well-being, what it is. Forcing people to do what they do not want appears a sufficient evil to offset the merely *possible* benefit which they may gain as a result of one's coercion.

Mill employed a similar argument in support of freedom of expression[14]. He argued that we can never be sure that an opinion is untrue. Any opinion may turn out to be true. Thus no opinion should be stifled or suppressed. To deny this and to suppress an opinion one takes to be false is to assume one's infallibility - that is, to assume that one's judgement of the opinion as a false one cannot possibly be incorrect. Returning to the case of well-being, we can ask how anyone can be so sure that he is right in his determination of what constitutes it, that he will inflict an immediate evil - forcing people to do what they do not want to do.

However, it could be objected that there is something paradoxical about a view which asserts that something is objectively harmful to a person and yet requires one to stand by and allow him to bring this harm upon himself, simply because it is his autonomous decision. Although one may not be certain that one is right, moral action does not, nor can it, require certainty. The objectivist could respond. He could say that it is not simply that we are not certain about what a person's objective well-being consists in. We are in a great deal of doubt about it. If this is the case then the policy of non-coercion does make sense.

5.4) SUBJECTIVE AND OBJECTIVE THEORIES

Many, if not most, teleological moral theories have objective views of well-being. They tend to have a particular view of what a creature's nature is. Usually they believe that all creatures of the same species share that nature. (Such theories usually focus their attention on the nature of humans.) Given all this, what benefits a creature is not a matter of individual choice, but is rather that which will fulfil its nature. Such accounts of well-being are also called "perfectionist" accounts. They often speak of the "good life" for a species and provide an objective description of which actions would produce

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14. J.S. Mill, *On Liberty*, chapter 2.

this. The most notable example of this kind of teleological theory is that of Aristotle (and his philosophical heirs).

Utilitarianism is a teleological moral theory that has a subjective view of well-being. It does not dictate what an individual's real desires are. It allows each individual to determine what would benefit him. It is these subjectively determined appraisals of well-being that are entered into the utilitarian calculation to yield a moral prescription which everyone ought to follow. In other words, each individual is given a "vote" in each moral decision. Utilitarianism only prescribes how votes are counted, not how people ought to "vote". How - that is, for what - one "votes" is a matter of individual choice.

Thus while utilitarianism connects morality to well-being, its view of well-being is a subjective one. As such it has the advantages and is subject to the problems of a subjective view outlined above. Although some deontological moral theories do not connect at all with well-being the deontological theory which I am advancing connects overtly with well-being. A deontological theory may have either a subjective or objective view of well-being. I have argued for the adoption of the objective view of well-being. In the next chapter I shall argue that natural rights can only plausibly be connected to an objective view of well-being.

CHAPTER 6

CONNECTING RIGHTS TO WELL-BEING

6.1) WELL-BEING AND THE VARIETY OF MORAL CONCEPTS

Having discussed different ways of looking at well-being, I shall now focus on how morality - more specifically natural rights - might connect with these. To be successful in connecting morality to well-being is to found morality.

Natural rights do not exhaust moral discourse. There is much more to morality than such rights alone. Natural rights are just one type of moral tool - a very strong moral tool. They are claims we are entitled to make in virtue of our nature alone; they are correlated to negative duties on determinate people; and they are able to trump collective goals. It is my view - a view for which I shall soon argue - that some natural rights are absolute and may never justifiably be overridden. Other natural rights, while very strong, are not absolute.

In addition to natural rights, the moral landscape is populated by other concepts. For example, there are non-natural rights (chapter 0.3). These too are characterized by correlative duties on determinate people and by their trumping power but, unlike natural rights, they are not possessed *ab initio* by creatures in virtue of their nature alone. They may be either positive or negative (chapter 1.3).

In addition to rights - both natural and non-natural - there are also moral claims which cannot correctly be called rights. Such claims can differ from rights in a couple of ways. They may be too weak to be considered trumping claims. In this case they would lack the *strength* which rights have. Alternatively, they may lack correlative duties.

Such claims are claims "against the world"[1], even if against no one in particular. Feinberg illustrates this by saying that to have some important need unfulfilled gives one a claim even if nobody is in a position to do anything about it. Such claims lack the *correlativity* of rights.

There are also ordinary correlativeless obligations. These are owed, but not to any particular person. They are moral requirements which arise because their adverse effect on the well-being of the duty-bearer would not be too great and their benefit to some or other individual would be great. I think that the obligation to give charity is such an obligation.

Another concept is that of morally neutral acts. These are actions which are neither praiseworthy nor contemptible, morally speaking. Whether someone plays golf, for example, is morally neither here nor there (unless in a particular circumstance he plays golf when he should be fulfilling some pressing moral obligation that he has).

Then there are morally desirable acts which, although not a requirement of duty are morally praiseworthy. Here we can imagine, for example, the person who rises early every morning to crack the ice on the bird bath so that the birds can drink. He has no moral duty to do this, but it is morally commendable that he does.

Finally, there are morally heroic acts which are those where (usually great) benefit is brought to another person at great cost or risk to the well-being of the moral hero. An example of such a person is Miep Gies, the woman who risked her life to bring food rations to the Frank family who were in hiding in Nazi-occupied Amsterdam. As it happened, she was not caught (though the Franks were), but many people like her were executed for similar actions.

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1. J. Feinberg, *Social Philosophy*, pg 67.

Each of these moral concepts has a different character, but can be brought to bear in moral situations and decisions. I think that it is safe to assume that if these concepts can be justified they will connect with well-being in different ways. In other words, they will each have a different foundation in well-being. Were this not the case, then they would be morally indistinguishable from each other, which they are not.

I shall not give an account of how *each* concept attaches to well-being. This is not the aim of my inquiry. I shall examine just one moral concept - that of natural rights. Because the claim that there are absolute natural rights is more controversial and more difficult to justify than the claim that there are non-absolute natural rights, most of my argument will be directed to supporting the former claim. I shall then show why, given the existence of absolute natural rights, we should also accept the existence of non-absolute ones.

6.2) THE IMPORTANCE OF RIGHTS

I have already argued that morality must be connected to well-being and more specifically that it must be connected to the well-being of individuals (chapter 4). I shall now argue why absolute natural rights, as I understand them, are required to moor morality to individual well-being.

Just as natural rights, given their nature, can only be negative (chapter 1.3), so correlativeless duties, given *their* nature, can only be positive. Correlativeless duties are owed to indeterminate people (precisely because they are correlativeless). If, for example, one has a positive duty to give charity, then if one gives to some people one need not be expected to give to others as well. This is because the obligation is not owed to *them*. However, if one has a natural negative duty, such as the duty not to beat

up old people, it is not enough that one simply desists from beating up *some* old people. To have a natural negative duty not to beat up the aged is to have a duty to each and every old person (that is, to determinate people) not to beat them up. We see that the only correlativeless duties there can be are positive ones. Any natural negative duty cannot be correlativeless.

The consequence of this observation is important because it follows that if all moral obligations were correlativeless it would be possible for morality to become detached from the well-being of individuals. Positive obligations owed to indeterminate individuals are insufficient to anchor morality to the well-being of individuals. This is so for two reasons. Firstly, some individuals may be completely overlooked in the fulfilment of positive obligations. For example, everyone may fulfil their obligation to give charity by giving to *some* poor people. (One does not have to give to *all* poor people in order to fulfil one's duty.) The result could be that some poor people are left out and do not receive charity, even though everyone has fulfilled their duty to give charity. Secondly, there would be no restriction on how any individuals may be treated. One might, for example, fulfil a duty to feed the starving and then, after their meal, go on to satisfy one's own appetite by eating *them*, perhaps something like the plan of the witch in the Hansel and Gretel story. There would be nothing wrong with this because (1) one would have fulfilled one's positive duty and (2) there would be no negative duty not to eat them (because such a duty cannot be correlativeless). In other words, if there were only correlativeless obligations, one may feed a person one moment and eat it the next moment.

It is apparent that a moral tool that entails a correlativity of obligation and claim is required to moor morality firmly to individual well-being. However, this does not yet show that claims with the trumping strength of rights are required to tie morality to individual well-being, let alone that *natural* rights are required for this purpose. I shall

argue in what follows not merely that claims with the trumping strength of rights are required to moor morality to individual well-being, but that some of these rights must be absolute. Since these rights are rights which individuals *must* possess, it follows that they are natural rights. I have already shown (chapter 0.3) that only natural rights are held necessarily, in virtue of the right-bearer's nature alone. Since non-natural rights are rights which are not possessed in virtue of a creature's nature alone, and are acquired contingently, they are rights which a creature might not come to have. Thus, if individuals *must* possess certain rights to ensure that morality remains moored to individual well-being, then these rights must be natural rights.

The well-being of different individuals will inevitably conflict. For example, different individuals will compete for limited resources and will have different and conflicting conceptions of the good. Utilitarianism resolves this conflict of interests by determining what constitutes the well-being of society as a whole. It models the state of inter-personal resolution on the state of resolution which exists in the case of each individual considered separately. The psychology of each of us is not unmarked by dissonance. We are not without inner conflict. For example, we may have conflicting desires. These tensions and conflicts are resolved in the individual, pictured as a whole. This resolution is determined by the individual's calculating what is in his overall interest. Just as this is an individual prudential calculation, utilitarianism prescribes a social prudential computation. Such a calculation is relatively straightforward. Admittedly it does involve problems of accurately determining the consequences of a proposed course of action and accurately calculating the social utility which will be produced. However, in theory, all a utilitarian calculation is about is simply weighing up desires, by counting them and measuring their intensity. It seems, however, that the real problems of morality are more complicated than this. The simple calculation of the utilitarian is an acceptable method in the intra-personal case because we are dealing with one individual - a moral unit. However, in the case of conflicting interests between such

units, a more sophisticated moral calculation is required. It must take cognizance of more than simply the weight and number of desires. For example, it must consider not merely desires but other interests too. It must recognize the fact that the interests to be considered are the interests of *different* people. It must also resolve intra-personal conflicts of interests.

Given the inevitable conflict of individual interests, individuals must expect and must be expected to make some concessions. Everyone's interests cannot be served all the time. Compromises will *have* to be made. But what concessions by one individual can be required for what benefits to other individuals? Utilitarianism sets no conceptual limits here. *Any* sacrifice can be required of an individual if this maximizes social utility. An individualist view rejects this. Determining what sacrifices of some can be required for what benefits to others is, I think, what moral debate and discourse is about. However, my inquiry is into just one aspect of moral discourse - that is, natural rights. If, as I think, there is a limit to what sacrifices by some can be required to bring benefit to others, then there are absolute natural rights. Let me explain why I think that there is such a limit.

The individual must remain primary. We are attaching morality to the well-being of individuals. If there is no limit to what sacrifices some must make for others, then morality will become unhinged from individual well-being. The focus will be shifted from individuals to society. This, I have argued, is unacceptable, because of the distinctness of individuals' subjectivity and the moral significance of this.

We determine the limit of acceptable sacrifice by looking at the sacrifice from the perspective of a subject. By this I do not mean that we adopt a subjective view of well-being by asking a subject what sacrifices he is not prepared to make. Rather we look objectively at his well-being. I shall now explain why this is so.

Natural moral rights, as I conceive them, must be connected to well-being objectively viewed. Natural moral rights exist *ab initio*. Such rights do not vary from individual to individual, but are shared by a class (or classes) of individuals. Thus, while their correlative duties are owed to determinate individuals, it is to *all* individuals of that kind. Since the right is common to all, it cannot be founded on a conception of well-being which varies from one individual to another. The right must be founded on a conception of well-being applicable to all individuals who have that right. On a subjective view, the account of well-being inevitably varies from individual to individual. To this it may be objected that a subjective view may have some universal formula of well-being which is true of all individuals. An example of such a formula would be: "An individual's well-being is what he takes it to be". However, such a formula provides the *form*, but not the *substance*, of a particular individual's well-being. The substance of well-being varies from individual to individual. On an objective view, by contrast, the substance of well-being varies only in matters of detail. The broad structure of the substance of well-being is common to all members of a species. It is to this broad structure of well-being, objectively understood, that rights must be connected.

Were there rights which were connected to well-being subjectively understood, not only would rights vary from individual to individual but there could well be a bizarre range of rights. If, for example, an eccentric valued his collection of Beatles records above all else, he could turn out to have a right not to have these removed from him no matter what the benefit to others. Of course, if a right were framed in a very general way - for example, a "right to what one deems to be most important to one's well-being" - then this right would be shared by all individuals and would not vary from individual to individual. However, such a general right would issue in a multitude of specific rights

which would differ from individual to individual. It is these substantial, particular rights that could be obviously bizarre.

On an objective view, the different aspects of well-being are objectively stratified. Rights will attach to the most basic levels. We look objectively at a subject's well-being and ask ourselves if there are any sacrifices which would be too disadvantageous to a subject - qua subject - irrespective of the advantages it would bring others. If so, this would fix the threshold at which an absolute right comes into effect. In the next chapter I shall discuss which sacrifices I think would be too disadvantageous.

To say that rights must be founded on well-being, understood objectively, is not to say that the right bearer has no control over his right. It seems that although rights must be rooted in an objective account of well-being, an individual *may* forgo whatever rights which it may be shown he has, if he so chooses. However, he would not be morally permitted to choose some other right either in addition or instead. Rights morally guarantee a certain minimum standard. While one would be free to forgo this guarantee, one would not be free to extend its scope.

6.3) AN ABSOLUTE RIGHT AS EXISTING FROM A THRESHOLD ON A SCALE OF HARM

An absolute right comes into existence at a particular threshold on a scale of harm. There is, of course, more than one scale because there is more than one kind of harm. Thus, for example, there can be a pain scale, an injury scale, and a (restriction of) liberty scale. Some pains, injuries and restrictions of liberty *may* be required or, at least, justified, if other moral considerations (including social utility) are sufficiently weighty. However, there comes a point on each of these scales where the sacrifice for the individual is so great that under no circumstances can it be justified - that is, no

matter how weighty the counter-vailing moral considerations are. This point is the threshold at which an absolute right comes into existence. In other words, individuals have a right not to have harm of the particular kind (pain, injury, restriction of liberty) at and above this threshold inflicted on them. Lesser harm of the same kind (that is, lesser pain, injury, or restriction of liberty) *may*, as I have said, be justified if sufficient social utility would thereby be achieved. Thus there can be no absolute right to liberty, for example; there can only be an absolute right against violations of liberty beyond a certain degree. Major infringements of liberty below the threshold would be protected against by non-absolute rights. Minor infringements of liberty, such as being locked for twenty seconds in a room, would be justified more often.

Following is a graphic illustration of how the threshold works. I take as my example the scale of restrictions on liberty.

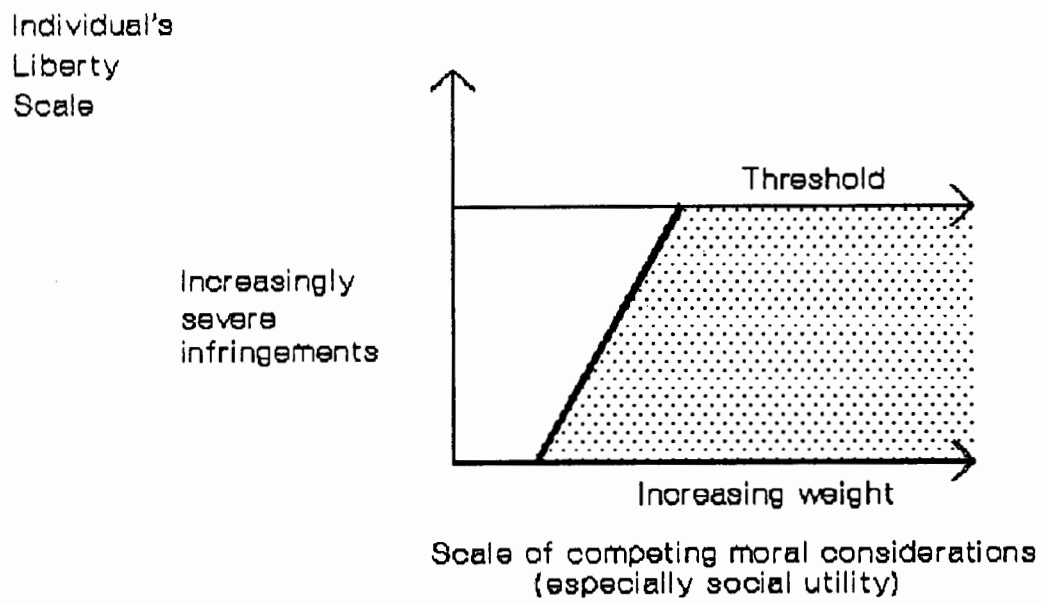

Diagram 1

Below the threshold, infringements of liberty can be required or justified if the competing moral considerations are sufficiently weighty. The line emanating from and at an acute angle to the horizontal axis represents the minimum weight of competing moral considerations that can justify each degree of restricted liberty. The shaded area to the right of this line represents the circumstances under which infringements are morally justified. The unshaded area to its left represents those circumstances under which such infringements are unjustified, not because *absolute rights* are operative in this area but simply because the competing moral considerations are not strong enough. Were they stronger, then a sacrifice of this degree would be justified. This would not be the case if the individual had an absolute right against that degree of harm of that kind being inflicted on him. The permitted restrictions of individual liberty are not determined by a straightforward utilitarian calculation. Claims against infringement of individual liberty have greater weight than those of social utility. I think that it is appropriate that claims against restrictions of individual liberty should be presumed to have sufficient strength to outweigh very small increases in social utility. However, I am not committed to this view. Those who wish to reject it could alter Diagram 1 so that the line indicating permissible infringements of liberty below the threshold originates from the origin of both axes rather than from its current position on the horizontal axis. Either way, the threshold terminates the line, indicating the point on the liberty scale at which no matter what further increments of social utility there are to be derived, that or greater sacrifices cannot be required of the individual.

