RIGHTS AND DEPRIVATION

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ABSTRACT

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This thesis is concerned with rights-based justifications for redistribution. Orthodox views are critically examined in three of the chapters. The case against fundamental moral rights to welfare, not derived from other more fundamental moral rights or principles, is pressed in chapter three. Chapter five distinguishes between rights-based and equality-based justifications for redistribution and argues that Ronald Dworkin's idea of a right to equal respect and concern is best understood as an equality-based justification. The enabling model of rights and deprivation is introduced in chapter six. This model says that liberty rights require that others ensure that the right-holder enjoys the means to do what he or she has the right to do as well as not interfere with him or her doing what he or she has the right to do. It is found to break down because it is unable to accommodate the right to do wrong. The other four chapters are concerned with defending an alternative model of rights and deprivation. The groundwork for this alternative model - the development model of rights and deprivation - is laid in chapters two and four. Chapter two presents a person-affecting theory of rights. The two principal conclusions of the development model of rights and deprivation are defended in chapter seven. It is argued, first, that from both of the abstract moral rights to liberty introduced in chapter four flow certain derivative rights against others to have one's needs met and, second, that the state is required to promote and protect particular forms of culture as well as to meet certain sorts of personal needs including special needs, collective needs, and the unmet personal needs that arise when the prevailing methods of meeting those needs breaks down. The final chapter discusses two general issues relating to the development model of rights and deprivation.

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Lesley Jacobs
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CHAPTER ONE

INTRODUCTION

Today, it is widely believed that justice requires, among other things, that the state come to the aid of those living within its boundaries who suffer from unmet physical needs or other forms of deprivation. The redistributive implications of this belief have provoked controversy, for some people doubt that it is possible to justify any state action which involves the redistribution of resources from some citizens to others. This essay is concerned with rights-based justifications for redistribution. The most important thesis I shall advance here is that an appeal to certain abstract moral rights to liberty can justify that redistribution from those not in

need to those in need which is implied by the belief that the state is required, as a matter of justice, to provide certain remedies for deprivation.

The role for the state that I am proposing to explicate and defend is very similar to that ordinarily associated with the modern welfare state. The modern welfare state characteristically pursues two sorts of policies.[1] There are, first of all, its economic policies whereby instruments of macroeconomics and microeconomics are used to regulate the supply side of the capitalist economic market. Secondly, there are its redistributive social policies. Typical social programmes of the welfare state include a health care service, an education system, housing schemes, and income supplements for low earners. It is commonly claimed that these social policies are motivated by a concern for those in need. It is difficult to say whether or not this claim is correct. The fact that the redistributive social policies of the modern welfare state co-exist with capitalism has led many people to express doubt about the claim that such policies

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1 Albert Weale, *Political Theory and Social Policy* (London, MacMillan, 1983), pp. 2-7.

are motivated, in the first instance, by a concern for the needy. Recently, for example, it has been argued that the primary function of the modern welfare state is to 'legitimate' advanced capitalist societies by creating and maintaining the conditions for social harmony. Redistributive social policies supposedly improve the lot of the unemployed and the earners of a low wage - the biggest losers under capitalism - in such a way as to ensure that they do not organize and challenge the dominance of capitalists. I suspect that there is some truth in this critical analysis of the function of the modern welfare state. Nevertheless, it does not establish that there is anything inherently wrong with the redistributive social policies of the modern welfare state. It only indicates a misgiving about their operation in the context of a capitalist economy.

The fact that the role of the welfare state is so familiar and that it is generally thought to be in keeping with a well-received view about distributive justice suggests the particular perspective of the argument in this essay. Consider a distinction between two kinds of philosophical approaches to political morality, the

descriptive approach and the revisionary approach.[2] The descriptive approach seeks to explain and justify well-received views about political morality. The revisionary approach, in contrast, challenges those views. Since my principal aim is to ground a widely held belief about what justice requires, the present essay should not be regarded as an endeavour in revisionary political philosophy. That is not to say, however, that well-received views about political morality go unchallenged. An important theme I shall develop is that the orthodox rights-based justifications for redistribution are flawed and that an alternative rights-based theory is needed.

This revisionary theme is developed in chapters three, five, and six. The object of chapter three is to cast some doubt on the proposition that certain fundamental moral rights to welfare, not derived from other more fundamental moral rights or principles, are capable of justifying redistribution. I turn to Ronald Dworkin's well-known idea of the right to equal respect

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2 See Derek Parfit, *Reasons and Persons* (Oxford, Oxford University Press, 1984), p. x.

and concern in chapter five. There, I distinguish between rights-based and equality-based justifications for redistribution. What I show is that the right to equal respect and concern is unable to ground in-kind redistributive transfers. In chapter six, I focus on what I shall call *the enabling model of rights and deprivation*. This model says that liberty rights held against others require not only non-interference with the right-holder but also that he or she enjoys the means to do what he or she has the right to do. I argue that this model breaks down because it is unable to accommodate the right to do wrong.

I defend as an alternative what I shall call *the development model of rights and deprivation*. The groundwork for that model can be found in chapters two and four. In chapter two, I defend a person-affecting theory of rights which holds that the ascription of moral rights should ultimately reflect a fundamental concern either for what happens to the right-holder or for the ability of the right-holder to determine what will happen. Rights are valuable on this theory because they give people an element of control over certain dimensions of their lives. In chapter four, I address the important question of what sort of rationale can be offered for ordinary liberty

rights such as the right to freedom of expression, the right to free religious worship, and the right to practice one's sexual orientation. I distinguish between two rival rationales, the agency conception of liberty rights and the integrity conception of liberty rights. Both conceptions account for the importance of having control over a certain dimension of one's life. They can be said to give rise to respectively an abstract moral right to agency and an abstract moral right to integrity. And from these abstract moral rights flow the derivative moral rights that are directly relevant to concrete policy issues.

My defence of the development model of rights and deprivation comes in chapter seven. The central insight of that model is that both the agency conception of liberty rights and the integrity conception of liberty rights are committed to the value of being a certain kind of person. Moreover, this commitment justifies the conclusion that certain derivative rights to have one's needs met flow from and are a natural extension of both the abstract right to agency and the abstract right to integrity. The state is required to meet needs in those instances when coercive collective provision is warranted.

Chapter eight addresses two final issues. First, I

defend the development model of rights and deprivation against the objection that workfare is a better way to meet needs than redistributive transfers. Secondly, I show that the development model of rights and deprivation is more promising than distributional equality, on Dworkin's interpretation, when it comes to justifying the protection and promotion of culture.

The conclusions reached by the development model of rights and deprivation are not in themselves surprising. They are, however, ordinarily associated with the enabling model of rights and deprivation. This association is rather unfortunate because, as I demonstrate in chapter six, the enabling model of rights and deprivation is unsound. The development model of rights and deprivation is, in my view, important because it offers a very different route to a similar conclusion.

The development model does not, however, purport to justify redistributive transfers as extensive as those claimed by defenders of the enabling model. Some might think that this makes it an unattractive basis for redistribution. But it is important to keep in mind that the rights-based justification for redistribution I am offering here - the development model - is intended as only a partial theory of redistribution. It should, in my

view, be complemented by an equality-based justification for redistribution. The development model of rights and deprivation justifies in-kind redistributive transfers that are designed to meet needs and, thus, remedy deprivation. Equality-based redistribution, unlike rights-based redistribution, is not designed to meet needs. Instead, it aims to make people equal with regard to the resources they have to pursue their life-plans. Ideally, in a just society, both sorts of redistribution will receive recognition and be institutionalized.

CHAPTER TWO

A PERSON-AFFECTING THEORY OF RIGHTS

Introduction

1. All rights-based justifications for redistribution face a serious and immediate problem. The problem is that there is no concensus on the answers to two closely related questions about rights: (1) What do we mean when we say that someone has a moral right? and (2) What moral rights do we have? The second question is addressed in the three chapters that follow this one. The principal concern in this chapter is with the first question. It is my intention to outline what I shall call the person-affecting theory of rights. The central tenet

of that theory is that the ascription of moral rights should ultimately reflect a fundamental concern either for what happens to the right-holder or for the ability of the right-holder to determine what will happen.

It is important to keep in mind that the scope of the theory of rights I shall present is restricted in two respects. The first restriction is that it is intended as a theory of moral rights, not legal rights. I am assuming here that the basic difference between legal rights and moral rights is that legal rights, unlike moral rights, can be said to exist simply in virtue of their recognition in a legal system. Thus, legal rights need not reflect a concern either for what happens to the right-holder or for his or her ability to determine what will happen. The second restriction on the scope of the theory of rights I shall defend is that it is intended only as an account of rights as, in Hohfeld's sense, claims.[1] A claim right is a justified claim or entitlement held against someone else to meet some requirement. The relevant requirement might be negative in the sense that it can be fulfilled by

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1 Wesley Hohfeld, *Fundamental Legal Conceptions*, ed. Walter W. Cook (Westport, Conn., Greenwood Press, 1964), p. 38.

forbearance or it might be positive in the sense that it can be fulfilled either by the performance of some action or by the provision of some good. This requirement can also be referred to as a duty. The reason for concerning myself with a theory of rights restricted to claim rights is that only claim rights - as opposed to liberties, immunities, and powers - can justify the redistributive implications of the belief that justice requires the state to help meet needs.

An Overview of the Theory

2. Consider a moral right requiring you not to assault me physically. What gives this right its special moral force? One explanation might be that it is somehow wrong *for you* to act so as to assault me. The wrongness of the act can be said to reside in your role as the agent, and not fundamentally in its effects on me. Let us call this a deontological account of rights. Distinct from it is a person-affecting account. On this alternative explanation, the wrongness of the act resides in the effect of your assault on me, the victim. The deontological account is puzzling. It might well sometimes be the case that the wrongness of an act does

reside in your role as the agent. In the case of physical assault, however, I think we are immediately inclined to focus our attention on the effects on the victim. We are, in other words, drawn to some sort of person-affecting account of rights. This is reinforced by the fact that the language of rights seems to be well suited to person-affecting accounts. It is *my* right not to be physically assaulted by you and not simply the case that you have a duty not to assault me physically.

It is possible, I think, to distinguish between two basic kinds of effects on a person which might underlie the ascription of moral rights.[2] One concern is with *what happens* in a given situation to the victim. This is quite different from having a concern for the ability of the right-holder *to determine what will happen* in a given situation. A right against physical assault might be thought to be motivated by either of these two concerns. It could be motivated by a concern to protect him or her

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2 Thomas Scanlon, 'Rights, Goals, and Fairness' in *Consequentialism and Its Critics*, ed. Samuel Scheffler (Oxford, Oxford University Press, 1988), p. 76. See also Michael Slote, *Common-Sense Morality and Consequentialism* (London, Routledge & Kegan Paul, 1985), pp. 2, 10-11, & 31-34.

from being physically assaulted. Alternatively, protecting a person from physical assault could be motivated by a concern for its effects on his or her ability to determine what will happen. From this perspective, what happens to him or her - the actual physical assault - is of secondary importance to the effects it has on his or her ability to determine what will happen.

It is a mistake to try to conflate these two concerns: on the one hand, the concern for what happens to a person and, on the other hand, the concern for a person's ability to determine what will happen. This is because these two concerns are quite distinct and can even come into conflict. An experience described by John Fowles in his novel *The Magus* illustrates such a conflict. Conchis, a principal character in Fowles's novel, had been the mayor of a small village on a Greek Island during the Second World War. During the German occupation, the Greek Resistance organized a successful attack on the occupying forces. Eventually two of the guerrillas were traced to Conchis's village and captured. The Nazi commander posed the following dilemma for Conchis: either he Conchis club the two guerrillas to death or the Nazis would shoot 80 innocent hostages from the village as well

as Conchis and the two guerrillas. Conchis chose not to club the guerrillas to death, much to the dismay of the onlooking relatives and friends of the hostages. For he felt repulsed by the thought of committing that act - it was contrary to his deepest held principles of morality. Amazingly, by some miracle, and very much beside the point, Conchis survived the subsequent slaughter of the villagers by the Nazis.

There are in Fowles's story many possible points of conflict. Most obvious is the one faced by Conchis: Should he waive his moral principles in order to save himself and the 80 villagers? Consider too the situation of the guerrillas: Should they have encouraged Conchis to impose on them a long and painful suffering instead of a merciful quick death by bullets in order to save the lives of the 80 villagers? Although the viewpoints of Conchis and the guerrillas do indeed illustrate conflict, they do not illustrate conflict between a concern for what happens to a person and a concern for a person's ability to determine what will happen. For that we must turn to the onlookers. Suppose, for argument's sake, that these onlookers were in a position such that they could force Conchis to act in one way or the other. These onlookers are obviously concerned about what happens to the hostages

and indeed Conchis. We might even think that the hostages and Conchis have a right not to be shot by the Nazis and that, therefore, the onlookers are required to force Conchis to beat the guerrillas to death. Yet, on the other hand, these onlookers recognize the importance of allowing Conchis to determine what will happen. He has a right not to be forced to kill anyone himself even if it means that he himself will be killed.[3] This then requires forbearance on the part of the onlookers. The upshot is a conflict between two person-affecting concerns, neither reducible to the other.

Now, it is my view that the ascription of a moral right to an individual should ultimately reflect one or the other of these two person-affecting concerns. The dual role of rights, on this view, is to confer on an individual certain *discretions* to determine what will happen and certain *protections* against what happens to him or her. The importance of these discretions and protections rests on what they bring about. And what they can be said to bring about are, first and foremost, an

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3 Implicit here is the idea that a person can have a right to do that which is the morally wrong thing to do. The idea of a right to do wrong is defended in chapter six.

element of control for the right-holder over certain dimensions of his or her life. The person-affecting theory of rights I am here proposing holds that the distribution of moral rights to people is principally a matter of distributing to them control over certain factors in their lives. The fact that rights help to bring about control over some dimensions of one's live is what makes them valuable, rather than that they are signs of respect or point out moral worth.[4]

3. This person-affecting theory of moral rights is incompatible with any utilitarian account of rights. The reason for this is not so much that the rights it embraces cannot be embraced by a sophisticated utilitarian account but rather because those rights are valued on non-utilitarian grounds. All utilitarians are committed to the view - welfarism - that judgements about the goodness of a state of affairs must be based exclusively

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4 Scanlon, 'Rights, Goals, and Fairness', p. 89. For an emphasis on rights as signs of respect and moral worth, see Gregory Vlastos, 'Justice and Equality' in *Theories of Rights*, ed. Jeremy Waldron (Oxford, Oxford University Press, 1984), pp. 51-58.

on the welfare levels of individuals in that state of affairs, where welfare is understood in terms either of preference-satisfaction or states of consciousness.[5] It follows that utilitarians can value rights only on welfarist grounds. Since the theory of rights I propose says that rights are valuable because they bring to the right-holder an element of control over his or her life and not because they promote his or her welfare or indeed anyone else's, it cannot be brought into the fold of utilitarian theory.

The present theory also differs from the well known choice theory of rights defended by H.L.A. Hart. Hart says that the distinctive feature of a duty grounded on a right is that the right-holder has the power to waive that duty or demand that it be fulfilled.[6] Quite clearly the

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5 Amartya Sen, 'Utilitarianism and Welfarism' *Journal of Philosophy 76* (1979), p. 468.