I want to distinguish the kind of threshold I have described from another kind with which it may be confused, and for which many people, including sophisticated utilitarians and Dworkin, may have sympathy. This latter kind of threshold has, in an important sense, the reverse effect to the one I have described. It purportedly marks the point *up to which* rights trump other moral considerations (such as social utility). Once the accumulative strength of these considerations exceeds this point, rights no longer

trump them[2]. This view, if it is a view about all rights, has as a consequence the idea that no rights are absolute. This is a view which Dworkin seems to hold. I do not deny that *some* rights may be overridden justifiably by other rights or by consequentialist considerations. All I wish to claim is that some rights are absolute and may never be overridden justifiably.

The alternative view of the threshold can be represented in the following diagram. Once again, I take as my example, the scale of restrictions on individual liberty.

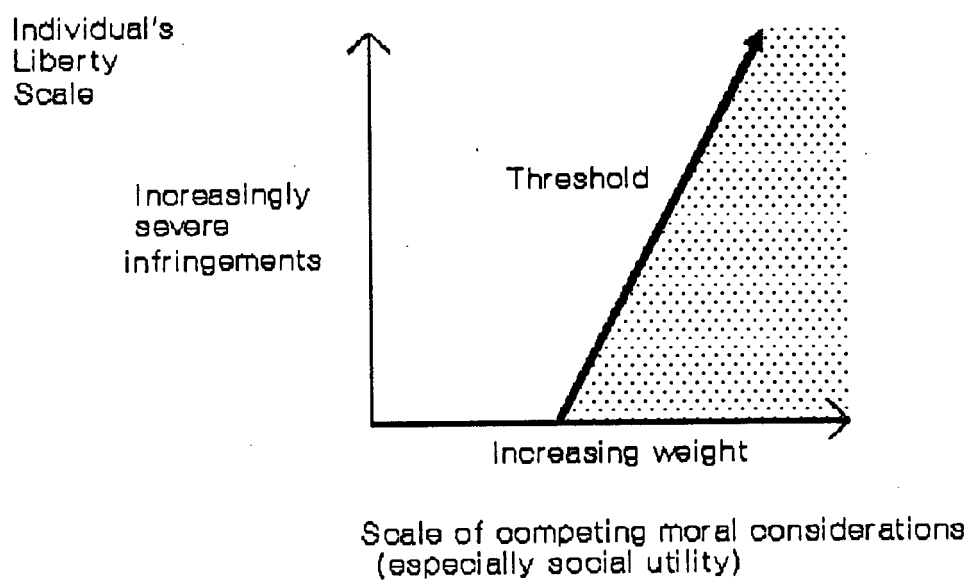

Diagram 2

Rights are operative to the left of the threshold, in the unshaded area. In other words, they are operative *until* the threshold of social utility is reached. At this point they are overtrumped by the competing moral considerations. The strongest rights - those protecting individuals from infringements at the top of the liberty scale - can, of course, always be overtrumped by a sufficiently weighty position on the social utility

2. See R. Dworkin, *Taking Rights Seriously*, p. 92.

scale. The opposite is not true. That is, the most weighty considerations of social utility cannot be overridden by any, even the strongest, right.

The reason why the origin of the threshold is where it is, rather than at the origin of both axes, is that a right has *some* trumping ability. Thus, on this view, a minor infringement of liberty would not be justified by the mere fact that the infringement would maximise utility. However, the prospect of a substantial increase of social utility would justify overriding the right.

The above diagram is the most plausible representation of the non-absolutist view of a threshold. Less plausible interpretations of this view would not give the threshold a gradient. The effect of having a gradient is to give differing strengths to a right against different degrees of infringement of liberty. Some non-absolutist views of the threshold are not as sophisticated as this. They would not determine the point at which rights become operative by weighing up the severity of the infringement of the individual's liberty against the amount of social utility that stands to be gained. They would say, for example, that a right to liberty protects its bearer against all violations of liberty no matter how small or great until a certain threshold of social utility is reached. Thus a degree of social utility immediately below the threshold could no more justify a mild infringement of liberty than it could justify a severe infringement. From the threshold, the right ceases to be operative so that even very severe infringements of liberty are not protected against. This view of the threshold can be represented as follows:

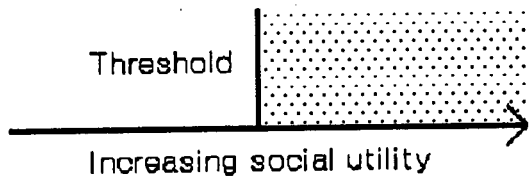

Diagram 3

The threshold in Diagram 1 is not determined by weighing up the severity of the infringements of the individual's liberty against the amount of social utility to be gained. Such considerations are operative below the threshold. The threshold marks the beginning of the absolute right. Any infringement at and above the threshold is protected by a right of fixed strength - an absolute right. It protects the individual against any infringement of his liberty above the threshold, irrespective of considerations of social utility.

In summary, then, the kind of threshold I first described (Diagram 1) differs from the one with which it may have been confused (Diagram 2) in two important ways: (1) On the first account the threshold is a point on a scale of *individual* sacrifice (or individual utility). On the other view, the threshold is a point on the scale of *social* utility. (2) On the first account, rights are operative - that is, trump other moral considerations - *from* the threshold. On the other view, they are operative - that is trump other moral considerations - *until* the threshold is reached.

A point I made earlier about the value of rights (chapter 6.2) bears on the above two differences and shows why there must be some rights that can be represented by the first view of the threshold. I said that it is absolute rights that *ensure* that morality remains moored to the well-being of individuals rather than drifting into the sea of social utility. The first threshold-account links rights to individual well-being. Rights come into existence at a threshold on the scale of individual well-being. This is not true of the other threshold view.

6.4) QUALIFYING THE IDEA THAT ABSOLUTE RIGHTS EXIST FROM THRESHOLDS ON SCALES OF HARM

Rights do not guarantee against all impairments of well-being beyond the threshold. Some such impairments are not the responsibility of agents as in the case of death by "natural" causes. These are clearly beyond the scope of morality. One cannot have a right against nature that one should not die by its hand.

Other onslaughts on individual well-being above the thresholds may also not be protected by rights. These are when the individual concerned is not innocent. Rights protect the innocent. One loses the protection of rights to the extent of one's guilt. By stealing a car, one does not lose the protection of a right to life. (In chapter 7.2, I shall show why such a right is amongst those rights we have). However, having stolen a car one may justifiably have one's liberty curtailed by being imprisoned for a while.

That some actions constitute rights-violations when the person against whom they are performed is innocent but do not constitute rights-violations when he is guilty, provides one reason why great importance must be placed on a due process of law to determine whether a person is guilty, and if so to what extent. We do not live in a world in which

a person's innocence or guilt is transparent to everybody. We need a reliable mechanism to establish innocence or guilt. Failure to follow a due process of law is not only to run the risk of inflicting unjustifiable punishment and violating rights, but also to be guilty of failing to take reasonable steps to ensure that one's punitive actions do not constitute such evils.

Why should rights protect only the innocent? Why should guilt cost one some of one's rights? Here I am not speaking simply of punitive cases in the judicial system, but also of instances where aggressors are harmed in the act of unjustified aggression. Such cases of defence and protection seem as morally acceptable as just punishment, if not more so. The issue in all these cases is really part of a broader issue - the issue of how an agent's actions interact with the fabric of moral obligations and claims, altering these in the process. Since this is not the place to pursue this issue, I have simply asserted the common sense view that one loses the protection of rights to the extent of one's guilt and of one's moral crime.

I have argued that there are some natural rights which have absolute strength. Some people may find the latter conclusion hard to accept and believe that my arguments for it are not sufficiently convincing. They may believe that, in at least some cases, so much good can be achieved by violating rights that there are no rights that may not ever be overridden justifiably. I shall consider such cases in the conclusion (chapter 11.2), showing why even in the light of them, I think that there are some absolute restrictions on the way we may treat individuals.

6.5) NON-ABSOLUTE NATURAL RIGHTS

Individuals have a variety of interests in virtue of their nature. These interests ground claims which they have against others. Some of these interests are very strong - such as

the interest in not being killed. Other interests are much weaker - such as the interest in always having one's own way. Because these interests have varying strengths, the claims which they generate also vary in strength. In arguing for absolute natural rights, I have argued that some of these individual interests may never be overridden. No doubt, there are also interests and claims which are so weak that they may regularly be overridden. It makes sense to think that between these points on the spectrum of interest-strengths there will be some interests we have in virtue of our nature which are sufficiently important they they may on rare occasions be overridden but not so important that they may never be overridden. The natural rights that protect these interests, while not absolute, will none the less be very strong. Such rights can be represented in Diagram 1 (chapter 6.3) as points higher up on the line emanating from and at an acute angle to the horizontal axis. They could also be represented by the threshold line in Diagram 2. Such rights protect us against sacrifices which would be too disadvantageous to us to be justified *merely* because those sacrifices would serve collective goods. By contrast, those interests which ground only weak claims - ones that may regularly be overridden either by rights or by consequentialist considerations - cannot be said to be protected by rights of any kind because part of the meaning of a "right" is that it is a *strong* moral tool. However, these weak claims can nonetheless be natural and can be referred to rather transparently as "weak natural claims" in order to differentiate them from natural rights - whether they be absolute or very strong but not absolute.

CHAPTER 7

WHAT ABSOLUTE RIGHTS ARE THERE?

7.1) INTRODUCTION

I have argued that there is a limit to the sacrifices that can be required of one individual for the benefit of others. I have said that absolute rights are the moral tools that provide a moral guarantee for the individual against having to make these sacrifices. If my argument has been successful, then I have shown that there is a justification not only for natural rights, but for absolute ones. There is, however, a further question: What natural rights are there? Given the fact that those natural rights which are absolute are the most controversial and that the existence of non-absolute rights is relatively unproblematic, I shall focus on the more specific and interesting question: What *absolute* natural rights are there?

If an absolute right is, as I have said, a moral tool that comes into existence at a particular threshold on a scale of individual well-being, then to determine this threshold is to determine that there is such and such a right of absolute strength. Different rights are associated with thresholds on different scales. One has absolute rights against harm above these thresholds. Although absolute rights come into effect at the level of the threshold, we may (though we need not) speak of a number of rights above that threshold - that is, rights against increasing degrees of the same kind of harm. Of course, these rights will all be equally strong against competing moral considerations. All that distinguishes them is their *object* - that is, the exact degree of harm (of that kind) against which they are rights. For example, if one had a right against pain and the threshold at which it came into effect was pain of degree X, then one would have a right against pain of degree X. One may then wish to say that one also has a right

against pain of degree 2X. Both rights would be equally strong. They only vary in the degree of pain against which they morally guarantee. Of course, one need not speak of more than one right above a threshold. One may prefer to say that there is a single right against *all* pain above the threshold. Which approach one prefers makes no practical difference and little conceptual difference. I prefer the latter approach because it is more economical.

If there is a right-threshold on a particular scale, at which point on that scale is it to be found? This is a difficult question. Before I deal with it, let us examine the possibility of there being an absolute right to life, because this kind of absolute right is the most easy to establish. We can reason in the following way.

7.2) LIFE

If there is any way in which the importance of the individual may not be overridden, it would appear to be the taking of his life against his wishes. Life is essential to well-being, not only because it is the necessary condition for all other aspects of well-being (except perhaps posthumous interests), but also because its loss is in itself the greatest loss an individual can sustain. It is, after all, the cessation of the individual - at least on a common sense view. The prospect of this matters very much to the individual concerned.

There are not degrees to which an individual can lose his life. One either loses one's life or one does not. There is nothing in between. The advantage this has for my account is that fixing the point on a scale at which the right to life comes into existence is quite clear and uncontroversial. I am not saying that it is uncontroversial which *creatures* have a right to life. (In the next chapter I discuss the question of which creatures have rights.) I am claiming that it is relatively uncontroversial what

constitutes a fatality, and thus when a creature has a negative right to life what exactly it is a right against. There are degrees of pain and degrees of liberty, but not degrees of death. It is true, of course, that *risks* to life can either be greater or lesser, but this does not alter the fact that loss of life is itself not a matter of degree. If one risks someone's life, then one is gambling with his right to life. One may be morally lucky and not violate his right, or one may be morally unlucky, as in those cases where the gamble results in death.

It might seem that the fact that loss of life is not a matter of degree is also disadvantageous for my account. This is because it might be thought that since there are no degrees to which one can lose one's life, there is no life-scale and consequently there can be no threshold. If absolute rights come into existence at thresholds, then it would appear that there can be no absolute right to life.

I think that while the advantage is real, the disadvantage is only apparent. The reason for the latter is that, while a moral threshold may be viewed as a point *on a scale*, it need not be. It may indicate a morally outlawed action - such as killing - that does not admit of degrees. It is a threshold of moral impermissibility or unjustifiability.

Given the indispensability of life to well-being, the sharp distinction between life and its loss, and the importance of a life to the individual whose life it is, an absolute right to life is relatively easy to establish. It is far more difficult to establish what other absolute rights there are - if indeed there are any others. Clearly, there is considerable room for debate. However, this obviously does not mean that all opinions are equally acceptable. As in all philosophical debate, it is the strength of the justification for one's view that counts.

The greater sacrifices, higher up the scales, are less controversially considered above a right-threshold. However, the lower down the scales one looks, the less the sacrifice and the more difficult it is to say that such a sacrifice is *never* justified. This can be illustrated by looking at a few examples on different scales.

7.3) INJURY

Consider first an injury-scale consisting of non-fatal injuries. Some of these injuries, such as losing a limb or being blinded, are very severe. They make a radical difference to an individual subject qua subject. For example, in the case of being blinded, his ability to perceive his environment is severely impaired. The excision of visual images and data from his consciousness is not only an intrinsic loss. It compromises his functioning in many ways. It seriously affects his ability to effect his ends by traversing and manipulating his environment in required and desired ways. His life is radically altered for the worse. The seriousness of these effects is compounded by the fact that they are not temporary, but lasting. If morality is to be connected to the well-being of individuals and there are consequently some ways in which individuals may not be treated for the benefit of others, then it would seem that an action that results in an injury such as being blinded or maimed, is unjustified. Its effects on the individual are just too unacceptable. It would seem then that blinding and maiming fall above the right-threshold on the injury-scale and there is therefore an absolute right against being blinded or maimed.

Other injuries, such as a little nick on the finger, are not very severe (except to a haemophiliac in which case a nick on the finger can be like a slit throat). Clearly, while minor injuries may not be inflicted without justification, it seems that such injuries are not so serious to the individual as to never or only rarely be justified. Therefore, these injuries fall well below the right-threshold. There can be no absolute rights to protect

the individual against such minor injuries, though there can be non-absolute rights and weaker claims not to be so treated. In other words, though there are no absolute rights against minor harms, they may not be inflicted without sufficient justification - that is, without the presence of sufficiently strong competing moral considerations (such as social utility or competing rights). Increasing harm below the threshold can only be justified by corresponding increases in the benefit to be derived. (See Diagram 1 in chapter 6.3)

7.4) PAIN

Distinct from the injury-scale is the pain-scale. While it is true that pain often accompanies injury, there may be pain without injury (as in the case of psychosomatic disorders), and injury without pain (as in the case of amputations under anaesthetic). On the pain-scale, some pains seem to be too horrible ever to be justifiably inflicted on an individual. Torture seems to be a case in point. If we look at the aim of torture we see why this is so. While some people torture others for the sheer satisfaction of sadistic desires, torture is usually for the purpose of breaking people down, as a means of ensuring conformity or extracting either information or a confession - often a false one. These are achieved by forcing the tortured person to overlook all desires and interests other than the immediate alleviation of the pain. All aspects of individual well-being may be brushed aside by the victim of torture simply to avoid any further pain. He may even make a false confession that will result in his death. The pain of torture is, therefore, designed to override completely the individual and his well-being. As such, it is unjustified.

Other pains, such as the pain suffered as a result of a pin-prick, are far less severe. They have none of the kinds of effects on individual well-being that torture has. Thus, while one may not inflict even mild pain without justification, such pain is not so

damaging to individual well-being that its justification on at least some occasions can be categorically ruled out. In other words, while there cannot be absolute rights against the infliction of mild pain, there can be non-absolute rights and weaker claims not to have such pain inflicted on one.

7.5) LIBERTY

We can consider too a liberty-scale. Minor violations of liberty are inevitable and justifiable. For example, my liberty to drive across an intersection is curtailed by the red traffic light facing in my direction. I am not legally or morally free to drive in contravention of the traffic light's signal. This restriction on my freedom is minor - I wait my turn with the green light and then I may proceed. I am not too seriously disadvantaged and must expect to make such sacrifices, given the competing equal interests of many individuals. (Clearly, were there special circumstances, such as in the case of the ambulance rushing a seriously ill person to hospital, then the extent of the red light's restriction on liberty would be greater, but such circumstances would then require the ambulance driver to proceed with caution in spite of the red light.)

Other violations of liberty are far more serious. Take, for example, prolonged incarceration in solitary confinement. It seems that such treatment of an innocent person can never be justified, because its effect on his well-being is simply too disastrous. The individual is deprived of vital social stimuli. Such isolation from other people usually causes severe mental imbalance. The individual is prevented from living out his life-plans at even a relatively basic level. He cannot *lead* a life. He is the *subject* of a life in barely any significant way.

Dworkin denies that those infringements of liberty that are protected by rights receive this protection because the deprivation of liberty is greater, either in amount or in

impact, than infringements of liberty that are not protected by rights. In support of this view he says that if, on the one hand, we try to think of liberty as a commodity and try to measure its diminution by the frustration this induces, then we are forced to concede "that laws against theft and even traffic laws, impose constraints that are felt more keenly by most men than constraints on political speech would be"[1]. This is in conflict with what we ordinarily think - that is, that people's rights to liberty do not include protection against criminal and traffic restrictions, but do include protection against political restrictions. If, on the other hand, we measure the degree of infringement of liberty by its impact - on future choices, Dworkin says - then once again we have to admit that traffic laws reduce choice more for most men than laws which prohibit fringe political activity.

I am not sure that I would accept an *absolute natural right* to political activity, though I certainly think that everyone has a *strong moral claim* of some sort to it. Nevertheless, in case Dworkin's point applies equally to some absolute natural right which I do recognize I must reply to it.

Dworkin takes his argument to show that it cannot be true that the difference between those infringments of liberties that are protected by rights and those which are not, is a matter of degree. I suggest an alternative understanding of the kind of "degrees" it is about which we must speak. I do not think that liberty is simply a commodity and that losing more is straightforwardly worse than losing less. I am concerned with the *seriousness* of an infringement of liberty. This has something to do with how much a person's liberty is restricted, but it also has to do with whether the restriction is intolerable. When dealing with the seriousness of an infringement of liberty, we are not concerned with whether the general imposition of this infringement causes more frustration or is felt more keenly by more people. We are not concerned, in other

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1. R. Dworkin, *Taking Rights Seriously*, p. 270.

words, with the general level of inconvenience that results from there not being a right against such a restriction of liberty. Rather we are concerned to rule out restrictions of liberty that are intolerable (and not simply inconvenient) for individuals. The restrictions which traffic laws impose may be felt by more people, but they are not an intolerable imposition on individual well-being. The kind of restrictions on liberty which I think should be protected by absolute rights are those whose seriousness is of such a degree that they would be an intolerable sacrifice for individuals to have to make.

7.6) WHY THERE IS NEITHER A NATURAL NOR AN ABSOLUTE RIGHT TO PROPERTY

Many philosophers have thought that there is a natural right to property. One such philosopher is John Locke[2]. In this section I shall outline his argument and show why rights to property cannot be natural in the sense in which I have spoken about natural rights. My arguments will not be extensive, but rather impressionistic. Given the magnitude of the issue of property rights, an extensive treatment would be beyond the scope of my inquiry.

According to Locke, G-d has given the world to mankind "in common"[3]. However, he claims, if any individual is to make use of anything in the world he must be able to appropriate it for himself. For example, two people cannot both eat the same whole apple. Thus, if a person wants to eat an apple he must be able to remove it from the common realm and make it his own. Locke's argument for how people come to acquire property (and the rights to that property) starts from the claim that everybody owns himself and his labour. In Locke's words: "The labour of his body and the work of his

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2. Robert Nozick is another.
3. J. Locke, *Two Treatises of Government*, II, 26.

hands, we may say, are properly his"[4]. By mixing his labour with objects in the world, a person acquires those objects. This is because he has attached something which is his - his labour - to something to which no other individual has a private claim. Locke does place a restriction on such appropriation - a restriction which, he says, obtains only until the invention of money. He says that one may mix one's labour and acquire property only "where there is enough, and as good left in common for others"[5] - that is, where there are sufficient resources of comparable quality left for others to appropriate.

Locke's argument has been subject to much criticism. For example, why should we think that mixing something which belongs to a person - his labour - with something which does not belong to him, makes the latter his property? Why should we not think the reverse - that rather than gaining property, he loses his labour? Even if we accept that Locke is right about this, is justifiable acquisition of property possible any more? In Held's words "the unowned wilderness no longer exists"[6]. Thus when we mix our labour it is rarely with objects in nature to which no private claim has been made. Finally, the Lockean proviso that ample resources of equal quality be left for others can almost never be met in our times, given the overpopulation and scarcity of resources[7].

I shall not examine these criticisms because whether or not Locke's argument succeeds it does not justify *natural* rights to property as I understand them. There are a number of senses in which a right can be said to be natural. Firstly, some people call all non-legal rights natural[8]. Given this taxonomy Locke's rights to property are natural. Secondly, the property rights for which Locke argues are natural rights in the sense that they are acquired in the Lockean state of nature. However, I have been using the

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4. Ibid, II, 27.
5. Ibid.
6. V. Held, *Rights and Goods*, p. 172.
7. Ibid.
8. J. Waldron, *The Right to Private Property*, p. 19.

expression "natural right" in neither of these senses. In my taxonomy legal rights are distinguished from what I call moral rights. Some moral rights are natural while others are not (chapter 0.3). What distinguishes natural from non-natural moral rights is that the former are necessarily possessed by a creature in virtue of its nature alone, while the latter are acquired contingently. The property rights for which Locke argues are *acquired* in the state of nature and as such they are not natural rights in the sense in which I have been speaking about natural rights[9].

Although these rights are acquired, Locke also recognized another right to property which is not acquired and is possessed by all humans. This is a right to those goods which are necessary for subsistence[10]. He says that "men, being once born, have a right to their preservation and consequently to meat and drink, and such other things, as nature affords for their subsistence"[11]. This right is operative when a person has insufficient resources of his own to save him from extreme want and from death. It is "a right to the surplusage"[12] of the private property of another person.

This right to subsistence is also not a natural right on my view. I have claimed that natural rights are exclusively negative (chapter 1.3). The right to subsistence which Locke claims all people have is a positive right. Its correlative duty is not simply one of non-interference. It does not require us merely to abstain from tampering with or stealing other people's property. It requires us to provide food and perhaps shelter and clothing for the destitute. Those with surplus have a positive duty and those in dire need have a positive right.

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9. Waldron calls the rights that allegedly result from mixing one's labour with resources "special rights" (J. Waldron, *The Right to Private Property*, p. 127), by which he means rights which are acquired (Ibid pp. 107ff). These are to be distinguished from "general rights" which are possessed ab initio.
10. Waldron calls this a "general right" (Ibid, pp. 128, 139).
11. J. Locke, *Two Treatises of Government*, II, 25.
12. Ibid, I, 42.

Perhaps what is *natural* - in my sense of the term - is neither a positive right to be given property nor a negative right to the property which one acquires, but rather a negative right not to be interfered with in one's pursuit of property acquisition. On this view[13] there is something about the nature of human beings which makes it wrong to prevent them from acquiring and owning property. However, the right to property is then simply another kind of right to liberty - a right to be free to appropriate.

So far I have argued that Locke's arguments do not yield a natural right to property in the sense of the term "natural right" which I have explicated in this thesis. Now I want to argue that an absolute guarantee for private property cannot be morally justified.

To have one's property interfered with or removed from one may be a very bad thing. However, it can never *in itself* be so disastrous for an individual subject qua subject as to warrant being protected against by a moral tool as strong as an absolute right.

This is mainly ascribable to the "distance" that characterizes the relationship between a person and his property. The relationship of a person to his life, his pain, his bodily integrity, and even his liberty is very close. There is a difference between a person and the world around him. Persons are capable of distinguishing between themselves and their environment. Things like a person's life, pain and injury are part of himself rather than part of the world that surround him. It is possible to determine, without recourse to the world beyond the person, whether or not he is alive, whether he is in pain or whether he is injured. By contrast, a person's property is not part of him. It exists independently of him. It is because of this that any property one has is property one has *acquired*. Furthermore, it is because a person's property is distinct from him that although he may have strong interests in his property, taking it is not like taking his life or inflicting pain on him. Interfering with a person's property cannot affect the

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13. J. Waldron, *The Right to Private Property*, pp. 20 -22.

person's subjectivity in the disastrously severe way that killing him, torturing him or maiming him can. As such, absolute rights cannot be used to protect a person's interests in property. As important as those interests may be, they are not of the magnitude that warrant the protection of an absolute right.

I realise that sometimes the removal of a person's property - say his last morsels of food - may condemn him to unbearable suffering or death. In such cases the property ought not to be taken, not because there is an absolute right to property, but because the person's negative rights of life and liberty, etc, would be violated were one to remove the property. Likewise, if the government confiscates a diver's oxygen tank, they may do wrong and violate a non-absolute right. If they violate any absolute rights, however, it would be a right to life, not a right to property. This would be the case if the diver were underwater using the tank at the time that it was confiscated.

We can need property to satisfy the kind of vital interests that rights protect. However, the absolute rights we have are not to the property but rather to the protection of those vital interests - such as life and the absence of excruciating pain - which our property can serve. The absolute right is not to the property because it is not the loss of the property as such that is so disastrous for the subject. To some degree this is because property is not part of a subject. Property is merely of instrumental value to the subject.

Now it might be objected that although property is only of instrumental value, because, as a matter of contingent fact, property is essential to fulfil vital interests such as the interest in life, this justifies there being an absolute negative right to that property which is necessary to satisfy those interests. My response to this is that a parsimonious ascription of rights seems correct. Why multiply rights-ascriptions when a more economical ascription of rights will do the same work? The diver's right to life

prevents his oxygen tank justifiably being removed from him while he is underwater using it. Ascribing a property right to him not to have his oxygen tank taken under these conditions does nothing extra. In cases where the removal of his oxygen tank would not result in his death then his right to life would not provide him with absolute protection from having his oxygen tank removed. Under these circumstances there would be no vital interests that would then be thwarted so the protection of an absolute property right would be inappropriate under these conditions.

By saying that there are no natural and no absolute property rights, I am not saying that we may behave in any way as far as people's property is concerned, even when this does not affect their vital interests. While there may not be natural or absolute rights to property, there will still be moral obligations and claims - including non-natural and non-absolute moral rights - governing property.

7.7) DETERMINING THE LEVEL OF RIGHTS THRESHOLDS

In the examples which I gave of scales of harm, I attempted to argue that certain sacrifices are so great that they can never be justified because of their effect on individual well-being, and that other, much less severe, sacrifices may sometimes be justified. It is hard enough to make such determinations at the polar ends of the scale. It is far more difficult to draw a line demarcating the threshold at which absolute rights come into effect.

This is a significant theoretical problem. While one can perhaps work out some of the absolute rights that there are, it is near impossible to provide a comprehensive list of all absolute rights or, more accurately, the thresholds at which they come into existence. However, in practice the problem is less severe. Those proposed actions closer to the polar extremes of the spectrum are relatively easily identified as being above or below

the threshold. The closer a proposed action is to the centre of the spectrum's grey area, the more doubt there will be. One consequence of this is that moral agents will be less likely to decide in favour of performing such actions. This is because even if such an action falls just below the threshold, it would require such extreme countervailing advantages that it would seldom be justified. As far as proposed actions below the threshold are concerned, the more doubt there is about them, the closer they will be to the threshold and therefore the less often they will seem justified.

Obviously there will still be problems. For example, there will be *some* occasions on which a particular action is performed by one who believes that it falls just short of the threshold. This same action will be condemned by another who believes either that *it is* on the threshold or lies immediately above it. While this is unfortunate, it seems inevitable. In ethics, we can use moral reasoning to hone down onto an issue to attain a clarity and precision which would not otherwise be possible. Aristotle cautions against demanding more precision in an inquiry than the subject matter permits. Ethics, he claims, is not an exact science[14]. Thus, given the nature of ethical inquiry, there will inevitably be areas where precision cannot be attained beyond a certain degree. Fixing absolute rights-thresholds seems to be just such an area.

The problem of precision is absent from some other accounts of rights. This is the case, for example, in theories (such as those of Locke and Nozick) that argue for (or simply assert) rights to life, liberty and property. In such accounts, *any* violation of liberty or property is a violation of a right and is therefore morally unacceptable. One is absolved of the problem of having to decide *which* violations, of liberty for example, are violations of rights.

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14. Aristotle, *Nicomachean Ethics*, Book I, chapter 3.

There is obviously a large price to pay for this relative precision. Rights, so understood, are too extensive to have appeal. This is because social utility and the competing interests of other individuals are accorded *no* importance. It is true that it is the trumping power that is essential to rights. However, it is an error to confuse a moral tool's having trumping power with its being maximally extensive. Moreover, it is an error which costs the concept of rights much of its appeal. Understanding rights as I have suggested, enables one to preserve the appeal of an absolute trumping tool and yet not to treat social utility and competing interests of other individuals as completely irrelevant to moral decision-making and action.

CHAPTER 8

WHAT CREATURES HAVE RIGHTS?

8.1) INDIVIDUALS AND MORALLY RELEVANT WELL-BEING

I have argued that morality should be connected to the well-being of individuals rather than that of society. The assumption so far has been that the individuals whose well-being is concerned are human individuals. However, this has not been explicitly stated - and for a specific reason. While what I have said is true of human individuals, I have not wanted to exclude the possibility that some of it may also be true of other kinds of individuals.

The description of well-being which I provided earlier, was a description of *human* well-being (or, at least, the well-being of normal, developed humans). This kind of well-being is the most complicated currently known to us, though it may well be that someday we may discover a creature whose well-being requires a far more sophisticated description. The description of human well-being is not true in its entirety of non-human individuals, but some aspects of it are. Other aspects of the description of human well-being can be adapted to non-human individuals.

The word "individuals" is very broad. It may refer, in addition to humans, also to inanimate objects, plants and animals, for example. It is, however, only in a very limited sense that we can speak about the well-being of inanimate objects. Consider a car, for example. In some sense a car has interests and one can therefore speak of its well-being. For example, we can speak quite meaningfully about rust's not being good for a car. However, the sense in which a car has interests is very limited and morally insignificant. A car, being an inanimate object, does not and cannot care about its own

interests or well-being. It makes no difference to a car whether or not its interests are served or its well-being advanced. Morality, I said much earlier (chapter 4.5), is unconcerned with such well-being. It is concerned with the well-being of creatures for whom their well-being makes a difference. Thus, while there may be things we should not do to a car, such restrictions are not based on the intrinsic well-being of the car but on its instrumental value to conscious creatures. Much the same can be said for plants and the moral restrictions that govern their treatment.

The well-being of animals - especially more sophisticated ones - comes closest to that of humans. Is morality then also to be connected to the well-being of individual animals? This is a question, not only for my account, but also for other theories such as utilitarianism. Thus, if it poses a problem, this problem is not uniquely mine. I think that the question must be answered affirmatively. Animals are not mere objects that may be treated in any way. However, they do not count for as much as humans. In fact, I think that the nature and extent of an animal's well-being is an excellent formula for what strength we should accord its interests in moral decisions. Because animal well-being is less sophisticated than human well-being, it will inevitably be less potent in moral calculations, both on my account and on a utilitarian account. Thus, for example, since a human has sophisticated desires, such as for philosophical reflection, these desires can enter into moral decisions. An animal has no such desires which can be entered into moral calculations. The more interests and the more sophisticated interests a creature has, the more its interests will count in moral determinations.