6 H.L.A. Hart, 'Are There Any Natural Rights?' in *Theories of Rights*, ed. Jeremy Waldron (Oxford, Oxford University Press, 1984), p. 82. See also Hart's 'Legal Rights' in *Essays on Bentham* (Oxford, Clarendon Press, 1982), pp. 183-86. Hart admits on pp. 189-91 & esp. 192 of 'Legal Rights' that the choice theory is unable to explain what is distinctive about all rights. This theory as at least a partial theory of rights has also been defended by Carl Wellman, *Welfare Rights* (Totowa, N.J., Rowman & Allanheld, 1982), pp. 7-21 and Alan Gewirth, 'Why Rights Are Indispensable' *Mind 85* (1986), p. 336.

importance of rights on this theory is the element of control they give to the right-holder. And in this respect it resembles the person-affecting theory of rights. But there is a very important difference in emphasis. Hart emphasizes that a right confers on the right-holder control over how others will act whilst I have emphasized that what makes rights valuable is that they confer on the right-holder control over certain factors in his or her own life.[7] These two forms of control may sometimes coincide but they are not identical.

The contrast to the so-called interest theory of rights is more subtle. The interest theory holds not that the right-holder can necessarily waive the duty correlated with the right but rather that some interest of the right-holder is a sufficient basis for that duty.[8] This theory differs from the person-affecting theory of rights in at least two respects. The first relates to the fact that the interest theory of rights is subject to a series

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7 Hart, 'Are There Any Natural Rights?', p. 80.

8 This theory of rights is defended by Joseph Raz in *The Morality of Freedom* (Oxford, Clarendon Press, 1986), chapter seven. Another aspect of Raz's theory is criticized in the next chapter.

of counter-examples involving paternalistic measures.[9] Paternalistic measures are motivated by a concern for a person's well-being or interests but are contrary to his or her personal wishes. For example, a publican has the duty not to serve a minor even when - especially when - the minor prefers to be served. The well-being or interests of the minor is in this case a sufficient reason to hold a duty against the publican. Yet, it does not make sense to say what would thus follow on the interest theory of rights, namely, that the minor holds a right not to be sold alcohol. For the person-affecting theory of rights, this case poses no problems. Since the rationale for the publican's duty not to serve the minor alcohol is not that it will bring to the minor an element of control over some dimension of his or her life, we should not ascribe to the minor a right not to be served alcohol. The more general point is that the person-affecting theory of rights, unlike the interest theory of rights, is able to explain the common-sense view that paternalistic measures do not generate rights for those whom they are

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9 Tony Honore, 'Rights and the Rightless' in *Making Law Bind* (Oxford, Clarendon Press, 1987), pp. 241-42.

designed to protect.

The second respect in which the interest and person-affecting theories of rights differ can be revealed if we consider whether or not the person-affecting theory is simply a particular variation of the much broader interest theory. How one responds to this question depends in part on whether or not having the ability to determine what will happen is counted among a person's interests. A person's interests seem to have two distinct components. There are, on the one hand, interests that are biologically determined and, on the other hand, interests that stem directly from the sorts of personal projects, goals, aims, and commitment one has. (In order to simplify what follows, I shall refer to all of these as personal projects.) Ordinarily, the ability to determine what will happen is an important aspect of being able to realize one's personal projects. Quite clearly, though, sometimes the requirements of a biological interest can conflict with the realization of a personal project. This is in part the dilemma faced by Conchis in Fowles's story. The interest theory of rights seems ambivalent about which kind of interest should have priority.[10] The

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10 Raz, *The Morality of Freedom*, pp. 291-92.

person-affecting theory of rights holds that sometimes having an element of control over a dimension of one's life is more important than furthering one's biologically determined interests; when exercising one's right conflicts with what is in one's (biological) interests, exercising the right should have priority. The difference here between the interest theory and the person-affecting theory can be expressed in a different way. Providing a person with an element of control over a dimension of his or her life may result in him or her deciding to sacrifice his or her interests to benefit someone else.[11]

Prerogatives and Restrictions

4. The person-affecting theory of rights offers an account of what is valuable about rights. It emphasizes that rights are valuable because they bring to the right-holder an element of control over certain dimensions of his or her life by conferring on him or her certain discretions and protections. It might be objected,

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11 For this emphasis, see Slote, *Common-Sense Morality and Consequentialism*, pp. 11 & 32-33.

however, that this theory of rights fails to explain the *agent-centred* (or *agent-relative*), as opposed to *agent-neutral*, character of rights. The distinction implicit here between the agent-centred and the agent-neutral character of moral principles is clearest when we focus on reasons for action.[12] An agent-neutral reason for action does not include an essential reference to the person who has it; it is a reason for action for anybody. An agent-centred reason, in contrast, does include an essential reference to the person who has it; it is a reason for him or her. The principle that in our actions we should aim to minimize the amount of deprivation in the world is agent-neutral in character; reducing the amount of deprivation in the world is a reason for action no matter who you are. The principle that we should try to realize our own projects is agent-centred in character. The fact that I have some project P that requires for its realization some action x

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12 See Thomas Nagel, *The View From Nowhere* (Oxford, Oxford University Press, 1986), pp. 152-153; Derek Parfit, *Reasons and Persons* (Oxford, Oxford University Press, 1984), pp. 142-144; and Samuel Scheffler, 'Introduction' to *Consequentialism and Its Critics*, p. 10.

means that there is reason for me to do x; there is an essential reference to me as the person who has the reason for action. This is because for someone who does not have the project P, there may be no reason to do x.

The objection that the person-affecting theory of rights fails to explain the agent-centred character of rights is, as it stands, imprecise because it fails to specify in what sense rights are supposed to be agent-centred. There are, I think, two very different perspectives from which rights might be said to be agent-centred: either from the perspective of the right-holder or from the perspective of the person or persons against whom the right is held. In my view, it is the fact that rights appear to be agent-centred from the perspective of the person against whom the right is held which poses problems for the person-affecting theory of rights. This problem I shall address in the next part of the chapter. In this part, my concern is with clarifying in what respects rights, on the person-affecting theory, can be said to be agent-centred from the perspective of the right-holder.

5. Moral rights have often been thought to be antagonistic to utilitarian approaches to morality and

politics. The most comprehensible reason for thinking this is that moral rights seem to set limits on how far the interests of specific individuals can be sacrificed for the general good where the general good is understood as the aggregate of what is in the interests of all individuals in a society. The idea that rights function in this way is emphasized by John Rawls: 'the rights secured by justice are not subject to political bargaining or to the calculus of social interests.'[13] A similar view of rights is advanced by John Mackie: 'the maximizing of utility may turn out to require that [a person's] well-being should be sacrificed, without limit, in order to promote that of others. It is this that a rights-based theory is meant to bar.'[14] The dual role of rights as *protections* and *discretions* emphasized by the person-affecting theory of rights corresponds to two different ways in which rights might limit the requirements of utilitarianism.

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13 John Rawls, *A Theory of Justice* (Oxford, Oxford University Press, 1972), p. 4.

14 J. L. Mackie, 'Rights, Utility, and Universalization' in *Utility and Rights*, ed. R. G. Frey (Oxford, Basil Blackwell, 1985), p. 87.

It is unproblematic that rights as protections restrict utilitarianism to the extent that they function so as to set limits on how far a person's interests can be sacrificed for that which is in the general good. This is evident if we consider the well known case of torturing an innocent man in order to further the general good. Although torture in this situation seems a gross example of unfairness, an unrevised utilitarianism would recommend it. Moral rights can protect the innocent man from this happening to him. Rights as protections can, therefore, be said to be agent-centred in the sense that in, say, the case of torture, the right-holder is protected from torture not because it is in the general interest to have that protection but because of its effects on the right-holder; ascribing that right to someone can make sense only if the agent-neutral reason for torture - that it would further the general good - is disregarded.

It might be less clear how rights as discretions set limits on the requirements of utilitarianism. Instructive on this matter is Samuel Scheffler's book *The Rejection of Consequentialism*. Scheffler is concerned with what he calls 'act-consequentialism' by which he means a theory of personal morality that, first, specifies how overall, from

an impersonal point of view, states of affairs are to be ranked from best to worst and, secondly, requires that individual agents act so as to produce the highest-ranked state of affairs possible.[15] I have already pointed out above that one basic component of utilitarianism is welfarism; I would now add that another basic component is act-consequentialism.[16] Scheffler concentrates on a particular challenge made to consequentialism by some modern critics, most notably John Rawls and Bernard Williams, which he summarizes in a single statement: 'people have certain distinct projects and commitments that they would not be willing (and should not always be required) to voluntarily abandon in order that the best overall state of affairs may be achieved.'[17] His interest is in seeing how far one has to depart from consequentialism in order to accommodate the main thrust

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15 Samuel Scheffler, *The Rejection of Consequentialism* (Oxford, Clarendon Press, 1982.), p. 1.

16 Sen, 'Utilitarianism and Welfarism', p. 464. The third component is sum-ranking: one collection of welfare levels of individuals is at least as good as another if and only if it has at least as large a sum total.

17 Scheffler, *The Rejection of Consequentialism*, p. 12.

of this challenge.

Scheffler distinguishes between two theoretical devices, an agent-centred prerogative and an agent-centred restriction, that might be appealed to by a consequentialist in order to deal with this challenge. An agent-centred prerogative would stipulate that a person is not required to produce the best overall state of affairs at the expense of his or her own projects or commitments but only that it is permissible to do so. An agent-centred restriction would, in contrast, stipulate that it is sometimes impermissible to produce the best overall state of affairs. Scheffler maintains that the latter of the two devices is the more familiar one. Nevertheless, he argues that an agent-centred prerogative better captures the root intuition of the challenge to consequentialism, for that challenge requires only that people be allowed to pursue their own projects and commitments when this conflicts with what is the best overall state of affairs, not that they must.[18]

This argument can be applied to Fowles's story of

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18 Scheffler, *The Rejection of Consequentialism*, esp. pp. 85n2 & 93-98.

Conchis. Since Conchis is very deeply repulsed by the thought of clubbing the guerrillas to death, we might say that it is not required of him to do so despite the fact that the best overall state of affairs would be one where he did club the guerrillas to death. But, although it is not required of Conchis to produce the best overall state of affairs, this does not mean that it is impermissible for him to do so. To use Scheffler's phrase, it is Conchis's prerogative whether or not to produce the best overall state of affairs.

Now, Scheffler's idea of an agent-centred prerogative may appear to capture the notion of rights as discretions. For quite clearly that prerogative leaves it to the discretion of the agent whether or not to act according to his or her personal commitments, goals, etc. when they conflict with the requirements of utilitarianism. We can thus understand how rights as discretions set limits on utilitarian requirements. The attractiveness of construing rights as discretions in terms of agent-centred prerogatives is reinforced by two very important claims Scheffler makes on behalf of prerogatives. First of all, he claims that a commitment to agent-centred prerogatives is less of a departure from consequentialism than a commitment to agent-centred restrictions. This claim, if

true, indicates that an utilitarian might be more easily able to adopt a concern for a person's ability to determine what will happen than is commonly thought. Secondly, Scheffler argues that agent-centred prerogatives are easier to defend than agent-centred restrictions.

It is my view, however, that it is a mistake to construe the role of moral rights as discretions emphasized by the person-affecting theory of rights in terms of agent-centred prerogatives. This is clear once we see that the two claims Scheffler makes on behalf of prerogatives are incorrect if those prerogatives are understood as claim rights. What Scheffler seems to completely overlook is that all such agent-centred prerogatives are double-edged: although they make it permissible for the agent to either produce or not produce the best overall state of affairs, they also *restrict* other agents in the sense that those other agents cannot force the agent holding the prerogative to produce the best overall state of affairs. I describe this as a restriction on other agents because, in order for, say, Conchis's prerogative to make sense, it must be the case not that it is permissible for the onlooking villagers not to interfere with his choice but that it is required of them not to interfere, i.e. it is required of them to act

so as to not force Conchis to kill the guerrillas and thus produce the best overall state of affairs. For any agent to have a prerogative to produce the best overall state of affairs or not, it is also necessary that there be restrictions placed on other agents in a form that requires them not to force that agent to produce the best overall state of affairs.[19] The elementary point I am making is that any claim right construed as a prerogative entails restrictions. And this implies both that a commitment to prerogatives is no less of a departure from act consequentialism than a commitment to restrictions and that a defence of prerogatives is just as demanding as a defence of restrictions since any adequate defence of prerogatives must defend the restrictions entailed by

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19 One response to my line of argument might be to emphasize the 'agent-centred' nature of the restrictions Scheffler is criticizing. The claim would have to be that these restrictions are different in kind from the ones I am suggesting act as constraints on the onlooking villagers in Fowles's story of Conchis. The problem I have with this response is that it is not abundantly clear to me what exactly 'agent-centred' is then supposed to signify. Scheffler says on p. 3 of *The Rejection of Consequentialism* that agent-centred restrictions 'have the effect of denying that there is any non-agent-relative principle for ranking overall states of affairs from best to worst such that it is always permissible to produce the best available state of affairs.' Clearly, however, the restrictions on the villagers have this effect. Why then shouldn't they count as agent-centred restrictions?

them.

This point can be put in another way. Since the rights that concern the person-affecting theory of rights are, in Hohfeld's sense, claim rights, the notion that some of those rights are discretions means that they are the basis for holding others to certain requirements. It follows that Scheffler's idea of an agent-centred prerogative is unable to capture the notion of rights as discretions because in order to maintain the distinction between restrictions and prerogatives, Scheffler must deny that prerogatives entail restrictions.

Despite the problem of invoking Scheffler's idea of agent-centred prerogatives to explain rights as discretions, we do have a clearer idea of how rights as discretions can be said to be agent-centred from the perspective of the right-holder, for they leave it at the discretion of the right-holder whether to pursue his or her projects or to maximize the general good, and they require others not to interfere with him or her exercising that choice.

Rights and Exclusionary Reasons

6. From the perspective of those against whom the right is held, the apparent agent-centred character of moral rights is more troublesome. The fact that there is a problem has been emphasized by Thomas Nagel who says,

> Any theory of rights must explain this structural feature...It is of the first importance that your right not to be assaulted is not a right that everyone do what is required to ensure that you are not assaulted. It is merely a right not to be assaulted, and it is correlated with other people's duty not to assault you.[20]

Nagel's point is that a theory of rights must be able to explain why the duty grounded on the right is restricted in the sense that its concern seems to be only that you the agent not assault the right-holder and does not extend the scope of that concern to anyone else assaulting the right-holder. The fact that the scope of the right is limited to you yourself not assaulting the right-holder is what gives the right its apparent agent-centred character.

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20 Thomas Nagel, 'Libertarianism without Foundations' in *Reading Nozick*, ed. J. Paul (Oxford, Basil Blackwell, 1982), p. 198.

As Nagel has put it, the puzzle is: 'How can there be a reason not to twist someone's arm which is not equally a reason to prevent his arm from being twisted by someone else?'[21] This puzzle I shall refer to as the limited scope of rights puzzle.