I shall now take a closer look at the different aspects of an animal's well-being. Since I am concerned specifically with rights (rather than with any other moral principle), I shall argue which, if any, animal interests merit the protection of rights. What I have to say will concern primarily those rights which are both natural and absolute, in order to determine to what extent those absolute natural rights which I argued humans have

(chapter 7) are also shared by (some) animals. However, my discussion will also have implications for the question of non-absolute natural animal rights. This is because it seems reasonable, as in the case of humans, that those strong interests which are not quite strong enough to merit *absolute* trumping power, should be protected by non-absolute rights.

8.2) ANIMAL PAIN

Higher, vertebrate animals probably feel pain much as we do. Of course, we cannot have the subjective feel of animal pain, so we cannot be sure of the qualitative similarity. However, neither can each one of us be sure that pain has the same qualitative feel for other humans as for himself. This is the problem of other minds. I concede that other minds are closest to mine if they are human minds, but I still have as little subjective access to other human minds as to animal minds. In the same way that I quite justifiably infer that other humans feel pain as I do, I have good grounds for believing that the pain of animals - at least the higher vertebrate ones - feels to them the way my pain feels to me.

If pain, above a certain threshold, is never justifiably inflicted on innocent humans because in itself it is just too horrible and overrides the individual, then, by extension, this pain can never be justifiably inflicted on animals. If the feel of the pain is the same, then how can it be justifiably inflicted on one individual but not on another, simply because the one individual happens to be an animal whereas the other happens to be a human?

It is true that subjecting an individual to excruciating pain may have more extensive effects if that individual is a human than if it is an animal. Although a human and an animal may feel exactly the same pain, a human may suffer more from it. This would

clearly not be because of the intrinsic feel of the pain but because of certain features of humans which animals lack. In other words, the psychological effects of physical pain *could* be greater for humans than for animals. For example, a human, unlike an animal is able to distinguish between pain which is willingly and even sadistically inflicted (such as torture) from pain which is inflicted by accident (such as stubbing one's toe) or by nature (such as the pain of end-stage terminal disease). While the qualitative feel of the pain is unaffected by knowledge of whether or not it was willingly brought about, knowing that the pain was willingly inflicted could cause additional mental suffering.

Where a human right against a particular degree of pain is justified in part by the effects of the pain and not merely by its intrinsic feel, animals *might* not have a right against that degree of pain. This would be the case when they were incapable of suffering the effects. However, where the human right is justified by the mere feel of the pain - because the pain itself is so horrendous - an animal capable of feeling that same degree of pain *must* also be protected against it by a right of the same strength. If a certain pain is unjustifiably inflicted on one individual because of how it feels to him, it is also unjustifiably inflicted on another individual who will have a very similiar feeling.

8.3) ANIMAL LIBERTY

The same cannot be said for the other scales and the right-thresholds I discussed earlier. The liberty of an animal may be justifiably curtailed to a degree that would never be justified in the case of humans. Unlike a pain, a violation of liberty is not a particular feeling which is necessarily transparent to its subject. Thus one cannot say that a particular violation of liberty means the same to two different kinds of individual. It usually means far more to a human to have his liberty infringed than it does to an animal. There are two reasons for this. Firstly, liberty has greater intrinsic value for

humans than for animals (if, indeed, it has any intrinsic value for animals). Humans care about having liberty for liberty's sake. They want to know that they are free to do certain things even if they do not actually want to do these things. Secondly, because liberty has considerable instrumental value and because humans have more goals and more sophisticated goals than animals, liberty is dearer to them. A restriction on liberty which does not affect an animal may prevent a human from pursuing important goals. So long as the restriction of an animal's liberty does not cause it great physical pain or mental suffering, or prevent it from reaching needed food, from engaging in healthy exercise, or from satisfying its sexual desires, an animal will hardly care about its liberty. It may be mildly inconvenient for a horse to be in a paddock, but a human would care a great deal more about being restricted to an area the same size.

8.4) ANIMAL INJURY

Like restrictions on liberty, being injured is not a particular feeling which is transparent to its subject. Thus we cannot say that a particular injury means the same to an animal as it does to a human. Being injured has both intrinsic and instrumental disadvantages. An injury of degree X may constitute greater intrinsic harm for a human than for an animal. For example, a human suffers more anguish over the amputation of a toe or finger, irrespective of the consequences, than a dog or a cat does. Lesser injuries also seem to cause greater instrumental disadvantage for humans than for animals. Once again, this is because an animal has less goals and less sophisticated goals. As a result it requires less to attain these goals. However, it would seem that some injuries are sufficiently severe never to be justifiably inflicted on animals. Consider, for example, amputating all four limbs of a dog, horse or monkey.

8.5) ANIMAL LIFE

It would appear that there are certain things which may never be done to an animal while it lives. It is a separate question, however, whether or not an animal has an absolute right to life. While an animal may care about its pain and its injury while it is alive, it may well not care about life itself. Although animals have a survival instinct, avoiding that which endangers their life and pursuing that which enhances it, it is just an instinct. A normal human is capable of caring about his life in a far more significant way. He is conscious of his own existence and of its continuation through time. He is capable of remembering, of imagining the future, and of imagining in the future remembering that which is currently his present. He is capable of making plans and of having a conception of the good. He knows what death is and realizes that although when he is dead he will not be able to care about this, he is currently alive and cares very much about his continued existence. He knows that without his life he cannot care for anything. To kill him is to override his individual existence in a way which matters a great deal to him. This is not the same with animals.

An animal lives very much in the present. Severe pain and drastic injury, both of which affect an animal life in the present as it is being led, are capable of making too drastic a difference to the animal whose life it is. Thus individual animals, like humans have absolute rights against such treatment. However, to kill an animal, so long as it is done painlessly and without mental anguish, would harm it far less than killing a normal human would harm him. Thus, I think that while humans have an absolute right to life, animals do not share this right.

While an animal may not have an absolute right to life, this does not mean that it may be killed without cause. To say that a creature has no *absolute* right to life is simply to say that there are *some* occasions on which killing it is justified. This is all that I am

allowing. Although I do not think that animals may never be killed justifiably, I do not think that their lives may be taken without considerable justification. This is because even though an animal's life does not mean as much to it as a human's does to him, it still means more than a plant's life means to that plant or a chair's existence to itself. Thus an animal life counts for something, but it does not count enough for there to be an absolute right against its deprivation. What justification would be required to take an animal's life is another question which falls beyond the scope of my inquiry. If, as I have suggested, *considerable* justification would be required - sufficient to override significant competing interests or substantial degrees of social utility - then we could say that animals have non-absolute rights to life. If they may be killed permissibly with only minimal justification, then though they may have claims not to be killed, these claims would be too weak appropriately to be called rights.

Peter Singer's argument for the equal treatment of animals does not rely on rights at all. His is a utilitarian argument. While it is true that on one or two occasions he speaks about animal rights, such as a right to equal treatment[1], he elsewhere acknowledges that this "concession to popular moral rhetoric" was "regrettable" and led to "misunderstanding"[2].

My argument that animals, unlike humans, do not have an absolute right to life does not fall prey to the charge of speciesism - treating creatures adversely simply because they belong to another species. Animals have no absolute right to life because of a morally relevant feature of their nature. If it could be shown that I have misrepresented the relevant feature of their nature, and that, like humans, they care very much about their own death then I would concede that kinds of animals possessing this feature also have an absolute right to life. I am simply claiming that the facts of their nature are

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1. P. Singer, "All animals are equal" in P. Singer (ed.), *Applied Ethics*, p. 221.
2. P. Singer, "The parable of the fox and the unliberated animals" in *Ethics*, Vol. 88 No. 2, January 1978, p. 122. Quoted by T. Regan, *The Case for Animal Rights*, p. 219.

such that they do not. The same applies to the disparities between human and animal rights against injury and infringements of liberty. That these rights are fixed at different thresholds for different species is determined by morally relevant differences between the species. Again, if it could be shown that I have misdescribed the factual differences between the species, I would willingly change my mind about the thresholds at which the rights of the various species comes into existence.

8.6) THE MORAL STATUS OF DIFFERENT CREATURES

The moral status of animals is not what it is because there is another species with a more sophisticated well-being. The status of each species is determined by its own kind of well-being, and not how this stands relative to that of another species. Thus the discovery of a superhuman species would not reduce the rights of humans, though this more sophisticated species may well have more rights or absolute rights fixed at lower thresholds.

I have tried to show in this chapter that not only humans have rights (both absolute and non-absolute). At least some animals also have rights (though absolute animal rights are not always fixed at the same threshold as human rights). I have said, however, that not all kinds of rights which humans have are had by animals. In arguing for all this, I have focused on normal humans and higher vertebrate animals. This is why some measure of success can be achieved. Clearly, though, there are problems when it comes to some abnormal humans, to human infants, to human foetuses (and to other intra-species exceptions). These are the problems raised by the moral issues of euthanasia, infanticide and abortion. The latter two issues, in particular, have highlighted some severe problems in our thinking about the moral status of various creatures. Those features of normal developed humans which animals lack and which cause such humans not to have an inferior moral status are the very features which human foetuses and

even infants also lack. The consequence of this is that there is no intrinsic reason why one should not do to human infants and foetuses whatever one does to animals, and perhaps more. This we take to be an unacceptable moral conclusion. Although arguments that refer to the side effects of treating human foetuses and infants in the way we treat animals provide strong grounds for not adopting such a policy, the fact remains that given the nature of human foetuses and infants there is nothing intrinsically wrong with it. The alternative is to grant the same privileged status to human foetuses and infants as we do to normal developed humans. This would have the effect of also granting such a privileged status to all animals, even very unsophisticated ones such as insects, because there is no morally relevant difference between insects and human foetuses at an early stage of their development. However, this view too is unacceptable. Privileged moral status seems to be enjoyed by either too broad or too narrow a class of creatures.

I shall not even attempt to try to solve this difficulty here. I shall simply make two remarks. Firstly, this problem is not that serious for a view such as mine which denies that rights exhaust morality. Thus a creature may not qualify as a bearer of absolute rights or as a right-bearer at all and yet be protected by other moral tools such as weaker claims. Secondly, what rights any kind of creature has depends on the nature of that creature's well-being. I have mentioned the sorts of considerations that need to be pondered in determining whether a particular kind of creature has a certain right. Ongoing moral debate must settle these individual practical questions as best as possible.

CHAPTER 9

GROUP RIGHTS

9.1) GROUPS AND RIGHTS

The concept of group rights is contentious, particularly in South Africa, where it has been applied in an oppressive and discriminatory manner, and where it is seen by some as a vital tool for the protection of whites from "cultural domination" under a black government elected under conditions of universal adult suffrage. While the controversial nature of the concept of group rights is explicit in the South African context and some other places, it is of theoretical importance and interest anywhere. This provides good grounds for a discussion of whether, on my view of rights, there are any absolute group rights.

It is a truism that advocates of group rights regard groups as being important - but not all do so for the same reason. An extreme view is the non-reductionist view of groups or society which I discussed in chapter 4.2. This is the view that groups are important because they, rather than individuals, are the significant units of existence. Groups are regarded as "mass-persons" that are not reducible without remainder to the individuals that constitute them. Accordingly, groups should have rights rather than, or (on a milder view) in addition to, individuals' having rights.

There is also a more moderate view which constitutes the foundation for some group rights theories. This view accepts, at least tacitly, that individuals, not groups, are the significant unit of existence and it views the importance of groups in terms of the interests of individuals. It claims that at least for most individuals, membership of a

group is an important component of their well-being. Therefore, an individual has a great interest in the flourishing of the group.

Amongst those advocates of group rights who hold this more moderate view, some believe that the bearers of group rights are groups, while others believe that group rights are a species of individual rights. Raz is an example of the first view. Although he thinks that groups are important because *individuals* have important interests in them, he maintains that each individual's interest in group goods is not sufficiently strong to justify holding other persons subject to a duty and therefore no individual's interest can ground a group right[1]. How then does Raz justify group rights? He says that such a "right rests on the cumulative interests of many individuals"[2]. He believes that a group right can be grounded on the sum of individuals' interests in the collective good. On this view it is groups that have rights, even though they have these rights because of the interests of their individual members.

The alternative moderate view is that group rights are simply another kind of individual right. Group rights are the rights of individuals to certain group goods.

Those who ascribe group rights usually ascribe them to linguistic, religious and national groups (or, in the case of the second moderate view, to the members of such groups). However, there are no conceptual limitations on which kinds of group (or the members of which groups) can have rights. Thus, sporting teams, orchestras and philosophy departments (or their members) could, in theory, be the bearers of rights. The reason why rights are not actually ascribed in such cases is that membership of these groups is believed to mean less to their individual members than national identity, for example, means to the individual members of nations.

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1. J. Raz, *The Morality of Freedom*, pp. 207, 208.
2. Ibid, p. 209.

The rights which groups (or their members) are believed to possess vary according to the kind of group in question. Thus, for example, linguistic groups are often claimed to have a right to preserve their language. Religious groups are believed to have a right to educational facilities to teach their beliefs and practices to their children. National groups are claimed to have the right to national self-determination. The belief in this kind of group right has been particularly powerful. It has been the fuel on which twentieth century nationalism has run, and has accounted for the independence of numerous nation-states and the demise of colonial empires, as well as the violent deaths of millions.

9.2) THE APPEAL OF GROUP RIGHTS

Many commonly accepted individual rights and claims afford groups some protection. For example, if every individual has a right or a claim to freedom of worship, then the prayer of each religious group is *ipso facto* protected by these rights. Similarly, if every individual has a right or a claim to freedom of association, the integrity of the group is protected because the members of the group cannot justifiably be prevented from associating with each other. Given this, what is the appeal of group rights? The answer is that these commonly accepted individual rights and claims are believed to provide inadequate protection for certain groups or for the interests which individuals have in certain groups.

Kymlicka thinks that minority and other disadvantaged cultural communities require the protection of group rights in order to ensure that their members are treated genuinely as equals. He claims that minority cultures in a society can need special rights to prevent their being "outvoted on matters crucial to their survival as a cultural community"[3]. This same threat does not face a majority culture. The majority group can, for

3. Ibid, p. 183.

example, simply vote resources in its own direction. Without the protection of group rights, the individual members of the minority group are disadvantaged in relation to the individual members of the majority group. It is significant, he claims, that the need for group rights does not result from particular choices which some groups make, but from the inequality of circumstance which characterizes different cultural communities. Were the need for group rights to have arisen from particular choices the group made, then the group would be responsible for those needs and would not deserve group rights to satisfy those needs. However, since the need for group rights arises from an inequality for which the minority group is not responsible, it deserves the protection of those rights. Kymlicka takes the case of the Indians in Canada to be an important example of a disadvantaged minority group that requires the protection of group rights.

Another reason why group rights may be regarded as necessary is that they are usually held to be positive, and not only negative[4]. Positive rights have correlative positive duties - duties actually to do something, not simply to abstain from doing something. If group rights are positive, they place positive obligations on, for example, the state. Thus, if the French-speaking group in Canada has a right to French language education, then it does not simply have the right not to have its teaching of French prevented, but also to active assistance from the state, in the form of funding at least. Individual rights, by contrast, are classically seen as being negative, at least in so far as they protect cultural interests. On this view, while individuals could have a negative right to learn French they could not have a positive right to state funding for this purpose. Thus, it is argued that one of the advantages of group rights is that they can constitute positive claims which individual rights do not.

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4. J. Degenaar, "Nationalism, Liberalism and Pluralism" in J. Butler, R. Elphick, D. Welsh (eds.), *Democratic Liberalism in South Africa*, p. 247; I. Macdonald, "Group Rights" in *Philosophical Papers* Vol. 18 No. 2, September 1989, pp. 123, 124.

9.3) WHY THERE ARE NO ABSOLUTE GROUP RIGHTS

Non-reductionism about groups or society was one view, I said, which leads some people to embrace the concept of group rights. If groups are the basic unit of existence, then groups need rights. In chapter 4 I examined and rejected such a non-reductionist view of groups. I said there that groups have no morally significant existence of their own. There are no group-creatures. I did not argue that it is impossible for there to be a group with a mind of its own - that is, a group with a mind distinct from the minds of the individuals which constitute it[5] - and therefore a group with its own morally significant well-being. I simply denied that there are actually any such groups. If there were such group-creatures, I might concede that they have rights (depending on their sentient and sapient qualities). However, since the only groups that there are - classes, teams, societies, nations - are not such creatures, they cannot have rights on the grounds that they are such creatures. In other words, because I reject a non-reductionist view of groups or society, I reject any group rights theory that is based on such mistaken ontological premises.

However, not all arguments in favour of group rights start from such ontological premises. What about the more moderate views that group rights are based on the interests of individuals? There are, I said, two such views. On Raz's view, an individual's interest in some group good is not sufficient to justify a right, but the cumulative interests of many individuals in such a good can ground a right. I disagree. A right cannot be grounded on the sum of interests of *separate* individuals. Doing so violates the individualist view that underlies rights in my analysis. Rights are meant to protect very special interests of each separate individual. If an individual's interest is not strong enough to warrant right-protection, then it is simply not strong enough. Adding interests of distinct individuals to ground group rights may open the way to

5. David Brooks has argued for this possibility. See D. Brooks, "Group Minds" in *Australasian Journal of Philosophy*, Vol. 64 No. 4, December 1986.

defeating the whole purpose of individual rights. If the sum of interests of separate people can ground a right because of their combined weight, then if there are sufficient people in the group who have similar interests, might their group right not override the individual right of either a dissenter within the group or an alien to the group? This priority of the group right over the individual right would then apply even if each individual interest which plays a part in grounding the group right is far less important than the interests of the one person which conflict with the group right. The interests of the group could outweigh the vital interests of the individual. Thus group rights could possibly override even a right to life if the combined group interests of individuals were sufficiently strong.

What about the alternative moderate view of group rights? This view, I said, understands group rights as a species of individual rights. They are rights which protect the interests which individuals could have in various group goods. However, I deny that any such rights could be absolute. I shall now explain why. Absolute rights exist to protect only the most sensitive interests an individual subject has qua subject, and they protect against only severe violations of such interests.

What are these sensitive *interests of a subject qua subject*? They are the interests in being able to *lead* a life, in a minimal sense. To *lead* a life is not merely to exist, but to freely decide what one wants to do, and to do it. I say "in a minimal sense" because being able to lead a life is a matter of degree. One can be more or less able to lead a life, depending upon what constraints are operative upon one. Minor constraints are protected against by various moral claims, but only severe constraints on one's ability to lead one's life receive the protection of absolute rights. In chapter 7 I dealt with the kinds of interest that are important to a subject qua subject, and with the violations of these interests which are sufficiently severe to justify the protection of absolute rights. Without one's life one is unable to lead a life at all. Similarly, if one is tortured,

maimed or if one has one's liberty severely infringed, one is unable to lead a life in a minimal sense. These assaults either severely curtail one's ability to make a free decision (as in the case of torture) or they severely impair one's ability to act on one's decisions (as in the case of maiming and severe liberty restriction).

The kinds of interest which individual subjects have in the particular groups to which they belong are not the kind of interest that require the trumping protective power of absolute group rights (over and above the protection which I have shown they already receive from commonly accepted individual rights and claims). If, for example, one's nation is not self-determining, it may well be very unfortunate for one, but objectively the kind of evil which the subject qua subject suffers from this is not sufficiently severe to justify an absolute right. His ability to make free decisions about how to act is not affected. His ability to act on those decisions is not so severely infringed that he cannot be said to be capable of leading a life in a minimal sense. Absolute rights must exist to protect against only the worst evils an individual subject qua subject can suffer.

I am aware that advocates of group rights take the interests which individuals have in their group membership to be very important. I am not denying that they are correct. I am simply claiming that these interests, however important they are, are not as important as our interests in not being killed, tortured, maimed or not having our liberty severely infringed. It is only interests of this order of importance that merit the protection of absolute rights. In response to this claim, group rights theorists may point to the fact that vast numbers of people have been and are prepared to make great sacrifices, including giving up their lives, for the sake of their cultural or national interests. I acknowledge that this is so. However, all this shows is that many people *perceive* their national interests to be at least as important as, if not more important than, their interests in not being killed, tortured and maimed. In chapter 5.3 I argued for an objective view of well-being and in chapter 6.2 I argued that rights must be

connected to well-being viewed in this way. Although people's perceptions of their well-being are relevant to determining what objectively is in their interests, it is not the sole determining factor (chapter 5.3). Thus, simply because people may think that their national interests are as important as their interests in life, for example, it does not mean that they are correct. I have attempted to show that they are wrong. No doubt there are *some* people for whom cultural or national interests are objectively more important, but that is not some natural feature they have because of the kind of creature they are. It is objectively in their interests because of the particular beliefs, desires and goals they they have. For the vast majority of people, the interests in not being killed, tortured or maimed are objectively much stronger.

9.4) THE IMPORTANCE OF GROUP INTERESTS

I have argued that there are no absolute group rights. This is because there are no group creatures and because the interests which individuals have in cultural communities are not sufficiently important, objectively speaking, to justify the protection of absolute rights. However, the fact that these interests are not sufficiently important to warrant the protection of absolute rights does not mean that they are not important at all.

Kymlicka believes that cultural communities are very important. Liberals have tended to downgrade the importance of cultural communities. Kymlicka argues that liberalism, correctly understood, highlights the importance of such communities. An important idea of liberalism, he says, is that we should be free to *choose* to act and live in a way we decide is valuable. However, he claims, we cannot choose the range of options that is open to us since these are determined by our cultural heritage. Thus he concludes that liberalism should seek to preserve cultural communities because it is "only through having a rich and secure cultural structure that people can become aware, in a vivid

way, of the options available to them, and intelligently examine their value"[6]. Kymlicka clarifies what he means by a cultural community or cultural structure. He means the community or structure itself and not the particular character of a community at a particular time[7]. On his conception of a cultural community, the culture can withstand changes within the community. Accordingly his conception of a cultural community facilitates and reinforces the idea that a cultural community provides a context for choice. On the alternative conception of a cultural community, a change in the character of the cultural community amounts to the demise of the culture. Such a view of community restricts choice and is in conflict with liberalism.

My problem with Kylmicka's argument is that I think that his view about why cultural communities are important to individuals is wrong. Cultural communities are not valuable to individuals because they provide a context of choice but rather because they provide a sense of identity and belonging. Kymlicka is not insensitive to the fact that communities provide an identity and sense of belonging. In fact, he cites this as the reason why it is not membership of *any* cultural community that is valuable but only membership of one's *own* cultural community[8]. It is simply that for him this feature of the value of community is secondary. In my view not only is it primary, but it also undermines the idea of cultural communities being valuable to a liberal on the grounds that they provide contexts of choice. It is not that I think that cultural communities, understood in the way Kymlicka understands them, do not constitute contexts of choice. It is simply that if one is interested in the broadest possible range of choices - and this is what Kymlicka must say is important to liberalism - then cultural communities are not the best way of achieving that. Because membership of a particular cultural community is more determined than chosen, and can mean so much to an individual, he will be restricted to the range of choices which his cultural community

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6. W. Kymlicka, *Liberalism, Culture and Community*, p. 165.
7. Ibid, pp. 166, 167.
8. Ibid, pp. 172-5.

provides. This Kymlicka acknowledges. What he does not acknowledge is that were we to place less emphasis on preserving the identity of the distinct cultural communities that exist within a particular state and put more emphasis on actively pursuing multiculturalism - perhaps even by "importing" cultures - a greater range of choices would be provided. I am not in fact advocating such a policy. I am merely suggesting that if the importance of community is that it provides a range of choices, and choice is important, then sharpening the divisions between cultures by preserving distinct cultural identities is not the best policy. A far better policy would be to promote multiculturalism and blur the distinctions between the different cultures. Blurring the divisions between cultures would facilitate moving from one culture to another, thereby enhancing the range of choices. Having rigidly distinct cultural communities restricts the range of choice.

Although I think that Kymlicka's reasons for valuing cultural communities are wrong, I think that such communities are valuable for other reasons. Cultural communities - whether they be national, linguistic or religious - are important because they provide the individual with a sense of identity and belonging. These can satisfy important psychological needs. For example, belonging to a group and having an identity can infuse meaning into a person's life. Individuals have interests not simply in being members of cultural communities but also in the well-being of their communities. It is not sufficient that one be a member of a cultural community that merely exists. One wants one's community to thrive if it is to benefit its members fully.

Now the question is whether the cultural interests which individuals have can ever justifiably override other important interests which individuals have. In other words, are there non-absolute group rights - group claims which are sufficiently strong to override some competing individual interests but not so strong as to always override such interests? Take Kymlicka's example of the Indians of Canada. Because of their

minority status and a history of oppression the Canadian Indians are in danger of losing their cultural identity. Circumstances have forced many Indians into the non-Indian culture of the rest of Canada. Other Indians remain on reservations, but even there their cultural community is in danger of disintegrating without certain restrictions on the mobility, property and voting rights of non-Indians. Are such and other restrictions ever justified in order to further cultural interests of individuals?

I am in agreement with Kymlicka that there is no in-principle answer to this question. The matter would have to be decided in each case given the relevant facts particular to that case. No doubt the proposed restrictions could not be justified under some circumstances. However, under other circumstances they could be justified. Conflicts between cultural claims and other claims are just like any other conflict of individuals' interests. Where an interest is protected by an absolute right it will always prevail over other interests. However, where an interest is not protected by an absolute right it can sometimes justifiably be overridden and on other occasions it may not be justifiably overridden. If the importance of the cultural interests is very great and conflicting interests are of less importance, restrictions of the proposed kind would be justified. However, if the weight of the conflicting interests is reversed so that the cultural interests are of negligible importance and the conflicting interests very great, the proposed restrictions would be ruled out. One example of an important interest which individuals can have which will rarely, if ever, be justifiably overridden by group interests is the interest in religious freedom. Contrast restrictions of such freedom with restrictions on one's property. I think that the latter - especially mild restrictions of this kind - could be justified far more often.

Another relevant consideration in determining whether group claims should prevail is the extent to which the claim is genuinely required to protect the important cultural interests of a given group, and not simply to bring unfair advantage. The Canadian

Indians no doubt have cultural interests in having an autonomous state in all of Canada, but these interests could not override justifiably the interests of non-Indian Canadians to their cultural, political and property interests. This is partly because such an extensive claim is simply not required to do the job of preserving the Indian cultural community. In fact, the Canadian Indians are not claiming such a state. Theirs is a lesser claim involving lesser sacrifices from non-Indians. As such it stands a greater chance of being justified. This Kymlicka thinks is the difference between the group claims of Canadian Indians and those of white South Africans. The latter - or, more accurately, the Afrikaner nationalists amongst them - claimed the bulk of the land for the minority, forcing the black majority into small homelands that are politically and economically dependent on South Africa[9]. Cultural claims are there to protect people's legitimate interests in the light of competing claims. Cultural claims are not there to protect unfair advantage and greed[10].

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9. Ibid, p. 247.
10. Ian Macdonald mentions five criteria which group claims must satisfy if they are to be valid. Amongst these criteria is the condition that group claims must not be bound up with unequal political power and privilege. See I. Macdonald, "Group Rights" in *Philosophical Papers*, Vol. 18 No. 2, September 1989, p. 128.

CHAPTER 10

ANSWERING OBJECTIONS TO RIGHTS

10.1) INTRODUCTION

In the preceding chapters, I have provided a theory of natural rights. That is, I have given an account of their nature and justified their existence. In describing what natural rights are, and providing a foundation for them, I have mentioned and argued against rival theories of rights. However, another task remains.

There are a number of standard kinds of objection that are raised against theories of natural rights in general. In this chapter, I shall consider a few of these objections. In the case of some objections, I shall show that they are unjustified. In the case of others, I shall argue that while they may be appropriately directed against some theories of rights, they cannot be levelled successfully at my theory. My intention, therefore, is not to defend all theories of rights. I do not think that all such theories are defensible. I intend merely to show why my theory is immune to these criticisms.

10.2) BENTHAM: MORAL RIGHTS AS ANARCHICAL FALLACIES

One cannot think of objections to natural moral rights without Jeremy Bentham and his famous description of "natural and imprescriptible rights" as "nonsense upon stilts"[1] coming to mind. However, Bentham's rejection of natural rights is on account of more than their alleged meaninglessness. In his view they are also morally odious. Thus, he refers to them as "a bastard brood of monsters, 'gorgons and chimeras dire'"[2] .

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1. J. Bentham "Anarchical Fallacies" in J. Waldron (ed.) *Nonsense Upon Stilts*, p. 53.
2. Ibid, p. 69.

These two kinds of criticism which Bentham levels against natural rights - that they are meaningless, and that they are morally odious - are reflected in the title of his *Anarchical Fallacies*. The moral odium of natural rights is a function of their alleged anarchical nature. Their meaninglessness makes arguments which appeal to them fallacious. Although Bentham's criticism of natural rights runs through all his writings, it was in this work that he devoted special attention to the topic of natural rights. Here he provided a comprehensive and detailed criticism of the *Declaration of the Rights of Man and the Citizen* issued by the French revolutionaries.

The underlying nature of Bentham's objections to natural rights is far from clear. What philosophical view underpins his claim that natural rights are anarchical fallacies? It is sometimes assumed that it is some form of legal positivism that leads Bentham to his views about natural rights. I shall argue that the essential doctrine of legal positivism, to which Bentham does subscribe, does not entail a rejection of natural rights. I shall also argue that additional doctrines which Bentham adopts are not essential to legal positivism and are, in fact, quite distinct views. Finally, I shall argue that the combination of doctrines which Bentham must hold in order to reject natural rights makes his overall position an incoherent one.

The term "legal positivism" encompasses a number of doctrines. Hart cautions against confusing these various views[3]. I shall not consider each of them. I shall restrict myself to the one central doctrine of legal positivism which is essential to all forms of legal positivism. This doctrine is the claim that there is no *necessary* connection between law and morality. What is legal and what is moral are not necessarily one and the same thing. This view is what Coleman calls the separability thesis[4]. Legal positivism gets its name because it recognizes, by way of the separability thesis, a law which is not

3. H. Hart, "Positivism and the Separation of Law and Morals" in R. Dworkin (ed.), *The Philosophy of Law*, p. 18; H. Hart, "Legal Positivism" in *Encyclopedia of Philosophy*, p. 418.
4. J. Coleman, "Negative and Positive Positivism" in *Markets, Morals and the Law*, p. 4.

necessarily moral. It is because this law is not natural, but rather posited, that it is known as positive law.

The separability thesis stands in opposition to a central principle of natural law theory, namely its refusal to recognize as law anything which violates the (moral principles of) natural law, including its natural rights. Positive "laws" which violate the natural law are not simply immoral; they are not laws at all.

Bentham clearly accepted something like the separability thesis. This is evident, for example, from his attack on the *Declaration of the Rights of Man and the Citizen* for its claim that all men are born free. How, he asks, can this be reconciled with the fact that many people are born slaves? Bentham says that some people do so by accepting the natural law doctrine that positive laws that conflict with natural laws are not really laws. According to a natural law view, the slavery into which people are born and in which they live is a slavery created by human-made "laws" - positive "laws". Because these laws conflict with the natural law that all men are born free, they are, in fact, not laws at all. They do not have the status of law. Therefore, people *are* born free. Bentham rejects this natural law view, and claims that the positive laws that enslave people *are* valid laws[5]. He says that the fact of human enslavement and subjection conflicts with the claim that all men are born free.

I agree with the legal positivists that it is possible for the law to be what it ought not to be. It is possible for there to be evil laws. However, this certainly does not entail that there are no natural rights. All that it entails is a rejection of the natural law thesis that laws in conflict with natural rights are not valid.

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5. J. Bentham, "Anarchical Fallacies", in J. Waldron (ed.), *Nonsense Upon Stilts*, p. 50.

In describing my view of rights, I have spoken of *natural* rights as those rights which exist *ab initio*, rights which are possessed by a creature in virtue of its nature alone. For example, I have argued that it does not make sense to speak of the rights of an inanimate object because the nature of such a thing is such that it cannot care about its own well-being. On the other hand, creatures with a certain degree X of sentience have, for example, a right against torture. They have this right in virtue of some feature(s) of their nature - that is, the degree of sentience they have. Were they to have a different nature - perhaps by being drastically less sentient - it would make no sense to ascribe to them the same right (or a right fixed at the same threshold). It is not natural rights which are challenged by the separability thesis - it is the claim that they have the power to invalidate positive laws which violate them.

What about Bentham's claim that natural law and natural rights are anarchical? According to Bentham to deny the validity of the human-made law is to call "upon mankind to rise up in a mass, and resist the execution"[6] of this so-called law, or at least to justify such a course of action. Bentham seems to be reasoning in the following way: If something is not law, why should it be obeyed, especially if it is evil? Thus, this doctrine of natural law is pernicious, because it encourages "disobedience" of positive "law" on every occasion that this conflicts, even in the minutest way, with the natural moral law. It is, in Bentham's words, "the extremity of mischief"[7]. Its purported anarchical consequences provide the name for his critique.

This Benthamite criticism of natural law as anarchical is prone to a misrepresentation against which I shall now caution. The positivist distinction between law and morality is often misconstrued as requiring blind obedience to the law, whether the law be good or evil. This misconstrual has resulted in much of its lack of popularity. The truth, however, is that a positivist is not committed to an uncompromising adherence to the

6. Ibid.
7. ibid, p. 52.

law. Positivism does not entail such a conclusion and, if coupled with other theses, can yield the conclusion that disobedience of the law is sometimes desirable, if not even required. I shall show how this is possible, using Bentham as an example.