Not everyone would agree that a theory of rights must explain this puzzle. For example, Amartya Sen implicitly denies that the scope of rights is limited in the relevant way in his well-known article 'Rights and Agency'. Sen devises in that article a moral problem to test conventional views about whether and how we should trade off the rights of different people. Ali is an immigrant from East Africa who has built up a successful shop in London. Unfortunately, a group of racists are planning to bash up Ali. His friend Donna learns about these plans. Her problem is that to warn Ali she must violate the rights of someone else. That this is a case of trading-off the rights of different people depends on one very important premiss: 'By not stopping the bashers, she [Donna] would rob Ali of one of his most elementary

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21 Thomas Nagel, *The View From Nowhere*, p. 178.

rights.'[22] In order to make sense of this premiss, Sen has to believe that Ali's right against assault requires of Donna not only that she herself not assault Ali but also that she act so as to prevent others from assaulting him as well. Clearly, though, this crucial premiss is deeply counter-intuitive. I cannot help feeling that Sen has misdiagnosed the problem Donna faces. It is not that Donna would be literally robbing Ali of his rights if she did not stop the bashers, but rather that she would not be fulfilling her duty as his friend. Indeed, it is hard to understand how anyone could intelligibly say that Donna would be robbing Ali of his rights. Thus, I am very sceptical of those who deny Nagel's claim that rights such as the right against assault are limited in their scope.

Notice that what was above referred to as a deonotological account of rights does not have a problem explaining this structural feature of rights since it holds that the wrongness of assault resides in the role of the assaulter as the agent and not fundamentally in its effects on the victim. This contrasts to the

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22 Amartya Sen, 'Rights and Agency' in *Consequentialism and Its Critics*, ed. S. Scheffler (Oxford, Oxford University Press, 1988.), p. 195.

person-affecting theory of rights which holds that the wrongness of assault does reside in its effects on the victim. Why, it might be asked of this theory, if underlying the ascription of my right held against you not to be assaulted is a concern with the effects of that assault on me, shouldn't you be just as concerned when someone else assaults me? In other words, an answer to the limited scope of rights puzzle cannot lie in a simple examination of the wrongness of assault since if our concern is to reduce assault, then we would also be required to come to the right-holder's aid should someone else assault him or her. Some explanation independent of the person-affecting theory of rights but capable of complementing that theory is needed in order to resolve the limited scope of rights puzzle.

7. It is commonly thought that one or the other of two closely related moral doctrines - the principle of double effect and the doctrine of doing and allowing - can explain the limited scope of rights puzzle. It is my view that neither doctrine offers a successful explanation of that puzzle.

Nagel seems to think that the principle of double

effect can account for the limited scope of rights.

> The principle [of double effect] says that to violate deontological constraints [requirements limited to not assaulting or interfering with a person oneself] one must maltreat someone else intentionally. The maltreatment must be something that one does or chooses, either as an end or as a means, rather than something one's actions merely cause or fail to prevent but that one doesn't aim at.[23]

The problem with Nagel's suggestion is that the principle of double effect does not in fact explain what he thinks it does.[24] This is evident if we reconsider Sen's example of the bashers. Suppose that instead of Donna learning about the bashing episode, a business rival of Ali's learns about the pending assault and does nothing to help Ali, thinking to himself, 'If I don't warn Ali and he gets bashed up so badly that he has to go into the

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23 Nagel, *The View From Nowhere*, p. 180.

24 See G.A. Cohen's unpublished note 'On Nagel on Acts/Omissions and Double Effect'. H.L.A. Hart in 'Intention and Punishment' in *Punishment and Responsibility* (Oxford, Clarendon Press, 1968.), p. 123, has also argued that the doctrine of double effect does not have the explanatory power often attributed to it.

hospital for a while, then I shall be poised to take over his business.' Although in this altered case the failure to aid Ali - the supposed maltreatment - is driven by an evil intention, it still is deeply counter-intuitive to say that this business rival is robbing Ali of his rights by not stopping the bashers. Thus, it is hard to see how focusing, as the principle of double effect would recommend, on the intentions underlying the failure to come to a person's aid when someone else is violating his or her rights explains the limited scope of rights puzzle.

A similar point can be made about the relevance of the doctrine of doing and allowing. The doctrine of doing and allowing has been formulated in many different ways. Rather than surveying the many possibilities, it is sufficient for our purposes to use the recent formulation of this doctrine by Warren Quinn. According to Quinn, this doctrine says, 'in situations of conflict it is often more acceptable to let a certain harm befall someone than actively to bring the harm about.'[25] Quinn believes that this doctrine is correct and that his formulation is

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25 Warren S. Quinn, 'Actions, Intentions, and Consequences: The Doctrine of Double Effect', *Philosophy and Public Affairs 18* (1989), p. 334.

capable of meeting any criticisms that might be directed at it.[26] It is my intention to show that the doctrine of doing and allowing cannot explain the limited scope of rights.[27]

The distinction that is central to my argument is between conflict examples and comparison examples. This distinction has been explained by H.M. Malm:

> Comparison examples require us to assess the acts in question *independently* of one another. The task is to

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26 For his defence of it, see 'Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing', *Philosophical Review 98* (1989), esp. pp. 298-312. The other notable defender of this doctrine is Philippa Foot. See 'The Problem of Abortion and the Doctrine of the Double Effect' in *Virtues and Vices* (Oxford, Basil Blackwell, 1978), esp. 26-29. Jonathan Glover in *Causing Death and Saving Lives* (Hammondsworth, Penguin Books, 1977) has formulated some of the most powerful criticisms. It is significant for our discussion that Glover on p. 92 summarizes the doctrine, which he calls the doctrine of acts and omissions, in the following way: 'in certain contexts, failure to perform an act, with certain foreseen bad consequences of that failure, is morally less bad than to perform a different act which has the identical foreseen bad consequences.' Notice that, unlike defenders of the doctrine such as Quinn and Foot, Glover does not restrict the scope of the doctrine to situations of conflict.

27 Charles Fried in *Right and Wrong* (Cambridge, Mass., Harvard University Press, 1978) esp. pp. 110-112, appeals to this doctrine to explain what I have called the limited scope of rights.

> determine whether the acts, which are occurring in similar situations, deserve equivalent moral assessments. Conflict examples, on the other hand, require us to assess the acts in question in light of their being the *alternatives* of an agent. The task here is to determine whether there are moral grounds for preferring one act to the other given that one act must occur.[28]

It is, I think, an elementary but nevertheless very important feature of Quinn's formulation of the doctrine of doing and allowing that the difference between doing and allowing is held to be morally relevant only in situations of conflict or in what Malm calls conflict examples. The virtue of restricting the scope of the doctrine of doing and allowing to conflict examples is that it allows defenders of that doctrine to side-step difficult counter-examples.[29] Consider, for example, the fact that very few people deny the moral equivalence of

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28 H.M. Malm, 'Killing, Letting Die, and Simple Conflicts', *Philosophy and Public Affairs 18* (1989), p. 242.

29 The vice is that it is also silent on certain examples which give the doctrine of doing and allowing some of its initial plausibility. For example, few people think that failing to come to the aid of starving people in the developing world is morally equivalent to sending them poisoned food.

allowing one's child to die of starvation and actually poisoning him or her. This counter-example defeats the claim that doing and allowing, with the identical foreseen consequences, are never morally equivalent. Since, however, what is at issue here is a comparison example, not a conflict example, Quinn can deny its relevance to his account of the doctrine of doing and allowing. The stipulation that the doctrine of doing and allowing has nothing to say about comparison examples means, however, that this doctrine cannot explain the limited scope of rights puzzle. For that puzzle is concerned with comparing the moral assessment of two similar situations and not with the moral assessment of two alternatives in a situation of conflict where one or the other must occur.

8. The response I shall propose to the limited scope of rights puzzle does not require the truth of any general moral doctrine such as the doctrine of acts and omissions or the principle of double effect. Rather, I shall restrict the scope of my comments to moral rights. Earlier, I stressed that the rights that concern me are claim rights. These are rights that ground moral requirements on others. One way to think about claim rights is in terms of providing others with reasons for

action. The limited scope of rights puzzle, as I understand it, pinpoints a very genuine tension in this idea of rights providing reasons for action. If rights provide us with a reason not to assault a person, then that reason would also seem to count when we are deliberating practically about whether or not to prevent someone else from assaulting that person.

I shall first argue that this tension is strongest when we hold to a *simple* view of reasons for action. On such a view, when we undertake practical deliberations about what we ought to do, we are required to take into account all sorts of different reasons for action: reasons of prudence, of principle, of contingent circumstances, and so on. What we ultimately decide to do is said to be a reflection of our weighing these various reasons. The assumption is that all reasons for actions can be assigned some weight. (Some reasons may, of course, be assigned a weight so great that they can never be outweighed by any other reasons.) This presupposes, however, that all reasons for action are of the same order, in the sense that it is possible to balance all reasons for action against each other. I call this view of reasons for action "simple" precisely because it represents all reasons as of the same order.

If one adopts the simple view of reasons for action, then this will be reflected in how one construes the proposition that rights provide others with reasons for action, for there is only one possible order of reasons for action that a claim right could be said to provide. Person A holding the right against me not to be assaulted physically means that there is a weighty reason for me not to assault A. (The exact weight of this reason is something we might quibble over.) In effect, when I deliberate practically about maybe assaulting A, I weigh this reason not to assault him or her (and possibly others) against reasons to assault him or her. Why then would this reason not also count as a weighty reason worthy of consideration when I am deliberating about whether to protect person A from assault by others? Why more precisely should that reason not carry exactly the same weight in this second case as it did in the first case? It thus becomes abundantly clear why on a simple view of reasons for action the limited scope of rights puzzle must be taken so seriously.

Suppose, however, that one holds to a more complex view of reasons for action where two possible orders of reasons for action are distinguished. Is the limited scope of rights puzzle still inescapable? I argue below

that it is not.

We saw in my sketch of the simple view of reasons for action that there are basic first-order reasons for action which have the role of guiding our actions in a very straightforward way. Reasons of this order dominate our practical deliberations. But occasionally we are required to take into consideration reasons of another order; these reasons for action I shall call second-order reasons. My characterization of second-order reasons draws upon Joseph Raz's discussion of authority.[30] Unlike Raz there, however, I utilize the notion of second-order reasons for action to illuminate the concept of moral rights. Second-order reasons are, fundamentally, reasons to act or not act for a specific first-order reason. An example will be helpful. As her son sets out on a journey with his grandparents, his mother instructs him to obey his grandmother. For her son, the mother's instructions constitute a reason for action, but only in a peculiar way because her instructions are not ordinary first-order reasons. Rather, those instructions are a reason to act

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30 Joseph Raz, *The Authority of Law*, (Oxford, Clarendon Press, 1979), esp. pp. 16-22.

for a certain first-order reason, namely, on the directives of his grandmother. This peculiar characteristic is what makes it appropriate to describe such instructions as second-order reasons for action. In addition to reasons to act for a certain reason, it is also possible for there to be second-order reasons not to act for a certain first-order reason. This type of second-order reason I shall call, again following Raz, an *exclusionary reason*. Exclusionary reasons function to exclude acting on certain first-order reasons. We can adapt the example given above so that the mother's instructions to her son are to not obey strangers. Thus, her son can be said to have a second-order reason not to act on the requests of strangers, requests which might otherwise have constituted weighty first-order reasons for action in practical deliberations.

This complex view of reasons for action should be clarified in two important respects. First, it must be emphasized that second-order reasons still guide action and consequently really are reasons for action. The action concerned is acting for a certain sort of reason or not acting for a certain sort of reason. Second, it should be noted that the defining feature of an exclusionary reason cannot be captured by any sort of

suggestion that it simply is a very weighty first-order reason that always outweighs the other first-order reasons for action it is said to exclude. This is because an exclusionary reason does not exclude certain first-order reasons as a consequence of it, on balance, outweighing them but rather it excludes them as a result of their being of a certain kind; no attention is paid to the weight of the first-order reasons excluded. What an exclusionary reason does is preclude the very possibility of weighing certain first-order reasons in practical deliberations.

Consider the thesis that rights sometimes provide other agents with second-order exclusionary reasons for action and not ordinary first-order reasons. Rights could then function to exclude acting on certain first-order reasons. It is of signficance that the action *per se* is not excluded. A distinction is useful to clarify this point. It is possible for an exclusionary reason to exclude either some first-order reasons for doing an action or all first-order reasons for doing an action. In the first case, the second-order reason for action can be called a *Partial exclusionary reason.* In the second, it can be called a *Fully exclusionary reason.* When a right provides a Fully exclusionary reason, the effect is the

same as if the right were to exclude the action *per se*. But when a right provides only a Partial exclusionary reason, the effects are quite different. The relevance and importance of this distinction between Partial and Fully exclusionary reasons will become clear in a moment.

This complex view of reasons for action has important implications for our analysis of the limited scope of rights puzzle. If the thesis that rights sometimes provide others with second-order exclusionary reasons for action is correct, then we would be able to explain that puzzle. The limited scope of rights puzzle is very potent if rights only provide first-order reasons for action. Suppose, however, that the right not to be assaulted provides others with an exclusionary reason for action. It would then not be the case that there is simply a first-order reason not to assault the right-holder. Instead, there is a second-order reason not to assault that person for certain first-order reasons such as because you dislike his or her sexual orientation or skin colour. But an exclusionary reason like this cannot count as a reason to prevent or protect that person from others assaulting him or her because it is of a completely different order of reasons for action. An exclusionary reason excludes first-order reasons for action; it is not

itself a first-order reason to act in a certain way such as to protect someone from assault by others. It would not, therefore, make sense, contrary to the claims of the limited scope of rights puzzle, to try to generalize from this being a reason for you yourself not to assault someone to a reason to protect that person from assault by others.

The fact that exclusionary reasons cannot be counted as ordinary first-order reasons for action is reinforced if we consider the difference between exclusionary reasons and what are often called presumptions such as the supposed presumption in favour of liberty or the presumption in favour of equality. Typically, the presumption in favour of equality is thought to say that goods should be distributed equally unless there is a good justification for not doing so. Some consideration of maximin might be an example of a good justification for inequality. The presumption in favour of equality counts as a first-order reason for action in the sense that it should be given weight in practical deliberations about undertaking an action that leads to an equal distribution of goods. In this respect, it can be contrasted to exclusionary reasons which can never be counted as first-order reasons for acting in a particular way.

Now, someone might reply that the explanation of the limited scope of rights puzzle I have just offered is unacceptable because in our ordinary way of thinking about the right against assault, we think that that right prohibits assault *per se* and not just assault for certain reasons. I do not propose to deny that this is how we ordinarily think about the right against assault. Nevertheless, I do not believe that this concession defeats my proposal. The thesis that rights can provide exclusionary reasons for action is able to accomodate this view of the right against assault without seriously altering it. Here is where the distinction between Partial and Fully exclusionary reasons becomes relevant. I said above that a Fully exclusionary reason has the effect of excluding an action *per se*. Suppose that the right against assault provides a Fully exclusionary reason for action. This proposal explains why in our ordinary thinking we are inclined to believe that that right prohibits assault *per se* and is perfectly consistent with my resolution of the limited scope of rights puzzle.