Bentham did not claim that the law must be obeyed on *every* occasion. Firstly, as a positivist, he acknowledged that the law could be evil. This is entailed by the positivist distinction between the law as it is, and the law as it ought to be. Secondly, as a utilitarian, Bentham had criteria for judging whether the law was what it ought to be. However, the difference between Bentham's attitude to disobedience and the attitude he imputes to the natural law theorists is that for Bentham a simple divergence of the law from the requirements of utility would not be sufficient to justify disobedience to the law. Disobedience to the law has significant disutility. For Bentham, positive law is all that protects humans from the Hobbesian state of nature. Thus while disobedience to this law could be justified in extreme circumstances, it could not be justified in every instance of conflict with moral principles. It is the widespread and frequent disobedience of the positive law, which natural law sanctions, and even encourages, according to Bentham, which poses the threat of the anarchy of Hobbes's state of nature. In Bentham's words, the point of claiming natural rights is "to excite and keep up a spirit of resistance to all laws - a spirit of insurrection against all governments"[8].

However, Bentham seems to misconstrue the natural law position in just the way that positivism is misconstrued. Just as positivism does not entail slavish obedience to the law, so natural law theory does not entail disobedience of all positive laws that conflict with natural law. All that natural law theory claims is that positive laws which violate the moral principles of natural law are not real laws. However, this does not entail rebellion against these positive "laws". It is compatible with natural law theory to maintain that even in instances where the positive "law" violates the natural law, that

8. Ibid, p. 54.

one is nevertheless under a moral obligation (arising from the natural law) to obey the positive "law". There are a number of possible reasons for this. These could include an argument very similar to Bentham's own: for example, natural law may be viewed as imposing a duty on us to obey our rulers within certain limits. These limits need not be identical with the precise limits of the natural law. Rather they would protect an essential core of the natural law. Thus, if a positive "law" conflicts with a peripheral feature of the natural law by requiring us to do something only mildly wrong, disobedience need not be required. Such a violation of the natural law would not constitute a justification for overiding the presumptive natural obligation to obey the government.

We see that neither natural law nor legal positivism entails any view about obedience to the positive law. We have also seen that legal positivism does not commit one to the view that there are no non-positive rights. Therefore Bentham could not have justifiably rejected natural rights simply because he accepted something like the separability thesis. He must have held some stronger view as well.

This stronger view was not any kind of legal positivism, but rather a positivism of another kind - a positivism about meaning. Although logical positivism is a modern philosophical school, Bentham was probably influenced by Hume, the philosophical ancestor of the logical positivists. Bentham's meaning-positivism supports the claim that legal rights are the only rights. He applies the same criteria of meaningfulness to rights as he does to law.

For Bentham, meaningful talk of law and of terms such as "obligation" and "rights" must satisfy certain empirical conditions[9]. In one place Bentham says:

> For expounding the words *duty*, *right*, *power* ... that abound so much in ethics and jurisprudence, either I am much deceived, or the only method by which any instruction can be conveyed, is that which is here exemplified. An exposition framed after this method I would term *paraphrasis*. A word may be said to be expounded by *paraphrasis* when not that *word* alone is translated into other *words*, but some whole *sentence* of which it forms a part is translated into another *sentence*; the words of which latter are expressive of such ideas as are *simple*, or are more immediately resolvable into simple ones that those of the former ... This, in short, is the only method in which any abstract terms can, at the long run, be expounded to any instructive purpose: that is in terms calculated to raise *images* either of *substances* perceived, or of *emotions*; - sources, one or other of which every idea must be drawn from, to be a clear one[10].

The simple ideas to which Bentham refers are part of the Lockean taxonomy. Locke distinguished simple and complex ideas. Simple ideas, he said, arise particularly through sensory perception. The mind uses them to form complex ideas. Bentham's view is that words can only be "expounded" satisfactorily if they are expressive of simple ideas.

If the conditions of observability could not be satisfied, then one's talk would be referentless and meaningless. These conditions are what Hart calls[11] the *criteria* of the law. These are the empirically identifying marks of the law. These criteria concern the origin of law and the motivation to obey it.

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9. J. Waldron (ed.), *Nonsense Upon Stilts*, p. 35.
10. J. Bentham, *A Fragment on Government*, chapter V, p. 495 in Burns and Hart edition.
11. H. Hart, *Essays on Bentham*, p. 82.

An imperative theory of law is one kind of theory which embodies claims about the origin of law and the motivation to obey it. Such a theory claims that law is the commands and prohibitions - that is, respectively, positive and negative imperatives - issued by a sovereign via a required process. These imperatives, which express the will of the sovereign (about the way in which its subjects should behave), have coercive sanctions attached to them to provide a motivation for obedience to them. What is important to note is that the sovereign (whether it be a democratic parliament, an oligarchy or an autocrat), the sovereign's imperatives and the attendant sanctions are all, in some way, empirically discernible.

Although the imperative theory is associated with the jurist John Austin, a philosophical heir of Bentham, Bentham himself is sometimes viewed as having had an imperative theory of law. Although Austin was undoubtedly influenced by Bentham, their conceptions of the law are not the same, as Lyons observes[12]. In many ways Austin's is a more rigorous and developed theory[13]. However, Bentham's seems to be more inclusive in the sense that it takes account, not only of prohibitions and (positive) commands, but also of what Lyons calls "permissive" laws - laws "which say what *may* or *need not* be done, rather than what ought or ought not to be done"[14]. Bentham even takes account of judicially determined law and conventional law. Strictly speaking, these are not commands or prohibitions, but they are empirically discernible, which Bentham claims natural law is not. In the case of natural law one cannot observe any sovereign, nor any commands. Nature is purported to be the sovereign, but neither its imperatival acts, nor its imperatives can be experienced. Furthermore, it has no sanctions. Failure to obey the natural law does not result in punishment (unless the presumed natural law is given positive endorsement and enforcement).

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12. D. Lyons, *In the Interest of the Governed*, pp. 108ff.
13. Ibid, p. 108.
14. Ibid.

How does all this relate to Bentham's rejection of natural rights? The answer seems to me to be something like the following. Rights have correlative obligations or duties. To have a right is to be the beneficiary of a duty. For Bentham, sense can only be made of this or any other duty if there is an action (or an omission) that the sovereign requires of the duty-bearer[15] on pain of some sanction. Thus the only duties of which we can meaningfully speak are legal duties. Therefore, given the correlativity of rights and duties, the only rights of which we can meaningfully speak are legal rights. A right which is claimed to be prior to, not dependent on, or contrary to positive law is an impossibility, Bentham says. "A natural right is a son that never had a father"[16].

Although meaning-positivism is not uncontroversial, I shall not subject it to criticism. My intention is to show how the combination of views which Bentham held entails an incoherence in his overall theory.

So far, although extreme, his position is at least coherent. Meaning-positivism is compatible with legal positivism. The problem arises when we consider that Bentham was also a utilitarian and therefore that he accepted a non-positive morality. As a legal positivist, Bentham accepted the separability thesis - that the law is not necessarily moral. As a utilitarian, Bentham would determine whether or not the law was moral depending on whether or not it conformed to utilitarian standards. In this way, he could also determine what laws there ought to be.

Either the utilitarian principle - that the good action is the one that maximizes happiness - satisfies Bentham's criteria of meaningfulness or it does not. If it does not, then Bentham's acceptance of the utilitarian principle conflicts with his meaning-positivism. Alternatively utilitarianism does satisfy the kind of criteria Bentham required for

15. J. Waldron (ed.), *Nonsense Upon Stilts*, p. 35.
16. J. Bentham, "Anarchical Fallacies", in J. Waldron (ed.), *Nonsense Upon Stilts*, p. 73.

meaningful talk of law and rights[17]. Those who hold this view could say that the whole point about the potential pains and pleasures that are entered into a Benthamite utilitarian calculation is that they can be experienced. However, if we accept this view, that Bentham's acceptance of the utilitarian principle does not conflict with his meaning-positivism, the question arises why Bentham was so opposed to moral rights. Surely he could have given a utilitarian account of rights?[18] Of course, it is possible that he held the view which I have advocated - that utilitarianism cannot properly account for rights. But this is not his professed reason for rejecting natural rights. He rejected them because they supposedly are meaningless.

Hart argues that it is because Bentham tied the notion of obligation to coercive sanctions that he would not accept a utilitarian theory of rights[19]. There is, for Bentham, no obligation without the prospect of punishment if one fails to fulfil it. Natural rights, even if they are possible on a utilitarian account, do not require legal recognition. Where legal recognition is absent, there will be no punishment of those who violate natural rights. Consequently there are no natural rights, according to Bentham.

While I agree with Bentham that punishment plays an important role in an understanding of *legal* rights, I do not think that the same is true of *moral* rights. He wishes to impose the punitive force that is characteristic of legal obligations and legal rights on moral obligations and moral rights.

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17. See H. Hart, "Natural Rights: Bentham and John Stuart Mill" in *Essays on Bentham*, p. 85.
18. Ibid.
19. Lyons points out that Bentham theoretically allowed for rewards instead of coercive sanctions. However, he did believe that punishment was a more effective motivation than reward (D. Lyons, *In the Interest of the Governed*, p. 134). Since this point is not central to my argument, I shall not pursue it.

Bentham says that the fact that there ought to be a right does not imply that there actually is a right. There are two problems here. Firstly, if one cannot give an account of obligation without coercive sanctions, then how can one make sense of a statement that there *ought* to be a particular (legal) right or law, a statement which Bentham must have held as meaningful, given his views about the desirability of legal reform? In other words, how can one make sense of utilitarian obligations? This problem aside, though, there is another. In one sense, Bentham is correct. There is a difference between saying that there ought to be a right and saying that there actually is a right. If there ought to be a *legal* right, it does not follow that there is a *legal* right. That is because of the character of legal rights. However, to say that there ought to be a *legal* right may be an implication of saying that there *is* a *moral* right. Let me explain why I think that this is so.

Why do we want legal rights? We want them because they can be enforced. Enforcement is what legal rights offer over and above the dictates of morality and moral principles. It is not enough to know that one *ought* to have a legal right, that one ought to be protected on pain of punishment. One wants actually to be protected in this way. However, simply because a moral right lacks this protection does not mean that it is not a right. It is not a *legal* right, but it is a right.

It is interesting to note that not even legal rights protect us sufficiently. Notwithstanding legally entrenched negative rights to life, people are murdered every day. Obviously the coercive power of the law is not sufficient to deter the murderers. If we were someday to discover a legal way to *ensure* that people were not murdered, we could perhaps then say that people had super-duper legal rights. This would not mean that the legal rights that people had until then were not legal rights. True, they would not be super-duper legal rights, but they would be rights and they would be legal

rights. There are degrees of enforcement. If a right is not recognized by anybody it will not be enforced at all, but it is still a right - a moral one.

I shall conclude by way of a summary. Bentham held the following views:

1) The separability thesis.

2) The thesis that there are no non-positive rights.

3) Utilitarianism.

Bentham's acceptance of the separability thesis of legal positivism does not entail his rejection of natural or moral rights, but only of the idea that natural rights have the power to invalidate positive laws. His claim that there are no non-positive rights follows from a positivism about meaning and is not essential to legal positivism. Coleman describes positivism about meaning as a "dubious metaphysical" claim[20]. Although I share his view, I did not provide an argument to this end because it was not required to defeat Bentham's criticism of moral rights. I pointed out that acceptance of Bentham's second thesis either conflicts with his utiliarianism - the third thesis - or it does not. Either way there is an incoherence in Bentham's overall view. If his meaning-positivism does conflict with his utilitarianism, then the incoherence is in accepting both these views. If, on the other hand, these views do not conflict, then we need to ask how Bentham could assert both 2) and 3). How can Bentham reject moral rights *on the grounds of meaninglessness* when he accepts the non-positive morality of utilitarianism? In other words, why are rights meaningless but other moral principles not? Of course, Bentham could have accepted utilitarianism and rejected moral rights on the grounds that they are incompatible with utilitarianism, but this is not what he did. He rejected rights because he took them to be meaningless. This seems incompatible with his acceptance of utilitarianism.

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20. J. Coleman, "Negative and Positive Positivism" in *Markets, Morals and the Law*, p. 12.

10.3) AGAINST RIGHT-BASED THEORIES

In *Taking Rights Seriously*, Ronald Dworkin writes in one place about goals, rights and duties, claiming that it "seems reasonable to suppose that any particular theory will give ultimate pride of place to just one of these concepts", though he exempts an "intuitionist" theory, in Rawls's sense of this term[21]. Rawls understands intuitionist theories as having two features: a) "they consist of a plurality of first principles which may conflict"[22]; b) they have "no explicit method, no priority rules, for weighing these principles against one another"[23] - they are weighed by means of intuition, by means of what feels right. We see, therefore, that by definition intuitionism (as understood by Rawls) does not give ultimate pride of place to a particular concept, as Dworkin suggests other theories do. Dworkin goes on to speak about "goal-based", "right-based" and "duty-based" political theories[24]. In a right-based theory, for example, some right or set of rights will be most basic. Any other moral principles that such a theory contains will be derived from this right or set of rights.

Dworkin does not simply claim that a right-based political theory is logically possible. He thinks that there are in fact some right-based theories. He cites as an example, Tom Paine's theory of revolution[25]. I think that we could add to that list both Locke's and Nozick's theories, in which the rights to life, liberty and property are basic.

Mackie regards these theories as being distinctly *political*, and he argues that right-based *moral* theories are also possible[26]. He claims that a right-based moral theory is more plausible than a goal- or duty-based alternative. I shall not say why he thinks this.

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21. R. Dworkin, *Taking Rights Seriously*, p. 171.
22. J. Rawls, *A Theory of Justice*, p. 34.
23. Ibid.
24. R. Dworkin, *Taking Rights Seriously*, p. 171.
25. Ibid.
26. J. Mackie, "Can there be a right-based moral theory?" in J. Waldron (ed.), *Theories of Rights*.

Here I am concerned to consider *criticisms* of right-based theories. Raz is a philosopher who argues that morality is not right-based[27]. He argues that rights, duties and goals are all to be found among the most fundamental precepts of morality, and that a theory that was right-based would be deficient. For example, he claims that a right-based theory cannot allow for the moral significance of supererogation. A supererogatory act is one that goes beyond the requirements of duty. While duties are derivable from rights, the value attached to going beyond one's duty is not.

What makes this criticism more interesting is that Feinberg claims not simply that having rights *can* allow for supererogation, but that it is a necessary condition for supererogatory virtues[28]. According to Feinberg, the knowledge that one has rights makes it possible to release people from their correlative duties. One has no duty to release people from their duties to one, but part of the idea of having a right is that one is at liberty to waive it. According to Feinberg, exercising this liberty is that in which supererogation consists. Without rights supererogation is not possible.

I agree with Feinberg that having rights can allow for supererogation. We *can* act supererogatorily by waiving rights. However, I think that his claim that having rights is *necessary* for supererogation is wrong. We can act supererogatorily without rights. Imagine that there were no rights, but only duties (uncorrelated to rights). We could then say that supererogation was doing more than one's duties required one to do. It would be a case of going beyond the call of duty. So while having rights can allow for supererogation, they are not a necessary condition for supererogation.

Furthermore, to say that the existence of rights can allow for supererogation is not to say that the existence of rights can account for the moral significance of

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27. J. Raz, "Right-based moralities" in J. Waldron (ed.), *Theories of Rights*.
28. See "Postscript" to J. Feinberg, "The Nature and Value of Rights" in *Rights, Justice and the Bounds of Liberty*.

supererogation. The fact that we *can* act supererogatorily by waiving our rights does not explain why we *should* be supererogatory and waive our rights. Theories of rights do not explain why going beyond the call of duty is so important. Some rights-waivings are in the interests of the rights-bearer and are therefore not cases of supererogation. For example, in extreme circumstances, such as end-stage terminal disease, a person may wish to waive his right to life. In such a situation the inability to waive the right could count against one's interests. Such instances of rights-waivings are explained by the rights themselves. The rights are there to protect one's interests. When the right stands in the way of one's interests, then one needs to be at liberty to waive it, if the purpose of the right is not to be self-defeating. However, such instances of rights-waivings are different from those which occur for supererogatory purposes. Nothing about the purpose or nature of the right tells us why we should value supererogatory rights-waivings.

As Raz points out[29], this problem is not unique to right-based theories. For example, duty-based theories would encounter this same problem. While duty-based theories can also allow for supererogation, they too do not tell us *why* it is sometimes valuable or commendable to go beyond the call of duty. It cannot be said without contradiction that sometimes one has a duty to go beyond the call of duty. However, if one does not have such a duty, then it is hard to see how duty-based theories can explain the value of such actions.

The failure to account for the value of supererogation is not Raz's only criticism of right-based theories. He says that a right-based theory also "cannot allow intrinsic moral value to virtue and the pursuit of excellence"[30]. In right-based theories, only rights have *intrinsic* value, though other principles may have derivative or instrumental value.