9. Indeed, it is my view that the thesis that rights sometimes provide others with exclusionary reasons for action is not, generally speaking, challenged by the

common-sense morality of rights but goes a rather long way towards explaining it. For example, rarely are rights against interference construed as prohibiting interference *per se* but only interference in particular circumstances. Consider, for example, the right to free speech. This right is well known for its complexities. Unlike the right against assault, few people defend the view that this right prohibits interference with free speech no matter what; in some cases interference with free speech is not unjustified. The relevant point is that if the right to free speech is thought of as providing a Partial exclusionary reason for action, we could say that it excludes interference for some reasons but not others. For instance, we might say that it excludes interference with free speech on the grounds that someone is expressing unpopular political views but yet does not exclude interference when someone is inciting a riot.

This approach to the complexities of the right to free speech contrasts to the approach taken by Frederick Schauer. Central to Schauer's treatment of free speech is the distinction between the coverage of a right and the protection of a right.[31] The coverage of the right to

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31 Frederick Schauer, *Free Speech: A Philosophical Enquiry*

free speech depends on the meaning of 'speech'. Suppose that speech is taken to have a very broad meaning such as 'communication'. In that case, all communication is covered by the right to free speech. It is a further issue, says Schauer, how much protection the right to free speech might give to acts of communication. It could, in other words, allow interference with some acts of communication but prohibit interference with others. The attractiveness of Schauer's distinction between the coverage and the protection of the right to free speech is that it seems able to explain, for instance, the intuitive difference between constructive criticism of a politican and libellous accusations against him or her. Although both acts are covered by the right to free speech, only the former is protected by it.

It is not clear, however, what the significant moral difference is between an act not covered by a right and an act covered by a right but not protected by it. Schauer offers the following response to this difficulty: 'If a particular act is covered by a right to engage in acts of

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(Cambridge, Cambridge University Press, 1982), pp. 89-92.

that general type, it takes a better reason to restrict that act than would be the case if the act were not covered by a right. But some reasons may be sufficiently powerful to penetrate the coverage of a right.'[32] In other words, Schauer is claiming that for any act covered by the right to free speech, there is a basic presumption - in the sense explained above - in favour of non-interference with that act. There can be said to be a weighty first-order reason for not interfering with that act; it is conceivable, however, that this reason could be outweighed by other considerations. The crucial point is that, according to Schauer, the right to free speech can be represented as providing a first-order reason for action, not a second-order one. (Hence, the contrast to my suggestion in the previous paragraph that the right to free speech provides a Partial exclusionary reason for action.) The problem with saying that there is a presumption in favour of free speech is that this does not explain the complexities of that right as we ordinarily understand it. For example, in libel cases the burden of

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32 Schauer, *Free Speech*, p. 89

proof falls on the defendent; what he or she must show is that the accusations in question were made with malice. If, however, there is, as Schauer seems to be suggesting, a presumption in favour of free speech, the burden of proof would fall on the plaintiff who would have to show why the defendent's free speech should be curtailed.

Not only can the thesis that rights sometimes provide exclusionary reasons for action explain some common-sense views of rights, it can also explain what Raz has recently called 'the dynamic character' of rights: '[Rights] are not merely the grounds of existing duties. With changing circumstances they can generate new duties.'[33] To a certain extent, I am deeply suspicious of this supposed dynamic character of rights. I am not utterly convinced that all of the moral requirements that might conceivably be grounded on a right cannot be captured by the description of a single duty. Let us suppose, however, that rights really have the dynamic character attributed to them by Raz. The idea that rights provide others with second-order reasons for action offers an insight into why

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33 Raz, *The Morality of Freedom*, p. 186. The 'dynamic character' of rights is also embraced by Jeremy Waldron, 'Rights in Conflict', *Ethics 99* (1989), pp. 509-512. Both emphasize that it is commonly overlooked by people thinking about rights.

rights have this character. For suppose that the right to free speech excludes interference with free speech for all first-order reasons other than for reasons X, Y, and Z. There are many first-order reasons individuals might come up with for interfering with free speech other than X, Y, Z; changing circumstances would seem to make it impossible to exhaust all of the possibilities. Since the right to free speech would require individuals not to act on these reasons, we could, in this respect, say that new moral requirements are being generated by that right all of the time.

Trumps and Side Constraints

10. So far, I have tried to show that the thesis that rights sometimes provide second-order exclusionary reasons for action can explain the supposed dynamic character of rights and that it fits with common-sense views of rights both because it is able to explain the limited scope of rights puzzle and and because it is able to justify the intuition that in some instances an interference with a freedom violates a right to that freedom and in other instances interference with the same freedom does not. Here it is my intention to argue that

despite appearances the thesis that rights can provide second-order exclusionary reasons for action is not out of keeping with other prominent theories of rights, especially those which represent rights as antagonistic to utilitarianism. I shall show, more specifically, that it is possible to reinterpret both Ronald Dworkin's idea of rights as trumps and Robert Nozick's idea of rights as side constraints so that they appear to affirm this thesis.

These two ideas of rights can be briefly summarized. According to Dworkin, certain collective goals such as the general welfare are ordinarily thought to be a sufficient reason for action. The distinctive role of rights is that they can be said to 'trump' the pursuit of collective goals like the general welfare.

> Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.[34]

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34 Ronald Dworkin, *Taking Rights Seriously, New Impression* (London, Duckworth, 1978), p. xi.

Basically, then, person A has the right to x when he or she can trump a decision by the government that prevents him or her doing or having x when that decision is justified *only* by the relevant collective goal such as the general welfare. For Nozick, in *Anarchy, State, and Utopia*, rights are 'side constraints upon the action to be done.'[35] Suppose that we accept that agents pursue goals. On Nozick's view, rights would act as side constraints on those pursuits. Thus, rights of others can be said to restrict the possible actions available in the pursuit of one's goals.

It is my view that for Dworkin rights function to exclude others acting on certain first-order reasons for action. Support for this interpretation of Dworkin's idea of rights as trumps can be found in his article 'Do we have a right to pornography?'. In that article, Dworkin proposes the putative right to moral independence:

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35 Nozick, *Anarchy, State, and Utopia* (Oxford, Basil Blackwell, 1974), p. 29.

> People have the right not to suffer disadvantage in the distribution of social goods and opportunities, including disadvanage in the liberties permitted to them by the criminal law, just on the ground that their officials or fellow-citizens think that their opinions about the right way for them to lead their own lives are ignoble or wrong.[36]

Assuming that there is this right, Dworkin goes on to consider the implications for the issue of censoring pornography. He argues that the right to moral independence would be violated if pornography is censored on the grounds that government officials or others think that looking at pornography is immoral and a debased thing to do. However, he believes that this right would not be violated if pornography was censored because it leads to an increase in violent crimes or has other such harmful effects. (This is apparently very difficult to establish.) Dworkin's underlying point is that it is extremely important to focus on the reasons for censorship

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36 Ronald Dworkin, 'Do we have a right to pornography?' in *A Matter of Principle* (Cambridge, Mass., Harvard University Press, 1985), p. 353. The view I attribute to Dworkin here is even more accented in his abridgement of this paper as 'Rights as Trumps', in *Theories of Rights*, ed. J. Waldron.

and not simply on the act of censorship itself. This is, then, a clear example of a right as trump providing the government with a Partial exclusionary reason for action in the sense that it excludes acting on certain first-order reasons such as the belief that something is ignoble or wrong but not on others such as it having certain harmful effects.

It is much more difficult to substantiate the claim that Nozick also ultimately understands rights to have the function of excluding others from acting on certain first-order reasons for action. Indeed, Nozick seems to explicitly reject that interpretation of rights in the following passage:

> Individual rights are co-possible; each person may exercise his rights as he chooses. The exercise of these rights fixes some features of the world. Within the constraints of these fixed features, a choice may be made by a social choice mechanism based upon a social ordering; if there are any choices left to make! Rights do not determine a social ordering but instead set the constraints within which a social choice is to be made, by excluding certain alternatives, fixing others, and so on.[37]

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37 Nozick, *Anarchy, State, and Utopia*, p. 166.

The emphasis in this passage on the idea that rights exclude certain alternatives *per se* would seem to indicate that for Nozick rights exclude actions *per se* and not acting on particular reasons. What should not be overlooked, however, is the implicit idea that rights do not function as ordinary first-order reasons. The idea of rights as side-constraints is not captured by simply putting a particular weight on rights to be taken into consideration in practical deliberations.[38] The fact that rights as side constraints are not ordinary first-order reasons for action and that their primary function is exclusionary suggests to me that one very accurate way to represent Nozick's view of rights is to say that for him all rights provide Fully exclusionary second-order reasons for action. This means that rights have the effect of excluding certain actions *per se*.

I must admit, however, that this is a rather hollow way to demonstrate that Nozick can be represented as holding to the thesis that rights can provide second-order

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38 This is especially emphasized by Nozick on pp. 29n & 46n of *Anarchy, State, and Utopia*.

exclusionary reasons for action. It would be much more convincing to show that sometimes he does understand a right to provide only a Partial exclusionary reason for action. I suggest then that we look at the actual rights which concern Nozick. He distinguishes in his account of rights between the moral form of rights and their moral content.[39] Rights as side constraints is the form of rights. Their particular content is what he calls the libertarian constraint which prohibits sacrificing one person to benefit another. Distinct from the libertarian constraint is the *full* libertarian constraint which adds a prohibition against paternalistic aggression. I shall concentrate my comments on the libertarian constraint. I find Nozick's discussion of this constraint a little confusing because sometimes he also refers to it as a prohibition forbidding aggression against another.[40] I take it that a prohibition forbidding aggression against another can be inferred from the more general prohibition

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39 Nozick, *Anarchy, State, and Utopia*, p. 34.

40 Nozick, *Anarchy, State, and Utopia*, p. 33.

against sacrificing one person to benefit another.

Does Nozick believe that the libertarian constraint excludes all sacrifices of one person to benefit another or are there some instances which he thinks it does not exclude? If there is one such instance, then it would follow that the libertarian constraint can be accurately represented as providing only a Partial exclusionary reason for action. Nozick seems especially troubled by two cases where sacrificing one person to benefit another does seem permissible. The first case relates to the apparent redistributive character of the minimal state in the sense that some people are compelled to pay for the protection of others.[41] For it would seem that in the state Nozick favours some people are being sacrificed for the benefit of others. Nozick argues, however, that this is not a case of redistribution and thus not a case in which some people are being sacrificed for the benefit of others. Rather, what we find in the minimal state is compensation being paid to some people for violations of their rights.[42] The fact that the minimal state appears

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41 Nozick, *Anarchy, State, and Utopia*, p. 27.

42 Nozick, *Anarchy, State, and Utopia*, p. 114.

redistributive does not, therefore, establish that the libertarian constraint can be accurately represented as providing a Partial exclusionary reason for action.

The concessions Nozick makes in the second case do, however, justify representing the libertarian constraint as providing a Partial exclusionary reason for action. This other case revolves around the problem of innocent threats.

> An *innocent threat* is someone who innocently is a causal agent in a process such that he would be an aggressor had he chosen to become such an agent. If someone picks up a third party and throws him at you down at the bottom of a deep well, the third party is innocent and a threat. Even though the falling person would survive his fall onto you, may you use your ray gun to disintegrate the falling body before it crushes and kills you?[43]

Nozick concedes that you may use your ray gun to kill the innocent threat without violating the libertarian constraint. But clearly this is an act where you are sacrificing one person - the innocent third party - to benefit another, namely, yourself. It follows, I think,

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43 Nozick, *Anarchy, State, and Utopia*, p. 34.

that on Nozick's own account the libertarian constraint can be represented as providing a second-order exclusionary reason for action that excludes sacrificing one person to benefit another for any first-order reason except when the person to be sacrificed is an innocent threat.

The point of this exercise has been to show that Dworkin and Nozick in their idea of rights as respectively trumps and side constraints can be interpreted as committed to the shared thesis that rights provide second-order exclusionary reasons for action.[44] This conclusion is important because it shows that this thesis is not as out of the mainstream as it may first appear. Furthermore, the claim that Dworkin and Nozick are committed to the thesis that rights provide second-order exclusionary reasons for action offers insight into why exactly rights are represented by both as antagonistic to utilitarianism. We have seen above that that thesis

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44 The idea that Nozick and Dworkin share the same analytical thesis has also been advanced by Philip Pettit in 'Rights, Constraints, and Trumps', *Analysis 47* (1987), pp. 8-13. The thesis they share, according to Pettit, is that rights have the function of protecting the interests of individuals rather than promoting them. This view is perfectly consistent with the thesis I claim Dworkin and Nozick share.

depends upon a complex view of reasons for action which distinguishes between two possible orders of reasons. The problem the utilitarian has with accomodating rights is that utilitarianism seems committed to a simple view of reasons for action which says that all reasons can be assigned some weight and in this sense are all of the same order, and that what we ought to do is a reflection of our weighing up these various reasons.

Conclusion

10. I have in this chapter proposed a person-affecting theory of rights which holds that the ascription of moral rights should ultimately reflect a concern either for what happens to the right-holder or for his or her ability to determine what will happen. I have also argued that this person-affecting theory of rights should be complemented by the thesis that rights sometimes provide second-order exclusionary reasons for action. This combination does not, however, tell us what moral rights we have and, therefore, what moral rights might be a sufficient basis for justifying the redistributive implications of the requirement that the state help the needy. In the next chapter, we will see that there are

good independent reasons for thinking that fundamental moral rights to welfare are unable to justify redistribution. This leads me to concentrate on fundamental moral rights to liberty.

Now, it could be said that this discussion neglects a very serious objection against talking about moral rights. The problem is that not everyone believes that moral rights enjoy objective existence. Some people deny that there are any objective moral principles.[45] It follows from this general thesis that moral rights cannot be objective. Instead, rights are best thought of as inventions or social fictions. Among those who hold this view, there is some dispute about how important rights are. There are those who see rights as of the utmost importance and others who doubt their basic coherence as a moral concept.[46] Distinct from those who deny the objective existence of all moral principles are those who only deny the objective existence of moral rights. They

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45 John Mackie, *Ethics: Inventing Right and Wrong* (London, Penguin, 1977), chapter one.

46 See John Mackie, 'Can there be a rights-based morality?' in *Theories of Rights*, p. 170-171 for the first view and Alasdair MacIntyre, *After Virtue* (Notre Dame, University of Notre Dame, 1981), pp. 66-67, for the second.

say that, although there are some objective principles, moral rights are not among them.[47]

The fact that I have not established that there are certain objective moral principles and that rights must be included among these principles does not, I think, seriously jeopardize what follows. This is because what follows is technically an *argument*, not a *proof*.[48] A proof starts from a true statement and involves a series of steps which, provided they are valid, will yield a true conclusion. But not all arguments are proofs. The aim of an argument is to convince. The starting point is not necessarily a true statement but rather a statement or set of statements with which others agree. An argument is designed to show how certain other statements follow from that statement or set of statements. Most people believe that everyone has certain fundamental moral rights. The dispute is over which rights these are. A convincing argument must start from the statement of a fundamental

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47 Robert Young, 'Dispensing with Moral Rights', *Political Theory 6* (1978), pp. 66-70.