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29. J. Raz, "Right-based Moralities" in J. Waldron (ed.), *Theories of Rights*, p. 182.
30. Ibid, p. 185.

Expanding these criticisms, one could argue that right-based theories are often minimalist. They provide a very narrow view of morality. In Nozick's theory, for example, the few obligations that there are are negative. Thus all one is required to do is to refrain from acting in certain ways. Simply not to murder, not to steal and not to violate another's liberty is to lead the moral life. Some feel that this is inadequate. One can sit about the house day and night, and be said to be leading a morally impeccable life. There is much more to morality that simply not violating rights. Admittedly, Nozick's theory is an extreme case. It is more than merely right-*based*. It gives place to rights (and their correlative duties) *only*. Right-based theories can (but need not) give derivative importance to other moral principles. These other principles are derived from the basic rights of the right-based theory. Nozick simply does not take matters that far. He has rights at the base of his theory, but he does not derive any other principles from them. This does make his theory more susceptible to the criticism of being minimalist than right-based theories need be. However, this observation does not altogether immunize other, less-extreme, right-based theories against the minimalist criticism. Though these theories give place to principles other than rights, they do so only *derivatively*. These other principles have no intrinsic value. Ultimately they are not what count. Thus the charge that right-based theories are minimalist has some force against these theories even though not as much as it does against extreme right-based theories such as Nozick's.

I believe that the conception of rights for which I have argued is immune to these criticisms. There is a difference between justifying rights and claiming that they are the most basic moral concept from which all others are derived. The theory of rights which I have provided is not a right-based theory. It does not claim that rights are most basic and all else is derivative. I have argued that rights are only one, though a very important, moral concept. There are, I have said (chapter 6.1), many other moral

principles. It is because of this that I do not need to respond to criticism of right-based theories.

It may be objected that I have failed to mention an important characteristic of right-based theories - a characteristic which my theory possesses. This feature is that (some) rights have supreme moral strength in the theory[31]. In cases of conflict, absolute rights always override other moral principles. Although my theory does indeed possess this feature, it is nonetheless not a right-based theory. Why is this? The moral strength which right-based theories accord rights stems from the fact that in such theories rights are basic and other moral principles are derivative. It is this attribute - rights' being the only non-derivative principles - which is the defining feature of a right-based theory and which gives rise to the objections I have described. These objections are not objections to the moral strength of rights but to the fact that rights are basic and all else is derivative. Since in my theory other moral principles and values are also non-derivative, the objections do not apply to my theory.

I would argue, therefore, that the problems which Raz raises for right-based moral theories are not faced by a theory such as mine which gives a place to rights, but does not make them most basic. For example, if rights are not the only basic component of morality, then supererogatory values *may* be equally basic. So may virtue be equally basic. I am not claiming that supererogation and virtue *are* basic, but simply that in a non-right-based theory they *could* be. Finally, a theory such as mine, which gives a place to rights and to goals (social utility) is not subject to the charge of being a minimalist view of morality. It can include all the important features which we think should be contained in a satisfactory moral theory.

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31. R. Dworkin, *Taking Rights Seriously*, p. 171.

10.4) AGAINST THE ONTOLOGICAL INDIVIDUALISM OF RIGHTS

This objection "sets itself in opposition to the atomistic separateness of human selves that it finds in theories of human rights"[32]. It makes the claim that individuals are constituted by the communities to which they belong. According to this view the individualism that characterizes theories of rights ignores the fact that individuals do not exist separately and unrelated to each other. Rather, they are communal or social beings. It is said to follow from this objection that if any entities are to have rights, they must be groups, and not individuals[33].

There are, I believe, a number of sources of such ontological objections to individual rights. First, there is the non-reductionist view of society which I described in chapter 4.2. I argued against the extreme version of this view and claimed that although moderate versions are more plausible they pose no threat to individual rights.

Communitarianism also raises objections of an ontological sort. It claims that liberalism has a defective view of the self. Communitarians claim that individuals do not exist as separate, isolated entities, but that they are consituted in great part by the communities of which they are members. The community gives the individual self much of his identity.

Once again we need to ask what the strength of this communitarian claim is. If it is as strong as the radical non-reductionist view of society then, like this view, I think that it is wrong. I have argued that individuals, and not groups, are the unit of existence. If the communitarian view is simply that communities and groups are of great importance to individuals and their interests, then I agree. But this, as I argued in the chapter on

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32. A. Gewirth, "Human Rights and Conceptions of the Self" in *Philosophia*, July 1988, p. 130.
33. Ibid.

group rights, does not make a case for rejecting individual rights. Even if we accept the importance of groups to individuals, the morally significant unit of existence is still the individual and not the group.

Buchanan has argued that even if one were to accept the communitarian thesis, individual rights would still have great value[34]. They provide considerable protection for communities. For example, individual rights provide a strong, effective protection against totalitarianism. The totalitarian state can be and has been a great threat to the communities within its domain because these communities limit citizens' dependence on and allegiance to the state. So individual rights should be important even for communitarians.

10.5) MORAL OBJECTIONS

The concept of rights is seen by some as being morally defective. Gewirth discerns two types of moral objection to rights[35]. The first is what he calls the "egoistic" objection. This is the view that rights doctrines are self-centred and pre-occupied with the fulfilment of one's own desires and needs. More radical forms of this criticism are, in Waldron's words, "appalled" by rights because they are a "celebration of the claims that the individual might make on his own behalf, asserting his own exclusive interests against those of the communities that had nurtured him ..."[36].

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34. A. Buchanan, "Assessing the Communitarian Critique of Liberalism", in *Ethics*, July 1989.
35. A. Gewirth, "Human Rights and Conceptions of the Self" in *Philosophia*, July 1988, p. 132.
36. J. Waldron (ed.), *Theories of Rights*, pp. 1, 2.

The second moral objection to rights is the "adversarial" objection. This is the view that claims of rights "thrust persons into combative and potentially coercive relations"[37]. Claiming rights makes people into adversaries.

Bentham, as I showed in chapter 10.2, is someone who launches a moral objection against rights - a moral objection that incorporates both the "egoistic" and the "adversarial" objections. According to Bentham, society is held together by the sacrifices which people make. It is because government ensures these sacrifices by positive law that public peace and order can be established. "The great enemies of public peace", he says, "are the selfish and dissocial passions"[38]. He claims further that the purpose of declaring (moral) rights is to "add as much force as possible to these passions, already but too strong..."[39]. Elsewhere he says that the source of such rights is "self-conceit"[40] and that the purpose of claiming them is to have things go one's own way[41].

Another moral critique of rights which embodies both the "egoistic" and "adversarial" objections and which deserves some discussion is Marx's. His view of rights is by no means clear. Although there are substantial criticisms of rights that are bound up with his view of the predicament of man in capitalist society and although these seem to constitute the foundation for the conventional wisdom on Marx's view of rights - that is, that he is hostile to rights - there are other claims he makes which complicate such a straightforward depiction. Waldron claims that "Marx's views on rights were never formulated with the clarity or unequivocality that modern analysis presupposes"[42]. Leaving aside the questions whether rights are compatible with Marxism and whether,

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37. A. Gewirth, "Human Rights and Conceptions of the Self" in *Philosophia*, July 1988, p. 132.
38. J. Bentham, "Anarchical Fallacies" in J. Waldron (ed.), *Nonsense Upon Stilts*, p. 48.
39. Ibid.
40. Ibid, p. 54.
41. Ibid, p. 73.
42. J. Waldron (ed.), *Nonsense Upon Stilts*, p. 135.

viewed as a whole, Marx rejected all rights, I shall attempt to provide an accurate (but brief) account of that strand of Marx's thought which is hostile to rights, irrespective of the weight this strand has in the entire Marxist picture.

The Marxist critique of rights is, as I have said, part of the Marxist criticism of capitalist society and its atomistic view of the individual. According to Marx, man's "species-being", or true self, is social. Marx says that this means more than that man is a social being; it means that he can develop into an individual only in society[43]. Capitalism, he suggests, obscures this fact, and provides the illusion that we are self-sufficient individuals who are essentially independent of others[44]. Rights are a product of the material life of capitalist society. Thus, Marx says, "the so-called rights of man ... are nothing but the rights of the member of civil society, ie egoistic man, man separated from other men and the community"[45]. This egoism is a result of the conflict of individuals that is part of the condition of capitalist society. The human condition in capitalist society is one of alienation. One form of this alienation is alienation from other people. In capitalist society people exist not as the social beings they are, but rather as isolated and competing individuals. Individual rights, with their egoistic and adversarial nature, are the products of such alienation, but they also facilitate alienation. They preserve the separation between people and legitimize their selfishness.

Marx examines some individual rights to illustrate his view. Looking at the French *Declaration of the Rights of Man and the Citizen*, he notes that the right to liberty is the right to do whatever does not infringe on the rights of others. He says that "the freedom in question is that of a man treated as an isolated monad and withdrawn into himself"[46]. He concludes that this freedom is based on a separation of men, rather than

43. Ibid, p. 129.
44. Ibid, p. 128.
45. K. Marx, "On the Jewish Question", in J. Waldron (ed.), *Nonsense Upon Stilts*, p. 145.
46. Ibid, p. 146.

on their union. It is a right to be limited to oneself, without having any obligation to anybody else. Similarly, the right to private property is, Marx says, a right to do with one's property whatever one wishes, without regard for other men and for society. It is the right to possess property and to use and dispose of it as one sees fit - even wastefully or arbitrarily - irrespective of the needs of others. There may be people starving to death and yet the right to private property entitles Scrooge to hoard wealth or farmers to destroy "excess" produce in an attempt to keep prices up. Thus, the right to private property is, Marx says, a right of "selfishness"[47]. The right to equality is simply an extension of the right to liberty. It is the claim that everybody has the right to be "a self-sufficient monad"[48]. The right to security is the right to have one's other rights guaranteed (by force if necessary). It is the "assurance of egoism"[49].

Lukes accuses Marx of having a "narrow and impoverished view of the meaning of the rights of man"[50]. He says that while some of the rights enumerated in the French *Declaration*, to which Marx refers, concern the individual unrelated to society[51], many others presuppose community. He cites, for example, the right to free expression of one's ideas. This, he maintains, is a right to go beyond oneself and to relate to others.

According to Waldron, such criticism is unfair. Marx in fact distinguishes between the rights *of man* and the rights of the *citizen*[52]. The rights of the citizen are political rights and they are only exercised in community with other men. The right to freedom of expression is, Waldron claims, just such a right.

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47. Ibid.
48. Ibid.
49. Ibid, p. 147.
50. S. Lukes, *Marxism and Morality*, p. 63.
51. The right to private property seems the most plausible example.
52. J. Waldron (ed.), *Nonsense Upon Stilts*, p. 129; K. Marx, "On the Jewish Question" in J. Waldron (ed.), *Nonsense Upon Stilts*, p. 144.

However, even if we take note of Marx's distinction between the rights of man and those of the citizen and include amongst the latter those that are exercised in community, we would still not have a class of rights that is immune to Marxist criticism. Marx's attitude to the rights of the citizen, although more favourable than his view of the rights of man, is still uncomplimentary[53]. Although there is some ambiguity in his view of the rights of the citizen, there seems to be agreement that he thinks of them as being in some way defective. While they are an improvement on the rights of man and indicate a measure of community and human freedom, they are still very much part of capitalist society. It is the conflicts and egoism of capitalist society that make these rights necessary.

A comprehensive defence of rights against the Marxist critique would have to involve a refutation of some key Marxist doctrines. This is clearly a vast subject, and one which is beyond the scope of this work. I shall rather respond to the moral objection to rights in a more general way.

I think that the charge that rights are egoistic is wrong for three reasons. While it is true that rights are trumping claims of individuals to be treated in certain ways, any acceptable theory of rights does not accord rights to a single individual or allow him to claim that he alone has rights. Natural rights theories are theories which claim that an entire class of creatures has rights. Thus the trumping claim which is a natural right is not the preserve of a solitary creature. To say that I, and I alone, have rights may be egoistic. To say that I have rights, but so do all others who are like me in all morally relevant ways, is not. I have to respect their rights, just as much as they have to respect mine.

This response may not be at all convincing for the Marxist. He will claim that it is this very withdrawal from community into the individual, this marking off of boundaries

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53. J. Waldron (ed.), *Nonsense Upon Stilts*, pp. 132 - 136.

between members of a community by rights, which explains why they are so egoistic. I turn, therefore, to the next reason why it is wrong to see rights as egoistic.

This reason is that in a theory such as mine, which gives place not only to rights, but also to other aspects of morality, including obligations uncorrelated to rights, people are morally less separated from each other than they are in moral theories which make room for rights alone. Although individuals have certain claims against each other (and the correlative negative duties of these), they can also have positive obligations towards others. These duties or obligations unite them with other men and with their community, rather than separating them.

To this the Marxist may respond that those components of a moral theory that do unite are not egoistic, and those - such as rights - which separate, are egoistic. To this I wish to reply that although rights *are* trumping claims that protect certain interests of individuals, these claims are justified. (It has been the aim of this thesis to show that they are justified.) There must be a limit to self-negation. The individual has some value - I think a great deal. It is not egoistical for an individual to assert himself when he is justified in doing so. We cannot say that a person is an egoist simply because he believes that he has *some* value. One can believe that one's life counts for something without being branded an egoist.

What about the "adversarial" objection? I think that this too is doomed to failure. Rights do not promote adversarial or combative relations between people. Rather what they do is handle already existent adversarial relations. I think that there is an inevitable clash of interests between people, though Marx would, of course, disagree with this. Morality has to cope with these conflicts and resolve them in a justifiable way. Different moral theories represent various attempts to do just that. In defending rights I have accorded a place to them in the resolution of this conflict. If there were no conflicts of interests, there would be no need for rights, nor for any other moral tool.

While Bentham would disagree that rights handle already existent adversarial conditions, Marx would not. Marx maintained that rights were a way of handling the conflict of interests that characterizes bourgeois society. For the Marxist, it is because capitalist society is defective, that these conflicts exist, and that rights are necessary. However, in the Marxist view, they are not natural because they are limited to capitalist society. They will have no place or function in communist society[54].

I do not share Marx's utopianism - his view that it is possible for a society, communist or otherwise, not to have conflicts between its individual members or, more accurately, that a society could be sufficiently conflict-free to make rights superfluous[55]. However, it is not this point that I shall pursue. Rather, I want to mention a philosophically more interesting point which Buchanan raises.

He argues that it is not only in defective societies that rights are needed[56]. For example, if we did not have rights, minorities and individuals could be disadvantaged in important ways by the democratic law-making processes of the society in which they live. The mass of people could vote for a course of action which would significantly disadvantage a minority. This is prevented by rights.

This argument assumes, of course, that a democratic society is not a defective one. A democratic society where the majority are malefactors certainly is defective. However, even in a society in which everybody was perfectly altruistic, there would be a need for rights. One altruist, A, might wish to act in the interests of another, B. He believes that it is in B's interests to attend a rugby match as an important part of his education about the mentality of South Africans. However, B does not wish to watch a rugby match and believes that to do so would, at best, be a bore. Rights protect B from being dragged

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54. Ibid, pp. 126, 127.
55. A. Buchanan, *Marx and Justice*, p. 57.
56. Cited by S. Lukes, *Marxism and Morality*, p. 65.

off to a rugby match on the altruistic grounds that it is in his own interests. Here, rights serve to mediate in a conflict of *perceived* interests.

I believe that neither the egoistic nor the adversarial objection to rights succeeds. The concept of rights is not inherently morally defective. This is not to say that the concept cannot be abused. The proliferation of alleged rights is such an abuse. Claims of rights have escalated to ridiculous extremes. People are often alleged to have numerous and bizarre rights. However, to reject these particular rights is not to condemn all rights, or the concept of rights.

10.6) OBJECTIONS THAT RIGHTS ARE HISTORICALLY LIMITED AND ETHNOCENTRIC

A legal right is a right which is enacted through the legal process. If it does not pass through this process, it does not exist. To determine what legal rights there are, one must examine the law. It is, according to legal positivism at any rate, an empirical question whether a particular legal right exists. By contrast, a moral right is one which is rationally discernible. To determine whether such a right exists, one cannot simply look up the answer in a law book - or seek an answer in the courts. One has to rationally determine whether such a right exists - whether or not it can be justified. This thesis has been an attempt to justify natural moral rights - an attempt to show that there are at least some such rights.

The fact that natural rights are meant to be rationally discernible has led to two objections to such rights. Firstly, there is the historical objection[57]. This objection states that, historically, the idea of natural rights is a relatively recent development. This is taken to indicate not only that rights are not rationally discernible, because

57. A. Gewirth, "Human Rights and Conceptions of the Self" in *Philosophia*, July 1988; L. Strauss, *Natural Right and History*, p. 9.

otherwise their recognition would not have arisen only in recent times, but also that moral principles change with the times.