48 Peter Strawson, *Introduction to Logical Theory* (London, Methuen, 1960.), pp. 12-13.

moral right with which most people agree. In chapter four, it is my intention to describe two abstract liberty rights; I hope that at least one of these rights meets this condition. In chapter seven, I shall show how certain rights against others to have one's needs met are derivable from either of these two abstracts rights.

CHAPTER THREE

THE CASE AGAINST WELFARE RIGHTS

Introduction

1. Welfare rights can, for our purposes, be understood as rights to certain things or services. They can be distinguished from both liberty rights which are rights to do certain things and property rights which are ownership rights in things. Redistributive measures by the state are sometimes held to be justified because individuals are said to have fundamental moral rights to welfare, not derived from other more fundamental moral rights or principles.[1] The purpose of this chapter is

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1 Implicit here is the distinction between abstract and derivative moral rights. This distinction is explained in

to cast some doubt on this proposition.

There are a number of different senses to the claim that there are certain non-derived moral rights to welfare. In one sense, all that is being claimed is that there are what one might call, following Joel Feinberg, 'manifesto' rights to welfare.[2] The statement of a manifesto right to welfare does not say that anyone in particular is required to provide the right-holder with a certain thing or service; it amounts to little more than a statement that it would be a good thing if the right-holder were provided with a certain thing or service. In other words, manifesto rights cannot be counted as claim rights in Hohfeld's sense of that expression. I shall not be concerned with welfare rights in the manifesto sense since it is unclear that they can justify the redistribution implied by the belief that justice requires the state to come to the aid of those suffering from unmet physical needs and other forms of deprivation.

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chapter four.

2 Joel Feinberg, 'The Nature and Value of Rights' in *Rights, Justice, and the Bounds of Liberty* (Princeton, Princeton University Press, 1980), p. 153.

I shall focus instead on the stronger sense of the claim that there are certain fundamental moral rights to welfare, not derived from other more fundamental moral rights or principles, which holds that a specific individual or group of individuals is required to provide the right-holder with a certain thing or service. My critical treatment of this claim is predicated on the distinction between *special* and *general* moral rights.[3] Special moral rights are created by special relationships or transactions between two or more parties. Although their creation may not be deliberate, all special rights arise from previous voluntary actions.[4] Special rights might also be represented as conditional rights: their

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3 H.L.A. Hart, 'Are There Any Natural Rights?' in *Theories of Rights*, ed. Jeremy Waldron (Oxford, Oxford University Press, 1984), pp. 83-88 and Jeremy Waldron, *The Right to Private Property* (Oxford, Oxford University Press, 1988), pp. 106-24. Note that the relevant concern here is with this distinction as it applies to moral rights. It is also possible to distinguish between special and general rights in a non-moral context. For example, in a rugby game all players can be said to enjoy certain general rights; distinct from these are the special rights some players come to enjoy in the course of the game such as throwing the ball in on a line out when the other team puts it out of bounds.

4 Hart, 'Are There Any Natural Rights?', p. 85.

existence requires that a necessary condition be met, namely, that they originate from some previous relevant voluntary action. The paradigmatic example of a voluntary action that creates a special right is a promise. The fact that I promised you something creates for you a special right held against me to fulfill that promise. Distinct from special moral rights are general moral rights. These are rights people enjoy unconditionally. In the first part of the chapter, I shall raise some problems with the idea that there might be special moral rights to welfare which can justify the redistribution implied by saying that the state is required to help meet needs. I turn my attention to general moral rights to welfare in the second part of the chapter. There, I defend the objection that it is not possible for general moral rights to welfare to ground duties.

Special Rights and Redistribution

2. It does seem to be the case that special moral rights are sometimes capable of justifying redistribution. If, for example, I promise you $5, then a transfer of $5 from me to you would seem justified. How much of an insight is this into redistributive social policies

designed to provide remedies for deprivation? It is my view that appealing to special rights to welfare will not take us very far towards finding a justification for those policies. Very few people now object on principle to helping the needy. Rather, the crucial issue is whether that help should be voluntary or enforced through the exercise of coercive power by the state. The fact that special rights are generated by previous voluntary actions suggests that their redistributive implications in most cases will not be contested. The problem with grounding state social policies on special rights is that those policies typically involve redistribution backed by coercion.

My scepticism about the capacity of the notion of special rights to justify state welfare provision relies heavily on the idea that all special moral rights are generated by previous voluntary actions. Is it a challenge to that scepticism that special rights may be created unintentionally by those actions? Particularly at issue here is the so-called principle of fair play which holds that sometimes because you have voluntarily accepted a benefit from a special relationship or during a special transaction, you can therefore be rightly held to a certain burden.[5] Our standards of fairness require that

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5 Hart, 'Are There Any Natural Rights?', pp. 85-87, John

you be so held. There are many counter-examples to this principle holding for all relationships and transactions where you accept a benefit. The acceptance of a gift is the most evident. To avoid these sorts of counter-examples, the principle of fair play is ordinarily restricted in scope to 'cooperative ventures' that provide public goods.[6] National defence is an example of a public good. It requires the cooperation of many people and no one in the community can be excluded from its benefits.[7] Although the principle of fair play has been subject to powerful challenges even when restricted to public goods, let us assume that it is in fact valid.[8]

Rawls, *A Theory of Justice* (Oxford, Oxford University Press, 1972), pp. 111-114 & 342-350, and William N. Nelson, 'Special Rights, General Rights, and Social Justice', *Philosophy and Public Affairs 3* (1974), pp. 427-429.

6 See Richard J. Arneson, 'The Principle of Fairness and Free-Rider Problems', *Ethics 92* (1982), pp. 616-33 and George Klosko, 'The Principle of Fairness and Political Obligation', *Ethics 97* (1987), pp. 353-362.

7 Klosko, 'The Principle of Fairness and Political Obligation', p. 354.

8 Two of the most influential challenges are A. John Simmons, *Moral Principles and Political Obligation* (Princeton, Princeton University Press, 1979), ch. V, and Robert Nozick, *Anarchy, State, and Utopia* (Oxford, Basil Blackwell, 1974), pp. 90-95. For a cogent response to Nozick, see I.A. MacDonald, 'Rights, Rights of Enforcement, and Nozick's Critique of the "Principle of Fairness"', *South African Journal of Philosophy 3* (1984), pp. 47-53.

The pertinent question is then whether or not the principle of fair play can justify the redistribution necessary for the state to aid the needy.

The recent revival of the idea of citizenship in justifications of redistributive welfare programmes may be instructive.[9] Although this line of argument has many different strands, the main gist of it is quite simple. The fact that someone is a citizen *entitles* him or her to some sort of minimal provision at the expense of his or her fellow citizens. I have deliberately described this claim in terms of an entitlement in order to suggest the appropriateness of talking in terms of rights. If a person does hold a right against fellow citizens to some sort of minimal provision, then this would indeed justify

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9 For the classic statement, see T.H. Marshall, 'Citizenship and Social Class' in *Citizenship and Social Class and other essays* (Cambridge, Cambridge University Press, 1950), esp. pp. 28-34 & 46-74. Ramesh Mishra discusses the influence of this essay on social policy in *Society and Social Policy* (London, MacMillan, 1977), pp. 20-32. Recent attempts to revive Marshall's idea of citizenship as the key to justifying state welfare include David Harris, *Justifying State Welfare* (Oxford, Basil Blackwell, 1987), Raymond Plant, *Citizenship, Rights, and Socialism* (London, Fabian Society No. 531, October 1988), and Desmond King and Jeremy Waldron, 'Citizenship, Social Citizenship, and the Defence of Welfare Provision', *British Journal of Political Science 18* (1988), pp. 413-443.

redistributive taxation extensive enough to finance that provision. The point is that fellow citizens do not owe this person their generosity or charity but rather, because of the special relationship they share with him or her - shared citizenship - he or she holds a special right against them to provide aid. Thus, at the core of the argument about citizenship and welfare provision, on my interpretation, is the idea that shared citizenship creates special rights to redistributive transfers.

Presumably there has never been wide-spread deliberated consent to citizenship. Are there other relevant voluntary actions which could have created, not deliberately but in accordance with the principle of fair play, these supposed special rights of one citizen against his or her fellow citizens? Any adequate response to this question must address a wide range of issues about the nature of citizenship. Is citizenship the sort of relationship that produces public goods? Is redistributive welfare provision one such public good? Can you ever be said to have voluntarily accepted some of the benefits of citizenship? How many benefits fall into this class? Suppose that you have voluntarily accepted some benefits of citizenship. How much redistribution is this ultimately going to justify? Would it be fair if your tax

contributions equal or are greater than the benefits you have voluntarily accepted? Surprisingly, these considerations have received little attention in arguments that try to justify redistributive social policies on the grounds of shared citizenship.

3. David Harris's recent book, *Justifying State Welfare*, offers one of the few sustained discussions of these issues. In the following passage, Harris outlines the perspective from which he develops his justification of redistributive social policies.

> The core of my theory of social justice is not that social justice amounts to the satisfaction of needs *per se*, but that it consists in protecting the status of individuals as full members of the community. The notion of full membership in the community I treat under the rubic of "citizenship".[10]

What he argues is that, in addition to respecting basic liberties, protecting the status of individuals as citizens entails what I have called welfare rights. Moreover, Harris recognizes that shared citizenship

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10 Harris, *Justifying State Welfare*, p. 3.

generates not human rights or what I have called general moral rights;[11] instead, the rights that concern him are conditional on the special relationship among citizens and, for this reason, can be said to be special rights.

How does Harris respond to the question I raised above about what is so special about the relationship of shared citizenship to warrant the claim that it generates special moral rights to welfare? His answer seems to rest on the analogy he draws between shared citizenship and family membership - what he describes as 'the familial basis of citizenship'.[12] Consider a family with a handicapped child. We might agree that the source of the special right to extra help the handicapped child holds against his or her parents is some previous voluntary action by them.[13] But we are also inclined to believe that the handicapped child holds a special right to extra

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11 Harris, *Justifying State Welfare*, p. 27.

12 Harris, *Justifying State Welfare*, pp. 153-55.

13 Another explanation might be what Hart calls the special 'natural' relationship between parents and their children. See 'Are There Any Natural Rights?', p. 87.

help against his or her siblings and, unlike with the child's parents, we cannot say that this special right has been generated by some previous relevant voluntary action; it exists, according to Harris, simply as a fact of family membership. Analogously, the special rights to welfare held by one citizen against another cannot be traced to some relevant previous voluntary action but instead exist simply as a fact of membership in the political community.

The problem with this argument is that the supposed analogy between family membership and shared citizenship breaks down at a very crucial point. The difference between the two cases is quite simply this. Unlike helping a family member, state welfare provision involves meeting the needs of strangers.[14] The reason why Harris overlooks the decisive relevance of this difference stems from his incorrect analysis of why a handicapped child holds a right to aid against his or her sibling. The explanation for why there is that right cannot be that it

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14 See Richard Titmuss, *The Gift Relationship* (London, Allen & Unwin, 1970), pp. 209-224, David Watson, *Caring For Strangers* (London, Routledge & Kegan Paul, 1980), pp. 2-3 & 18-21, and Michael Ignatieff, *The Needs of Strangers* (London, Chatto & Windus, 1984), pp. 9-10.

is simply a fact of family membership, as the following questions show quite clearly: Do two siblings, unaware of each other and separated at birth, hold special moral rights against each other? Do two children born of different sets of parents but brought up together by foster parents hold special rights against each other? Since we are inclined to answer 'no' to the first question and 'yes' to the second, the issue of whether or not they are siblings cannot be the decisive factor in determining whether any special rights exist between them. The decisive factor seems rather to be the intimate relationship siblings ordinarily enjoy as a consequence of being brought up together; there is this relationship in the second case but not the first.[15] Thus, holding a family member to the duty of helping another family member is disanalogous to state welfare precisely because the

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15 Now, it can be said that I have here mistakenly assumed a biological definition of a family. One might say quite legitimately that siblings separated at birth are not members of the same family and that children brought up together even if they are of different biological parents are. It follows from this that family membership in effect means an intimate relationship, in the sense I specified, in which case my conclusion that the decisive factor for determining whether any special rights exist between siblings is the existence of an intimate relationship is reinforced, not challenged.

latter involves strangers, people who by definition do not share an intimate relationship. One reason why it is such an important and pressing problem to justify state welfare provision is that although few people deny the demands of their own family and those close to them, quite a few need to be convinced that justice requires them to care about the unmet needs of strangers.

What's Wrong With General Rights to Welfare?

4. In contrast to special moral rights to welfare, general moral rights to welfare are supposedly rights people enjoy unconditionally. The claim that there are such rights has the virtue that its validity does not require establishing the relevance of some previous voluntary action or depend upon the soundness of the principle of fair play. The objection I shall raise to this claim is very different from my critique of special rights to welfare. It can be put very simply. No account of general moral rights to welfare is capable of explaining in what sense a welfare right is the basis or grounds for the moral requirement with which it is correlated. In so far as I can see, the statement that there is a certain general right to welfare adds up to

little more than the claim that someone has the duty to provide the right-holder with a certain service or thing; the welfare right does not generate that requirement.

Now, clearly this conclusion is negative. And this feature influences how I shall proceed to substantiate it. The focus for the discussion will be Joseph Raz's recent but already very influential theory of rights defended in *The Morality of Freedom.* The reason for singling out Raz's analysis of rights is that it is exemplary in so far as focusing attention on the role of rights as grounds for reasons for action. I shall show that Raz fails to explain how welfare rights ground duties for others. This conclusion warrants my generalized conclusion that no account of general moral rights to welfare is capable of explaining in what sense those rights are the basis or grounds for the requirement that someone provide someone else with a certain service or thing.

Raz offers the following concise definition of rights:

> 'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.[16]

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16 Joseph Raz, *The Morality of Freedom* (Oxford, Clarendon

It should be evident from this definition that for Raz it is aspects of well-being that are of ultimate value and not rights themselves.[17] The principal value of rights rests elsewhere. As he puts it, 'Assertions of rights are typically intermediate conclusions in arguments from ultimate values to duties.'[18]

The fact that Raz understands rights to be 'intermediate conclusions' may appear to make him a 'soft' target for my criticism. After all, this would seem to imply that he does not really believe that rights can ground duties. The interesting feature of Raz's theory of rights is that despite conceding that rights are typically intermediate conclusions in arguments from ultimate values to duties, he still thinks that rights ground duties.

Press, 1986), p. 166.

17 Raz does, however, emphasize on p. 192 of *The Morality of Freedom* that it is conceivable that having some rights can count as an aspect of well-being and therefore are of ultimate value.

18 Raz, *The Morality of Freedom*, p. 181.

This is evident from the following statements:

> Rights are grounds of duties in others.[19]

> To say that a person ought to behave in a certain way is to assert a requirement of action without indicating its ground. To assert that an individual has a right is to indicate a ground for a requirement for action of a certain kind, i.e. that an aspect of his well-being is a ground for a duty to another person.[20]

> Rights-statements are characterized as being capable of being justified by considerations of a certain kind and as being the justifying grounds for other kinds of normative statements. I...regard them as capable of being justified by considerations of the interests of the right-holder and as providing the grounds for ascribing duties to others to respect or promote these interests.[21]

The point is that if Raz can successfully show that welfare rights ground duties despite being 'intermediate conclusions', then this would refute my contention that

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19 Raz, *The Morality of Freedom*, p. 167.

20 Raz, *The Morality of Freedom*, p. 180.

21 Joseph Raz, 'Hart on Moral Rights and Legal Duties', *Oxford Journal of Legal Studies 4* (1984), p. 126.

general rights to welfare cannot ground the duties with which they are correlated. The puzzle that shall concern me is why Raz believes that it is the welfare rights rather than the ultimate values - the considerations of well-being - that ground the duties on others.[22]

Let me begin with two preliminary comments. The first concerns the idea that rights are intermediate conclusions. It seems to me absolutely right of Raz to insist on this characterization of moral rights. The reason is that it is very difficult to imagine any moral principle that does not derive its moral force from something of more ultimate value. The characterization of general moral rights to welfare or liberty as intermediate conclusions is not in itself inconsistent with describing those rights as fundamental because their status as fundamental is determined by whether or not they are

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22 The reason why I do not think that there is a parallel problem for liberty rights becomes apparent in the next chapter. The distinctive feature of liberty rights is the way in which they protect the right-holder's agency or integrity. They require forbearance on the part of others both when a person does what he or she has the right to do and when he or she does not do what he or she has the right to do. It is this distinctive constraint-type protective function of liberty right which allows us to say that they ground moral requirements on others.

derived from other more fundamental moral rights or principles, and not by whether or not they are derived from ultimate values.

My second comment concerns the difference between the statement of a welfare right and the statement of its correlated duty. Raz's explanation of the difference between the statement of a welfare right and the statement of its correlated duty can be found in the following passage:

> Notice that because duties can be based on considerations other than someone's rights the statement (1) 'Children have a right to education.' does not mean the same as statement (2) 'There is a duty to provide education for children.' (1) entails (2) but not the other way round. (1) informs us that the duty stated in (2) is based on the interests of the children. This information is not in included in (2) itself.[23]

Not much can be inferred from this argument in so far as the concern is with an explanation of how welfare rights ground duties. It is indeed true that statement (1) entails statement (2) but that statement (2) does not

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23 Raz, *The Morality of Freedom*, p. 186.

entail statement (1). What statement (1) does but statement (2) does not do is elucidate the grounds for the duty. It hardly follows from this difference, however, that the right grounds the duty. This is evident once we realize that statement (3) 'There is a duty-generating interest to provide education for children.' also entails statement (2). Statement (3) includes no reference to a right but yet still elucidates the grounds for the duty. The point is that the fact that statement (1) entails statement (2) provides us with no reason for thinking that the right grounds the duty.

The puzzle, as I have formulated it, asks why Raz believes that it is the welfare right rather than the ultimate value - the consideration of well-being - that grounds the correlated duty on others. Raz would, I think, respond that this is only a pseudo-puzzle because it presupposes what might in fact be false, namely, that there must be only one ground for the correlated duty, either the right or the ultimate value. Would Raz not say that the right and the interest which the right protects both ground the duty?[24] Raz might then say that although

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24 The idea that rights protect interests can be found on p. 185 of *The Morality of Freedom* where Raz says that the definition of a right is 'the interest which [the right]

it is true that the ultimate value grounds the duty, this is not inconsistent with saying that the right also grounds the duty, for each, independent of the other, is capable of grounding the duty.

The cogency of this response depends on being able to show that a welfare right, independent of the interest which that right protects, is capable of grounding the duty with which it is correlated. At issue here is Raz's contention that, with certain additional premisses, some intermediate conclusions can serve, quite apart from ultimate values, as 'complete reasons' for holding someone to a duty.[25] For it could indeed follow from this contention that a welfare right, independent of the interest which that right protects, is capable of grounding the correlated duty. If, for example, the statement that a child has a right to education can serve, with certain additional premisses, as a 'complete reason' for holding someone to the duty to provide that education,

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protects is sufficient to be the ground of a duty.'

25 Raz, *The Morality of Freedom*, pp. 181 & 183-84.

then it would be correct to say that the right grounds that duty.

Before examining the merits of Raz's contention that intermediate conclusions can serve as 'complete reasons' in practical deliberations, let me make two brief comments about what exactly he means by 'complete reasons'. The first is that a defining feature of 'complete reasons' is that they can serve as, 'reasons in their own right, albeit not ultimate reasons.'[26] The second is that although they reflect in a summarized form the intersection between conflicting considerations of ultimate value, their statement does not necessarily include any reference to ultimate values.

Why does Raz think that intermediate conclusions can serve as 'complete reasons' in practical deliberations? There are two possible answers to this question; Raz mentions both but puts most of the weight on the second. The first possible answer is that intermediate conclusions are indispensable in order to save time and tediousness when carrying out practical deliberations in ordinary

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26 Raz, *The Morality of Freedom*, p. 181.

life; having to refer to ultimate values all of the time would be a tremendous burden.[27] The problem with this answer is that it does not adequately explain how intermediate conclusions can serve as 'reasons in their own right'. It explains why we might in practice refer only to intermediate conclusions but it does not show that it is *rational* to not consider the ultimate values that supposedly warrant those intermediate conclusions.[28]

The other argument Raz offers for counting intermediate conclusions such as rights as complete reasons in practical deliberations is quite original. What Raz emphasizes is that counting intermediate conclusions as complete reasons, 'enables a common culture to be formed round shared intermediate conclusions, in

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27 Raz, *The Morality of Freedom*, p. 181.

28 This objection is analogous to an objection very commonly raised against rule utilitarianism. Rule utilitarians hold that in our practical deliberations our actions should be guided by rules based on a utilitarian calculation rather than directly by utilitarian calculation. The problem with this view is that if you really are a utilitarian and thus believe that maximizing utility is the only reason to act, then it is irrational to be guided by rules rather than a utilitarian calculation when in particular instances the two diverge. See J. J. C. Smart, 'Extreme and Restricted Utilitarianism' in *Contemporary Utilitarianism*, ed. Michael Bayles (Gloucester, Mass., Peter Smith, 1978), pp. 104-115.

spite of a great degree of haziness and disagreement concerning ultimate values.'[29] The implications of this claim are significant when it comes to the authority of the state. If the state counts certain intermediate conclusions such as rights as 'complete reasons' for action, then this practice will allow for the creation of a 'pluralistic society'.[30] The point is that given the widely diverging views about ultimate values in most societies, it may well be rational for the state in practical thinking to count intermediate conclusions as complete reasons for action. This argument suggests an explanation of how a welfare right might ground its correlated duty. Since welfare rights are intermediate conclusions in arguments from ultimate values to duties, they can be counted as complete reasons for action and, thus, can be said to ground the duties with which they are correlated.

Although, at first sight, this is a very compelling

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29 Raz, *The Morality of Freedom*, p. 181.

30 Raz, *The Morality of Freedom*, p. 58.

explanation of how welfare rights might ground duties, it is flawed in an elementary way. It assumes that we can agree on what rights we have while disagreeing about ultimate values. The problem with this assumption is that Raz insists that the statement that, for example, a child has a right to education simply means that the child has an interest of the ultimate value which is a sufficient reason for holding someone else to a duty to provide that education. My point is that if we assume Raz's definition of rights, I cannot imagine agreeing with someone about the statement of that right without first agreeing on ultimate values. Suppose, for example, that someone stated that a child has a right to education. Taking Raz seriously would mean that this statement should be understood as a claim that the child has a certain interest of ultimate value which is a sufficient reason for holding others to a duty to provide the child with education. It is hard to see why Raz believes that in a pluralistic society we would be any more likely to agree with this statement than with a statement about ultimate values. This is not to deny that people in pluralistic societies do agree on statements of rights even though they disagree about ultimate values. The fact, however, that they do reach agreements on rights statements

indicates to me that they do not hold to Raz's understanding of what the statement of a right means, for if they assumed Raz's definition it would not be possible to agree on what rights there are without first agreeing that in certain respects a person's well-being is of ultimate value. So, although it may be rational for the state to count some intermediate conclusions as 'complete reasons' in practical deliberations because they allow for the creation of a pluralistic culture formed round those shared conclusions despite disagreement concerning ultimate values, Raz cannot consistently claim that it is rational to count rights in this way because, assuming his definition of rights, any serious disagreement about ultimate values will be reflected in rights-discourse.

As I understand it then, Raz is attempting two irreconcilable projects. On the one hand, he offers a very careful definition of rights which depends on rights being characterized as intermediate conclusions in arguments from ultimate values to duties. This definition is attractive both because of its precision and because it fits well with our ordinary understanding of the role of moral principles such as rights in our practical thinking. On the other hand, he seeks to explain how rights ground duties. The problem is that it does not seem possible to

characterize welfare rights as intermediate conclusions and consistently show that they ground the duties with which they are correlated. This means that Raz faces the following dilemma: he must abandon either his definition of rights or his goal of explaining how welfare rights ground duties. The second option is, I think, the more compelling one. The upshot is that general moral rights to welfare cannot justify the redistribution implied by the belief that justice requires the state to come to the aid of those suffering from unmet physical needs and other forms of deprivation because they cannot ground duties on others.

5. Although Raz himself does not explore it, it is worthwhile to briefly consider another response to the problem of how general moral rights to welfare ground the duties on others with which they are correlated. It could be argued that what the statement of a welfare right introduces is not just that some aspect of the right-holder's well-being justifies a duty for someone else but also that the right-holder can waive this duty.[31]

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31 Alan Gewirth, 'Why Rights Are Indispensable', *Mind 85* (1986), p. 336.

The important point is that rights as grounds for duties are unique in that the correlated duty is waivable. This feature of waivability distinguishes duties grounded on rights from duties simply grounded on the ultimate value of some aspect of of the right-holder's well-being.

At issue here is the thesis that waivability is a basic feature of a right. This thesis is deeply problematic in two respects. First of all, as a thesis about welfare rights it seems especially off the mark. It is not unusual to think that the duty correlated to a welfare right cannot be waived. The right to education is a case in point. Furthermore, as a general thesis about rights it can be subject to a number of disturbing counter-examples. Consider the following example from law.[32] In English law, it is possible to consent to a minor physical assault but not to a serious one. It would follow from the thesis that waivability is a basic feature of a right that under English Law one can be said to have a right not to be subject to minor assault but yet have no right against serious assault.

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32 Neil MacCormick, 'Rights in Legislation' in *Law, Morality, and Society: Essays in Honour of H.L.A. Hart*, eds. P.M.S. Hacker & J. Raz (Oxford, Clarendon Press, 1977), p. 197.

Conclusion

7. The foregoing discussion was designed to cast doubt on the proposition that certain fundamental moral rights to welfare, not derived from other more fundamental moral rights or principles, can justify redistributive measures undertaken by the state. What I have not done is challenge the very idea of welfare rights and their redistributive implications. It is my view that certain general rights to welfare can be derived from certain abstract rights to liberty. An account of derived general rights to welfare does not have to explain how those rights ground the relevant duties on others; since it is the abstract rights to liberty that are properly the grounds for those duties, those duties can still be said to be rights-based. The fact that I have not in this chapter challenged the very idea of welfare rights and their redistributive implications distinguishes my critique from the ones more commonly directed at welfare rights.

Welfare rights have in the past been subject to two especially influential criticisms, one of them utterly

unconvincing, the other more troublesome. The first criticism has been made by Robert Nozick. The following passage states the premiss on which his objection to welfare rights is based:

> There are particular rights over particular things held by particular individuals, and particular rights to reach agreements with others, *if* you and they together can acquire the means to reach an agreement...No rights exist in conflict with this substructure of particular rights.[33]

Consistently with this claim, Nozick says that,

> [t]he major objection to speaking of everyone's having a right *to* various things such as equality of opportunity, life, and so on, and enforcing this right, is that these "rights" require a substructure of things and materials and actions; and *other* people may have rights and entitlements over these.[34]

Clearly, the appeal of this critique depends on the initial premiss. If it is rejected, then Nozick's

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33 Nozick, *Anarchy, State, and Utopia*, p. 238.

34 Nozick, *Anarchy, State, and Utopia*, p. 238.

objection to welfare rights collapses. That premiss involves two distinct claims. One is a claim about the structure of rights. It says that the structure of rights is such that they cannot exist in conflict. This claim is contestable.[35] It presupposes a particular conception of rights: rights as side constraints. If one adopts a different conception of rights, then there is nothing conceptually puzzling about rights in conflict.[36] The other claim Nozick advances in this premiss is that the space of rights is filled by property rights: the particular rights over particular things held by particular individuals. Even if we accept the claim that the structure of rights is such that rights cannot exist in conflict, it seems doubtful that the property rights Nozick identifies fill the space of rights. This is because the claim that those rights should have primacy can be subject to a series of counter-examples. Imagine, for example, that I am walking alone in the desert and

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35 For a defence of it, see Hillel Steiner, 'The Structure of a Set of Compossible Rights', *Journal of Philosophy 74* (1977), esp. p. 769.

36 Jeremy Waldron, 'Rights in Conflict', *Ethics 99* (1989), pp. 503-504.

come across a malnourished child close to death.[37] Unfortunately, I have no food with me to give to the child nor can I carry him or her to shelter. Off in the distance I see your solitary house. I approach your house, find no one at home, but enter anyway and take some food for the child. Without that food, the child would have died. You do not even miss the food when you return home. Would we say that the child had no right to the food in this case because the fulfillment of that right required the violation of your particular rights over that food? In light of this counter-example, I suggest that we dismiss Nozick's initial premiss and, thus, his critique of welfare rights.

The other general critique of welfare rights often made is more troublesome. It is founded on the observation that since 'ought' implies 'can', the validity of the claim that individuals hold certain moral rights to welfare against the state depends on it being possible for the state to fulfill those rights. The implications of this point for the welfare rights ascribed to everyone by

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37 Judith Jarvis Thomson, 'Self-defence and Rights' in *Rights, Restitution, and Risk* (Cambridge, Mass., Harvard University Press, 1986), p. 40.

the United Nations Universal Declaration of Human Rights have been powerfully expressed by Maurice Cranston:

> If it is impossible for a thing to be done, it is absurd to claim it as a right...For a government to provide social security it needs to do more than make laws; it has to have access to great capital wealth, and many governments in the world today are still poor. The government of India, for example, simply cannot command the resources that would guarantee each one of the 480 million inhabitants of India 'a standard of living adequate for the health and well-being of himself and his family', let alone 'holidays with pay'.[38]

This objection applies as much to derived moral rights to welfare as to fundamental ones.

I believe that the basic mistake Cranston makes is to assume that rights are attributed to individuals collectively or in aggregate rather than one by one.[39] When welfare rights are viewed from a collective perspective, it does indeed seem absurd, given that ought implies can, to claim them as rights. But think about

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38 Maurice Cranston, 'Human Rights, Real and Supposed' in *Political Theory and the Rights of Man*, ed. D.D. Raphael (London, Macmillan, 1967), pp. 50-51.