The ethnocentric objection has a similar form, except that it is formulated in terms of the differences between cultures rather than the differences between historical periods. It claims that (even in modern times) natural rights are only recognized by western culture. If this is so, the objection goes, rights cannot be rationally discernible - otherwise all people would have discerned them.

I wish to respond to these criticisms of natural rights with two points - one weaker and the other stronger. The weaker point is that even though rights do not feature overtly in the moral language of all cultures and in all times, the kind of moral ideas implicit in rights are indeed present in a number of traditions other than the western liberal one. For example, the concept of rights is not explicit in the Judeo-Christian tradition, yet the categorical prohibitions against treating individuals in certain ways - say by killing them - embody ideas that are central to rights theories.

The stronger point that I wish to raise against the historical and ethnocentric objections is as follows: Even if it were true that rights have been recognized only in western liberal culture and in modern times, this would not count against the existence of natural rights. Agreement, either across time or cultures, is not required for their existence. Simply because people have not, and do not all, recognize natural rights, does not mean that they do not exist. There was a time when people thought that the world was flat. Now we know that it is round. Even though there is not agreement between people of different historical periods about the shape of the earth, this does not mean that there is not a factual answer to this question. We cannot, of course, conclude from this that the western liberal view of rights is correct. It is simply meant to show

that the historical and ethnocentric objections do not show that it is wrong. It may be that it has taken a particular culture at a particular time to recognize rights.

CHAPTER 11

CONCLUSION

11.1) A THEORY OF RIGHTS

Although I have argued in this thesis that rights - more specifically natural rights - can be justified, they have not emerged unscathed from my treatment of them. The rights which I have justified are not the rights of rhetoric (chapter 0.1). The natural rights which I have defended are numerically fewer but some of them are more powerful than rights are normally taken to be.

In the course of this thesis I have mentioned three features of natural rights. I said that they have correlative duties (chapter 1.1), that they have great strength (chapters 1.2, 6.2, 6.3, 6.5) and that they are exclusively negative (chapter 1.3). Each of these features has a role in reducing the number of natural rights on the moral landscape. Rhetorical rights lack the first mentioned feature and are ascribed even when identifying a correlative duty and duty bearer is impossible. Such rights are likely to be more plentiful than rights correlated to duties. Similarly, if natural rights have great strength then it seems plausible to decrease their number. Finally, if there are only negative natural rights then it is likely that there will be fewer of them than if there are both positive and negative natural rights.

It must be reiterated that I am not claiming that *all* rights possess the combination of features which I have mentioned. I have been speaking about *natural* rights exclusively (see chapter 0.4). Such rights, I have said (chapter 1.1), are the most difficult to justify and, therefore, have been the object of my inquiry. I am sympathetic towards the idea

of non-natural rights which are positive (chapter 1.3), though they too would have to have correlative duties[1] and would have to have considerable strength.

In summary, my argument justifying natural rights goes like this. Individuals, rather than groups or temporal stages of an individual, are the morally significant units of existence. Thus morality, which must be connected to well-being, must be connected to the well-being of individuals (chapter 4). Rights play a vital role in ensuring this connection. Because *absolute* rights are in some cases needed to fulfil this role I think that some natural rights are never overridable (chapter 6.2, 6.3) and not simply very strong (chapter 1.2).

Although on my view there are fewer natural rights than on other views, the moral landscape is not thereby denuded. It is populated by other moral principles (chapter 6.1). Just as natural rights can fulfil roles which other moral principles cannot fulfil, these other moral principles fulfil functions which are sometimes inappropriately assigned to natural rights. Thus, as I have shown (chapter 1.2), charity is not appropriately translated into the language of rights. Every moral principle has its place and its function. It is important to use each principle appropriately.

Although a host of moral principles should populate that area of the moral landscape from which I think natural rights should retreat, I wish to highlight two principles which are most closely related to natural rights and presumably which should fill in much of this space. These are the principles of a non-natural right and a natural claim which is not a right (chapter 6.1). Very often the ascription of a non-natural right will be appropriate in instances where the ascription of a *natural* right is inappropriate. In

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1. Feinberg speaks of a special sense of a right - what he calls a "manifesto right" - "in which a right need not be correlated with another's duty". See J. Feinberg, "The Nature and Value of Rights" in *Rights, Justice and the Bounds of Liberty*, p. 153. However, "manifesto rights" are not genuine rights precisely because they lack correlative duties. (See chapter 1.1 and chapter 6.1)

chapter 1.3 I provided the examples of feeding a person who is starving to death before one's very eyes and of assisting the victim of a motor vehicle accident. In such cases, I said, one might have strong duties to a determinate person to provide aid, but because these duties arise contingently, their correlative rights cannot be said to be natural. Sometimes the ascription of a natural right is inappropriate, not because the proposed right is not natural, but because the claim is insufficiently strong to be termed a *right*. Then we ought to refer to it as a natural claim.

I think that it is valuable to distinguish between natural rights and non-natural rights as well as between rights and weaker claims. People have different kinds of interests and interests which require different degrees of protection. Some interests are so important that they require the protection of an absolute trumping claim. Other interests, while very important, can under certain circumstances be overridden. They ought to enjoy the protection of strong but not absolute claims. It is important to distinguish between these different kinds of claim. Having such distinctions does useful conceptual work.

11.2) THE PROBLEM OF CATASTROPHIC SITUATIONS

Consider the following case of Bill on a runaway tram. There is a fork in the track ahead, but on each of the divergent paths there are people who will be killed if the tram takes their path. The brakes have failed so Bill cannot bring the tram to a halt. Furthermore, the tram is in a narrow tunnel so that it is not possible for the people on the track to get out of danger. This is a case of negative rights conflicting with positive rights. If Bill does not steer the tram in either direction, the natural non-human forces will lead it in one direction or the other. Those on the track which the tram would take without Bill's intervention will surely die, but their *negative* rights will not be violated. A negative right cannot be violated by failing to act. Those who would be killed would have positive rights against Bill to steer the tram away from them. However, the only

way Bill can satisfy these rights would be to steer the tram towards the other track thereby killing the people there. To do this would be to violate their negative rights. He would be actively steering the tram towards them when they have a negative right against him not to do so. Thus we have a conflict of positive rights and negative rights. The positive rights are claims to be actively saved and the negative rights are claims not to be killed. Because I have argued that a person's negative right to life is an absolute right (chapter 7.2), Bill must desist from steering the tram from its natural course. In this way he respects the negative rights to life of those on the track which the tram would not naturally take.

My view that Bill must give priority to the negative natural rights over the positive rights is unproblematic if there are an equal number of people on each track or if there is a smaller number of people on the track down which the tram will run without Bill's intervention. However, what about cases in which there is a great discrepancy between the numbers of people on each track and many more lives stand to be lost by not violating rights? What happens if one negative right is in conflict with one hundred positive rights? What happens if, in another case, we can save a million lives, thereby satisfying a million positive rights, by killing a single person and thereby violating a single negative right? The greater the net number of lives that stands to be lost by not violating rights, the more people may feel uncomfortable about adhering to my view that some natural rights (such as the right to life) are absolute and must be respected come what may.

Many people's intuitions suggest to them that the possibility of saving a *mere* majority of lives is not sufficient to justify violation of rights. They think that rights must be at least sufficiently strong to override some conflicting positive rights to be saved. The problem arises when the stakes are sufficiently high and we have what can be called a catastrophic situation. In such situations many people's intuitions do not favour the

non-violation of negative rights. If my view of rights, described in this thesis, has a problem then its problem is that it is too rigid in the face of catastrophic situations. The constrasting view would be that although rights are very strong moral principles, none of them are absolute because they can, at least in theory, be overridden. I want to argue that my view, that some natural rights are absolute, is to be preferred, the problem of catastrophic situations notwithstanding.

However, I first want to digress in order to draw a distinction between two kinds of catastrophic situation. One kind is less problematic, I think. Sometimes a conflict of negative and positive rights is forced on us by natural facts beyond the control of any agent. The case of the tram exemplifies this. On other occasions, the conflict of negative and positive rights is forced on us by other agents. An example here would be if terrorists threatened to blow up a plane full of people unless I kill one person. The hostages have positive rights against me to save them, but the only way I can do so is to violate a negative right and kill a person. Here the conflict of positive and negative rights is imposed by the terrorists. If they withdraw their demands then the conflict disappears. I think that this latter kind of case is less problematic than conflicts forced on us by "nature". We should certainly not open ourselves to moral blackmail by violating negative rights when, for us, these have been forced into a conflict with positive rights by other agents. Gewirth suggests what he calls "the principle of intervening action"[2]. According to this principle, if there is a causal connection between A performing action X and B suffering some harm Y, then A is not morally responsible for Y if the action Z of some agent C intervenes between X and Y, and C knows the circumstances of his action and intentionally or recklessly brings about Y. Many people - notably utilitarians - will reject the principle of intervening action and will see no difference between the two kinds of case I have described. For them it makes no difference how a conflict arises. All that matters is that it exists and one must

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2. A. Gewirth, "Are there any absolute rights" in J. Waldron (ed.), *Theories of Rights*, p. 104.

act in the way that produces most utility. However, for those of us deontologists for whom personal responsiblity does not necessarily include responsibility for the actions of others which we fail to prevent, the distinction I have suggested is important. We will feel less guilty and be less guilty about not violating negative rights when evil agents force a conflict between these and positive rights, than when "nature" forces this conflict. To treat the two kinds of case alike by taking ourselves to be equally responsible for the outcome of both is to be blind to an important difference between the two cases. Nature is not responsible for what it brings about. Other agents are responsible for what they intentionally or recklessly bring about. Because nature is not responsible for what it brings about, the sole control for preventing that which it will bring about is in my hands. Because other agents are responsible for what they intentionally or recklessly bring about, I am not responsible for preventing an outcome which they are free to bring about or not bring about. Thus, the kind of catastrophic situation which I think is most threatening to my view of the strength of rights is where the conflict that we face is not engineered by agents.

If the right to life were very strong but not an absolute moral principle, then its apparently unacceptable rigidity which the catastrophic situation highlights would be avoided. In arguing for the absoluteness of some rights even in the face of catastrophic situations, I am not wanting to minimize the unease we feel about failing to save great numbers of lives where doing so conflicts with absolute negative rights. What I want to show is that although failing to violate negative rights can have catastrophic consequences, viewing certain rights as non-absolute would have such serious costs for a rights theory that we should preserve the absolute view.

I have argued (chapter 4) that individuals are the morally significant unit of existence and that morality should be connected to the well-being of individuals rather than the well-being of society. In chapter 6.2 I argued that if there were no limit to the severity

of the sacrifices that people can be required to make for others then morality would become unhinged from individual well-being. Rights morally protect individuals from having to make some kinds of sacrifice.

Now, the problem with viewing all rights as being non-absolute is that there is not a limit to what sacrifices can be demanded of some people for the benefit of others, in which case morality ceases to be connected to individual well-being. For *any* conceivable sacrifice, there will be some circumstances in which it would be justified. It should be obvious that this is a consequence of viewing all rights as non-absolute. However, to illustrate why this is so I wish to refer back to the diagrams in chapter 6.4. For the sake of convenience, I shall repeat them here in the conclusion:

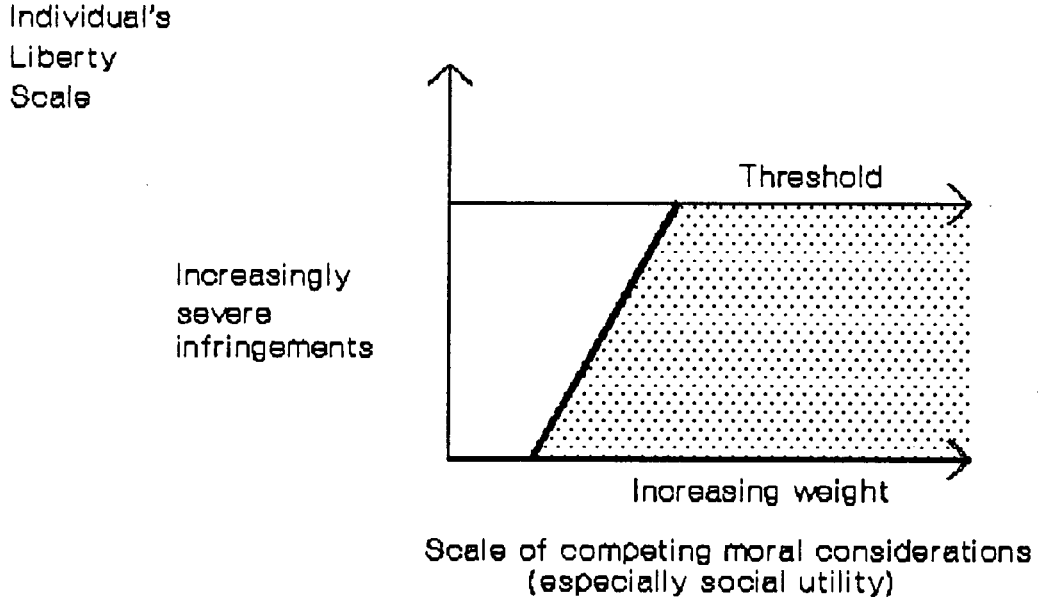

Diagram 1

Diagram 1 is a representation of my view of some rights - those which have absolute strength. There, the threshold at which these rights come into existence is a threshold

on the scale of individual well-being. The threshold marks the severity of sacrifice which cannot be required of the individual.

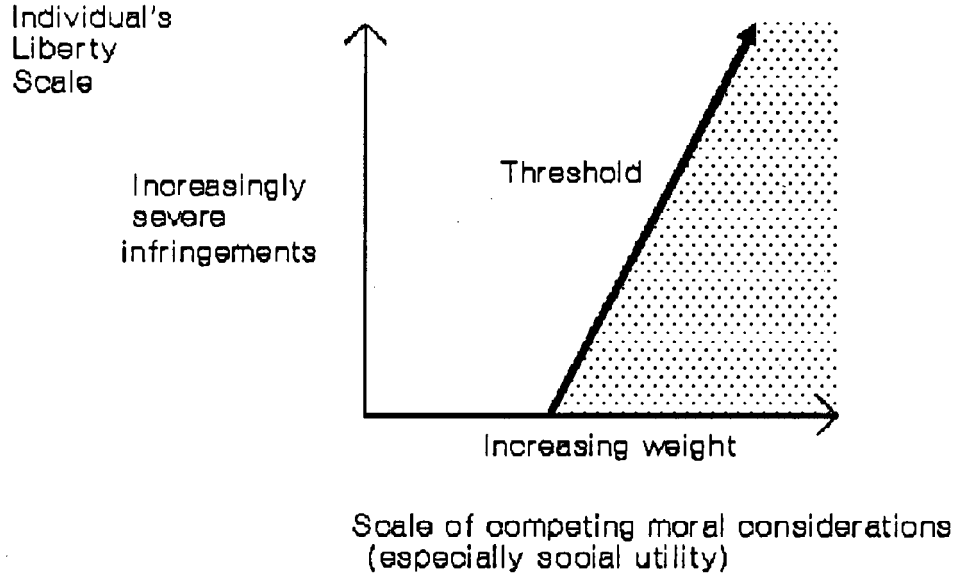

Diagram 2

In Diagram 2 I represented the view of rights which someone like Dworkin holds, a view which I take him to hold true of all rights. Here rights cease to be operative at the threshold. More significantly, the threshold is attached to the scale of social well-being rather than individual well-being. The threshold marks the degree of social benefit which overrides the interests of the individual which rights protect.

Notice that in Diagram 1, the threshold runs parallel to and just as long as the scale of social utility. No matter how much social utility could be produced by infringing individual well-being beyond the threshold, the threshold is there to prohibit such action. The rights represented by diagram 1 are absolute. In Diagram 2 the threshold is at an acute angle to the scale of social well-being and extends as long as that scale.

Thus, no matter how severe an infringement of individual well-being, there is a possible measure of social well-being that can justify that infringement. The rights represented by diagram 2 are non-absolute. Because of the importance of the individual, and the fact that the most important aspects of his well-being cannot be protected unless he is guaranteed against having to make certain sacrifices, I take the view represented in Diagram 2 to be defective in so far as it is a representation of all rights.

In the course of this thesis, I have described what I take to be the various advantages of my theory of rights. The overriding strength which I attribute to some rights is one feature that has much appeal. However, cases of catastrophic situations suggest, at least to many people, that to view these rights as absolute is too rigid. I too feel the gravity of this concern. However, to give up the absoluteness of these rights would entail giving up important propositions about the importance of individuals and the role these rights play in protecting them. This would be even more unacceptable.

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