39 Jeremy Waldron, 'Rights in Conflict', pp. 506-507.

what happens when we consider the rights of persons one individual at a time. For then it is true that practically any government can meet his or her rights. The point is that when the welfare rights of the inhabitants of India are considered individually one by one, scarcity and underdevelopment do not pose serious conceptual difficulties. It is only when we adopt a collective perspective on rights that there are these conceptual difficulties. Given this consideration, until a compelling argument is forthcoming for doing so, I can see no reason for adopting a collective perspective on rights.

CHAPTER FOUR

TWO CONCEPTIONS OF LIBERTY RIGHTS: AGENCY AND INTEGRITY

Introduction

1. The statement that person A has the liberty right to x means that it is at the discretion of A whether to do x or not to do x. The fact that A has this discretion does not mean that there are not any reasons against A doing x nor that there are not any reasons against A not doing x. Furthermore, the fact that person A has the liberty right to x does not provide him or her with a reason either to do or not to do x.[1] Suppose that I have

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1 This point is examined in more detail in chapter six.

the right to look at pornography. It does not, I think, follow that therefore I have a reason to look at pornography nor does it follow that I have a reason to not look at pornography. What does follow, however, is that others have a reason, in the form of a moral requirement, not to interfere with my looking at pornography.

The concept of a liberty right highlights, then, the protective function of rights. The liberty right to x protects person A from interference by others in his or her doing or not doing of x. We can say that it functions as a constraint on what others can do. Each right apparently identifies a sphere of action in which the right-holder can act without others interfering and forcing him or her to act in one way or another. If there is a right to pornography, for example, then the existence of this right demarcates a certain sphere of action - the looking at pornography - and grounds a moral requirement on others not to interfere with the right-holder either looking or not looking at pornography.

This concept of a liberty right can be subject to differing interpretations, each offering an alternative rationale or justification for the constraint-type protective function identified with a liberty right. These different interpretations of the *concept* of a

liberty right can be said to give rise to rival *conceptions* of a liberty right.[2] Each conception differs with respect to what of ultimate value it holds liberty rights to be *designed* to protect. The fact that they might actually protect other values as well is held to be incidental. The fundamental test for any adequate conception of liberty rights is that it must account for why the moral requirement of non-interference on others is appropriate both when the right-holder does x and when he or she does not do x; in other words, there must be an explanation for why our fundamental concern is with the right-holder's ability to determine what will happen.

Traditionally, conceptions of liberty rights have fallen into two broad classes. First of all, there is the class which holds that liberty rights are designed to protect something of ultimate value relating to the right-holder. This class shall concern me in the present chapter. The second broad class of conceptions of liberty rights takes into account other considerations of ultimate value. For example, the right to freedom of expression

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2 For the concept/conception distinction, see John Rawls, *A Theory of Justice* (Oxford, Oxford University Press, 1972), p. 5.

might be defended for its contribution to the discovery of truth since it allows for a free marketplace of ideas. In my view, all conceptions of liberty rights falling into this second class face a difficult if not irresolable problem which I shall try to briefly express. Assume right P is justified because it supports the general goal G. It will always be the case that some exercises of P will detract from G. How can these instances of the exercise of P be excluded from our understanding of that right? A concrete example will be helpful. It seems unquestionable that sometimes free expression is not only uncongenial to the discovery of truth but indeed hinders it. This fact might not seem troublesome: it simply explains why certain boundaries are set on the exercise of that right. Hate literature, for instance, is often thought to fall outside of the ambit of that right. I doubt however that we could readily agree that all exercises of free expression that hinder the discovery of truth fall outside the ambit of that right. The circulation of *Mein Kampf* is frequently defended by those who not only deny its truth but also think that it hinders the discovery of truth. How then can the underlying rationale for this be that it is essential for the discovery of truth? There is a parallel problem facing

rule utilitarians. They justify the existence of certain rules for guiding action because they maximize the greatest good. It is plausible to believe that sometimes in certain situations noncompliance with those rules yields more good than compliance, even after consideration of the indirect costs of that noncompliance are taken into account. How can the rule utilitarian object to this noncompliance? I mention this problem for the second class of conceptions of liberty rights only to further impress the case against justificatory acounts of liberty rights that do not relate the protective role of those rights to something of ultimate value relating to the individual. Nothing in the argument below especially depends on there not being a solution to this problem.

I will begin in this chapter by introducing the distinction between the agency conception of liberty rights and the integrity conception of liberty rights. The issue between these two rival conceptions is not what liberty rights *actually* protect but rather what they are *designed* to protect. By focusing on the underlying rationale for liberty rights, each can be seen to offer an explanation for the moral force of liberty rights. Then, I shall sharpen the rivalry between the agency and the integrity conceptions of liberty rights by contrasting

that distinction to a similar sort of distinction L.W. Sumner makes between the choice and the interest conceptions of rights. Finally, I shall turn to the differences between the agency and the integrity conceptions on certain controversial policy issues. This exercise is revealing because it proves to be an important testing ground for rival interpretations of the concept of a liberty right. If the agency conception and the integrity conception are genuine rivals, each offering a reasonable interpretation of the constraint-type protective function of liberty rights, then the superiority of one over the other may come to rest ultimately on which derivative liberty rights each says we have and how well this derived schedule fits with common-sense political morality. The three issues focused on are the censorship of pornography, language rights, and the extent of private property rights.

Agency and Integrity

2. The idea of agency held to be of ultimate value by the agency conception of liberty rights is quite familiar.[3] At its core is the portrait of the

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3 See especially Charles Taylor, 'What is Human Agency?'

right-holder as a person who makes antecedent choices about what he or she, in a particular situation, is going to decide to do. Not all decisions about what to do require in some fundamental way the exercise of agency. Certain decisions are very rudimentary. Examples might include deciding between flavours of ice-cream or soft drinks. What distinguishes these rudimentary decisions from higher-order choices is that the latter reflect judgements about goodness. Ordinarily, the choice between chocolate and strawberry ice-cream does not presuppose some judgement about what is good. The contrast is to, say, the choice involved in voting for one political party rather than another. Here I think do enter some judgements about goodness. I exercise my agency when I vote because I act upon higher-order choices that presuppose certain judgements about what is good. It is important to realize that I would not be exercising my agency if someone else forced me to vote one way or another, even if it coincided with how I would have decided to vote free from interference.

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in *Human Agency and Language, Philosophical Papers 1*
(Cambridge, Cambridge University Press, 1985), pp. 15-44.

Liberty rights are said to be designed to protect my agency in the sense that they allow me to act on certain choices I make free from interference by others.[4] The point is that regardless of whether I choose to do x or

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4 This conception of liberty rights enjoys wide currency. Robert Nozick in *Anarchy, State, and Utopia* (Oxford, Basil Blackwell, 1974) appears to subscribe to it. For him, rights are 'permissions to do something and obligations on others not to interfere.' (p. 92) When he explains the significance of rights, it is, on at least one reading, in terms of the importance of individuals constructing, choosing, and controlling their lives. (chapter 3) Similarly, John Mackie on p. 175 of 'Can There Be a Right-based Moral Theory?' in *Theories of Rights*, ed. J. Waldron (Oxford, Oxford University Press, 1984), takes, 'as central the right of persons progressively to choose how they live.' John Rawls's position is more difficult to pinpoint since for him rights are often thought of as legal and not moral. For example, he writes in *A Theory of Justice*, 'Taken together as one scheme, the major institutions define men's rights and duties and influence their life-prospects, what they can expect to be and how well they can hope to do.' (p. 7) This is of course more complicated because of the link between a theory of justice and the institutions in a just society. It is probably accurate to say that what Rawls calls the 'basic liberties' are rights in the sense relevant to our discussion. These basic liberties are justified because of their relation to the two 'highest interests' of a person. One of these interests is 'The capacity for a conception of the good [which] is the capacity to form, to revise, and rationally to pursue such a conception, that is, a conception of what we regard for us as a worthwhile human life.' ('The Basic Liberties and Their Priority', *The Tanner Lectures on Human Values III* (1982), p. 16) This capacity seems akin to agency.

not to do x the right functions so as to provide me with the discretionary power to do either one and grounds a moral requirement on others to refrain from forcing me to do one or the other. Let us assume that there is a unitary right to privacy. That right identifies a certain sphere of action - often only vaguely defined - in which a person can act on his or her choices about what to do. Some of those choices may well be only rudimentary but many require important judgements about goodness. This right then allows me to exercise my agency. We can say then that on this conception what gives liberty rights their moral force - their rationale - is that they are designed to protect the right-holder's agency.

Moreover, the agency conception of liberty rights is able to account for why the moral requirment of non-interference on others is appropriate both when the right-holder does x and when he or she does not do x. Protecting agency seems to warrant this constraint-type moral requirement. This is because of the nature of agency. Only I can exercise my own agency; no one else can. Suppose that I am in a situation in which I have made certain higher-order choices involving some sort of criterion of goodness. Whether or not I exercise my agency by acting on those choices is up to me. I might

decide not to act on those choices in which case I would not be exercising my agency; I only exercise my agency when I decide to act in accordance with those higher-order choices. But should others then try to force me to act on those choices, this would also not be a case of me exercising my agency since I am the only one who can decide to act on higher-order choices I have made and thus exercise my agency. If the objective is to protect my agency, the only alternative is non-interference. Enjoying the discretion to do x or not to do x unhindered is a necessary pre-condition for the exercise of one's agency.[5]

3. The integrity conception of liberty rights is likely to be less familiar than the agency conception. It holds that liberty rights are designed to protect the right-holder's integrity. Let me try to sketch out what I mean by integrity.[6] Everyone has commitments to certain

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5 One final issue concerns when higher-order choices warrant protection by rights. A choice to murder someone may well involve judgements of goodness but it hardly follows that there is a right to do so. Causing certain sorts of harm to others seems to be one reason for limiting the rights people have on the agency conception of liberty rights.

6 See especially Bernard Williams, 'A Critique of

projects, principles, institutions, and or personal relationships.[7] From these commitments flow some of our actions. An example will illustrate the point. Suppose that I am a devout Roman Catholic. That I eat fish every Friday can be said to flow from that commitment. It seems possible to distinguish among commitments between those which are *defeasible* - commitments that can be sacrificed without great remorse - and those which are *identity-conferring* - those commitments that reflect and are constitutive of one's identity.[8] Watching a

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Utilitarianism' in *Utilitarianism: For and Against* (Cambridge, Cambridge University Press, 1973), pp. 108-118.

7 I intend here a very ordinary understanding of what is a commitment. Amartya Sen in a discussion of welfare economics has tried to formulate a precise definition of commitment by contrasting it to a sympathy. A sympathy 'corresponds to the case in which the concern for others directly affects one's welfare.' A commitment does not reflect, according to Sen, a concern about your own welfare; although you think something is wrong, this is not because it affects your welfare. The narrow focus on welfare by Sen fails, in my view, to capture the complex nature of commitments. For example, it fails to capture the common case in which acting on one's commitments is contrary to what is in one's best welfare. An illustration of this sort of case is offered in section 6 below. See Sen, 'Rational Fools: A critique of the Behavioural Foundations of Economic Theory' in *Choice, Welfare, and Measurement* (Oxford, Basil Blackwell, 1982), pp. 91-92.

8 L. McFall, 'Integrity', *Ethics 98* (1987), pp. 12-13.

programme on television every week might be an example of a defeasible commitment whereas being a parent might be an identity-conferring commitment. My integrity is preserved when my actions are consistent with my identity-conferring commitments.

When liberty rights are held to be protectors of our integrity, the point is that they are designed to protect us from others forcing us to act contrary to our identity-conferring commitments and, therefore, without integrity.[9] Just as important is the fact that liberty rights also protect us from being forced by others to act on our commitments. This is also integral to our

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9 Explicit exponents of the integrity conception of liberty rights are rare. Occasionally rights as protectors of integrity is acknowledged but not generally given a central place. See, for example, Jeremy Waldron, 'A Right to do Wrong', *Ethics 92* (1981), pp. 34-35. Loren Lomasky in *Persons, Rights, and the Moral Community* (Oxford, Oxford University Press, 1987) has recently developed a view of rights starting from the observation that persons have projects that are important to them. However, he seems to hold to the view that all such projects are chosen. (p. 49) This suggests that he is leaning towards an agency conception. Furthermore, when faced with the fact that different persons have different projects, he justifies the claim that they all have the same moral rights by arguing that they all share the value of being project pursuers. (chapter 4) I find this a very contentious thesis. Hence, below when faced with a similar problem, I suggest the idea of an objective criterion for urgency.

integrity. My integrity is not preserved when someone else forces me to act consistently with my identity-conferring commitments. It is only preserved when I myself decide to act on those commitments. Having a liberty right allows me the opportunity to preserve my integrity. It in no way ensures that I will act with integrity; there is always the possibility that I might decide to act contrary to my deepest held commitments. But only by having the discretion to act without integrity is it possible for me to act with integrity. We find then an explanation for why others are morally required not to intefere both when I decide to do x and when I decide not to do x. The general point is that on this interpretation of the concept of liberty rights what gives those rights their moral force - their rationale - is that they are designed to protect the right-holder's integrity.

The integrity conception of liberty rights can be subject to a number of related objections. One such objection is suggested by the following question: since people have different identity-conferring commitments, would it not follow on the integrity conception that they should also have different rights? Consider two individuals, one who holds his or her religious commitments - atheist, Roman Catholic, Muslim, or whatever

- as identity-conferring and the other who regards religious beliefs in general as of only marginal importance. For the second individual, it would not particularly bother him or her if he or she was forced to attend church services or forbidden to attend them; he or she regards such regulations as analagous to traffic regulations. (I have in mind a character like Meursault in Camus's *L'Etranger*.) Would it not be appropriate in this case to say that the first individual has a liberty right to religious worship and yet deny that right to the second individual? This presents a genuine problem for integrity conception of liberty rights because that conclusion is deeply counter-intuitive; these moral rights are generally thought to be universally held by all persons. A different case illustrates another related problem, the problem of offensive commitments. Suppose that a person has a deeply-rooted, perhaps even identity-conferring, commitment to murdering someone. Does he or she have the right to do so on the integrity conception of liberty rights? A problem parallel to this last one arises when a trivial commitment is held so deeply that it is identity-conferring. Is there a corresponding right?

These problems indicate the importance of clarifying

when exactly an identity-conferring commitment is urgent enough to justify having a corresponding liberty right. What I propose is that we distinguish between *subjective* criterion and *objective* criterion for determining the urgency of commitments.[10] A subjective criterion looks to the commitments a person actually has. The liberty rights he or she can thus be said to have correspond to the identity-conferring commitments he or she holds. If these commitments do not include, for instance, any religous beliefs, then he or she does not have the liberty right to religious worship. An objecive criterion requires the identification of certain sorts of commitments that seem important enough for all persons to have and thus to enjoy corresponding liberty rights. Likely candidates for an objective list would include religious worship, associations, sexual orientation, self-expression, political participation, and job occupation.

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10 The distinction between subjective and objective criterion for the urgency of commitments is modelled after T.M. Scanlon's distinction between subjective and objective criterion for the urgency of preferences in 'Preference and Urgency', *Journal of Philosophy 72* (1975), pp. 656-658.

The cluster of problems with the integrity conception of liberty rights noted above only arise when combining that conception with a subjective criterion for urgency. I recommend that we avoid those problems by adopting an objective criterion.[11] There are at least two advantages of doing so. First of all, it ensures that everyone enjoys the same rights. Secondly, it enables us to deny that certain identity-conferring commitments we find repugnant or trivial have corresponding rights. There is, however, a paradoxical consequence of invoking an objective criterion. A person may have a right that makes it permissible for him or her to act in accordance with a type of commitment that he or she does not actually have or, at least, does not hold that closely. Thus, even though the rationale for him or her having that right is

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11 An alternative explanation might be to say that everyone has the same abstract right to integrity but enjoy different derivative rights. What derivative rights you have reflect your identity-conferring commitments. (For the distinction between abstract and derivative rights, see section 7 below.) I think that this alternative explanation is deeply problematic because I suspect that we think everyone has the same derivative rights, not just the same abstract rights. Moreover, this explanation does not deal with the problems of offensive and trivial commitments.

that so it will function to protect his or her integrity, there is in fact no way that it can actually protect his or her integrity.

4. The difference between the agency and the integrity conceptions of liberty rights can be pinpointed in the following way: whereas the agency conception claims that the rationale for liberty rights is that they allow actions to flow from *higher-order choices*, the integrity conception holds that their rationale is that they allow actions to flow from *identity-conferring commitments*.[12] The problem with expressing the contrast between these two conceptions in this way is that many commitments reflect choices and choices commitments. This means that it is often very difficult to separate commitments and choices. A liberty right may well allow for actions that flow both from a higher-order choice and an identity-conferring commitment. It may, therefore,

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12 I shall not discuss the interesting question of why in turn we should value agency or integrity. For some suggestions, see respectively Thomas Hurka, 'Why Value Autonomy?', *Social Theory and Practice 13* (1987), pp. 361-382, and Bernard Williams, 'A Critique of Utilitarianism', pp. 113-118, and *Morality: An Introduction to Ethics* (Cambridge, Cambridge University Press, 1972), pp. 87-95.

protect both the agency and the integrity of the right-holder. Herein lies the significance of distinguishing what the right is designed to protect - its justificatory nature - from what it actually protects. But it might be objected that such a distinction is of little consequence. The upshot of this objecion might be that the distinction between the agency and integrity conceptions of liberty rights is of little practical importance. The rest of this chapter is concerned with sharpening the rivalry between the agency and the integrity conceptions of liberty rights to meet this challenge.

Choice and Interest Conceptions of Rights

5. L.W. Sumner in *The Moral Foundation of Rights* introduces a distinction between a choice conception of rights and an interest conception of rights that bears some resemblance to the distinction outlined above. Like the account I give, Sumner highlights the role of rights as constraints. The choice and interest conceptions share, he says,

> a commitment to the root idea that the function of

> rights is to serve as one kind of constraint on the pursuit of social goals. Thus they share the conviction that real rights - standard, normal rights - must protect their holders by imposing normative constraints on others, and that these constraints must include duties borne by these others...From their common starting-point the two conceptions diverge by offering rival interpretations of the point or function of rights.[13]

Sumner clearly sees the protective role of rights to be a matter of constraints and that compliance to them by others requires, in the main, forbearance. Earlier in the book, Sumner emphasizes the importance of constructing a concept of rights that does not expand rights to include welfare-oriented values but instead preserves the traditional link between rights and basic liberties.[14] This is what I take him to mean by 'real rights' and 'standard, normal rights' in the passage quoted at length above. In effect, then, Sumner is proposing to construct a concept of liberty rights. The implicit point is this. In order for the choice and interest conceptions of rights

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13 L.W. Sumner, *The Moral Foundation of Rights* (Oxford, Oxford University Press, 1987), p. 47.

14 Sumner, *The Moral Foundation of Rights*, p. 17.

to be genuine rivals, they must both remain committed to the root idea of rights as constraints. This is also of course the context in which I have developed the agency and integrity conceptions of rights. There is then common ground on which to make a direct comparision between his distinction and mine.

Rights on the choice conception are conceived of as 'protected choices'. The basic idea is that the right-holder is then free to choose among a set of possible options. What makes these choices significant is their relation to 'freedom' or 'autonomy': 'the choice conception treats rights as devices for *promoting* freedom or autonomy.'[15] The fact that rights promote freedom or autonomy is then, on this conception of rights, what gives them their moral force. The puzzling feature of this account is how exactly rights as constraints *promote* freedom or autonomy. It is understandable how they might protect freedom or autonomy but *promotion* suggests much more than forbearance. The difficulty with this sort of suggestion is that it would involve moving away from the

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15 Sumner, *The Moral Foundation of Rights*, p. 47. Emphasis added.

'root idea' - recalling Sumner's phrase - of rights as constraints. I suspect, however, that all Sumner really means by *promote* is *protect*. I do not therefore think it necessary to labour this point any further. Ultimately I think that Sumner's choice conception of rights is akin to my agency conception of liberty rights.

Where the real contrast can be made is in our development of rival conceptions to the agency/choice conception of rights. In my view, Sumner develops a rival conception that is so impoverished that I doubt that it constitutes a genuine rival at all; Sumner himself not surprisingly expresses a preference for the choice conception.[16] Rights, on the interest conception, are conceived of as 'protected interests'. The basic idea is that the right-holder has interests that justify placing moral requirements on others or is the beneficiary of such requirements. What makes these interests or benefits significant is their relation to the right-holder's welfare. 'The interest conception,' writes Sumner, 'treats rights as devices for *promoting* individual

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16 Sumner, *The Moral Foundation of Rights*, p. 97.

welfare.'[17] His point is that what gives liberty right their moral force is the fact that they function in this way.

There is a very basic problem with this analysis. In light of the emphasis on the right-holder's welfare, it is extremely difficult for the interest conception of rights to explain the appropriateness of the contraint-type role liberty rights have. If the object is to promote the right-holder's welfare or even simply to protect that welfare, surely this would at least sometimes require more than forbearance. Why rights as constraints are therefore appropriate is less than obvious. Unlike the preservation of integrity or agency, we can advance the welfare of others. Why then should the role of others be restricted to forbearance? One response might be that autonomy is an important part of a right-holder's welfare and this takes us quite far in explaining the link between rights as constraints and the protection of the right-holder's welfare. But the initial proposition seems incorrect because at least in some circumstances I exercise my

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17 Sumner, *The Moral Foundation of Rights*, p. 47. Emphasis added.

autonomy despite it being contrary to what is best for my welfare. I might well insist on going out and buying a car that I quite like despite being aware that various consumer reports have found it to be quite unsafe. Unless the notion of individual welfare is radically altered to account for such anomalies, it is difficult to see how the claim that autonomy is an essential part of individual welfare can be sustained. It is therefore hard to see how the interest conception of rights is committed to the 'root idea' - again recalling Sumner's own phrase - of rights as constraints.

The upshot of questioning this commitment to that root idea is that it puts into doubt generally whether the interest conception of rights that Sumner constructs is a genuine rival to the choice or agency conception of rights. What would make them rivals is their shared commitment to the root idea of rights as constraints. Because however it appears that the interest conception does not embody a commitment to that idea, it is difficult to see how it is offering an alternative to the interpretation of that root idea offered by the choice conception.

6. The integrity conception of liberty rights,

unlike Sumner's interest conception, is a genuine rival to the agency/choice conception of liberty rights. We should note that acting on one's deeply felt, identity-conferring commitments - acting with integrity - can be contrary to what is in one's best interests. The example of Thomas More illustrates this. (So described by Robert Bolt in his play *A Man for All Seasons*.) Because of his commitment to Roman Catholicism, More felt unable to support the founding of the Church of England by Henry VIII. He acted with integrity despite knowing that it sealed his fate: he was executed. We have seen that understanding the rationale for liberty rights in terms of protecting integrity is consistent with the idea of rights functioning as constraint-type protectors. A person does not act with integrity anymore when others force him or her to act upon his or her identity-conferring commitments then when he or she is forced by others to act contrary to those commitments. A person can only act with integrity when others do not interfere with his or her actions related to those commitments. Like the agency conception of liberty rights then, the integrity conception of liberty rights is able to explain the concern, highlighted by the person-affecting theory of rights, with the ability of the right-holder to determine what will happen.

So far, I hope to have shown that when it comes to the test set out in the introduction to this chapter, neither the agency conception nor the integrity conception offers a superior interpretation of the concept of a liberty right. Another way to test these two conceptions for superiority is by examining their prescriptions for specific controversial concrete issues.[18] The basic idea is that one conception is superior to the other if it makes more acceptable recommendations on such issues. The difficulty with this sort of testing is determining what is an acceptable recommendation. I skirt this difficulty by not offering any judgement about the superiority of either conception as an interpretation of the concept of liberty rights. What I propose instead is simply to point out differences when it comes to the controversial issues of censoring pornography, language rights, and the extent of private property rights. This sharpens even further the rivalry between the agency and integrity conceptions of liberty rights.

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18 Ronald Dworkin in *Taking Rights Seriously, New Impression* (London, Duckworth,1978), pp. 134-135, suggests the idea of examining different conceptions of a single concept in light of their pronouncements on controversial cases.

Abstract and Derivative Rights

7. First, however, we must clarify in a more exacting fashion the relation between conceptions of liberty rights and the prescriptions they give rise to on concrete policy issues. The crucial distinction is between *abstract* and *derivative* rights.[19] The agency and the integrity conceptions each give rise to one abstract right, the abstract right to agency and the abstract right to integrity respectively. The abstract right to agency leaves it to the discretion of the right-holder whether or not to exercise his or her agency and grounds the moral requirement on others not to interfere with him or her doing so. The abstract right to integrity leaves it to the discretion of the right-holder whether or not to act with integrity and requires others not to interfere with him or her doing so. Derivative

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19 This distinction is composed of elements drawn from Dworkin's distinction between abstract and concrete rights in *Taking Rights Seriously*, pp. 93-94 & 273-274, and Joseph Raz's distinction between core and derivative rights in *The Morality of Freedom* (Oxford, Clarendon Press, 1986), pp. 168-170.

rights are those rights that are derived from or required by abstract rights. Derivative rights might be either welfare rights, liberty rights, or property rights; it is conceivable that all three kinds of rights might be derived from the same abstract liberty right. Typically, it is derivative rights rather than abstract rights *per se* that enter into arguments over public policy issues. The relation between abstract and concrete rights is principally justificatory. Ideally, the justification for there being a specific derivative right will involve, first, stating clear premises about the abstract right and, then, showing how the derivative right follows logically from them. It is, however, more likely that a justification will show how the derivative right is consistent with and can be said to flow from the abstract right. Derivative rights, thus, appear as natural extensions of the abstract right.

I have two additional comments to make about the nature of derivative rights. The first relates to the fact that derivative rights can be either simple or composite. Composite derivative rights are best thought of as composed of a number of simple derivative rights. For example, the right to privacy might also be expressed as a combination of the right to sexual orientation, the

right to pornography, the right to bodily integrity, and so on. It is an interesting puzzle about composite deriviative rights which comes first, the composite right or the simple rights of which it is said to be composed. Is there first the right to privacy and certain simple rights are inferred from that composite right or is there first these simple rights and from this is deduced a composite right, the right to privacy?[20] The view that there is first the composite derivative right strikes me as incorrect, given the relationship between an abstract right and its derivative rights. For it must be possible to show that individually each of the simple derivative rights said to make up the composite right are a natural extension of the abstract right. This means that the claim that there is a certain composite derivative right must be substantiated by showing how the simple rights that compose it are consistent with and flow from the abstract right.

Secondly, it is important to realize that certain derivative rights might be consistent with and appear to

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20 Judith Jarvis Thomson, 'The Right to Privacy' in *Rights, Restitution, and Risk* (Cambridge, Mass., Harvard University Press, 1986), p. 133-134.

flow from different abstract rights. I think, for example, that the liberty right to religious worship can be shown to be consistent with and flow from both the abstract right to agency and the abstract right to integrity. The point is that there may be some overlap in the derivative rights these two abstract rights allow for. The reason for singling out the three issues I have - the censorship of pornography, language rights, and the extent of private property rights - is precisely to pinpoint where there is not overlap between these two abstract rights.

Censoring Pornography

8. It is extremely difficult to offer a precise definition of pornography. I shall assume a very narrow definition of pornography as sex presented graphically in photographs, films, and on stage. There is at least one difficulty with this definition. Some so-called artistic work is also sexually graphic but yet is not ordinarily thought of as pornographic. This suggests a spectrum on which sexually graphic material can be represented. At one polar extreme is pure pornography free of any artistic merit; at the other extreme is pure art, free of any

pornographic elements but nevertheless sexually graphic. My claims in this discussion are directed primarily at pornography at its polar extreme. Utlimately, my metric for determining what is pornography is intuitive and in keeping with the American Supreme Court Justice Stewart's famous remark that while he could not actually define pornography, 'I know it when I see it.'[21]

That looking at pornography has harmful effects is a much debated issue. Certainly it has not been established that pornography contributes to violent sexual offences or other such crimes.[22] Given this consideration, there is on the agency conception of liberty rights a derivative liberty right to pornography. It is, in other words, at my own discretion whether or not to look at pornography, free from interference by others. The choice whether or not to look at pornography is a choice involving some sort

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21 *Jacobellis v Ohio (1964) 378 U.S. 184, 197.* Quoted in Peter W. Hogg, *Constitutional Law of Canada* (Toronto, Carswell Co. Ltd., 1985), p. 720.

22 The literature on this issue is immense. See, for example, the discussion in *Obscenity and Film Censorship: An abridgement of the Williams' Report*, ed. Bernard Williams (Cambridge, Cambridge University Press, 1981), pp. 61-95, and, more recently, Melissa Benn, 'Pornography: Adventures in the Soho Skin Trade', *New Stateman*, 11 December 1987, pp. 21-23.

of standard of goodness. Because of this, the right to pornography protects my agency.[23] Having that right does not give me a reason to look at pornography but it does ground a moral requirement on others not to interfere with my looking at pornography. It follows that the state should not censor pornography or restrict by other means access to pornography. Of course, if pornography does have the harmful affects sometimes attributed to it, then that might justify certain restrictions. Until that is established, however, the presumption is in favour of a right to pornography.

This argument against the censorship of pornography cannot be made by someone who holds to the integrity conception of liberty rights. This is because an objective list of identity-conferring commitments would have to include the commitment to looking at pornography in order for there to be a derivative right to pornography. Since this seems unlikely, I seriously doubt that the right to pornography is consistent with and can be said to flow from the abstract right to integrity.

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23 For an example of this kind of argument, see Ronald Dworkin's 'Do we have a right to pornography?' in *A Matter of Principle* (Cambridge, Mass., Harvard University Press, 1985), esp. 353-59.

Now, it might be held that there is on the integrity conception of liberty rights an indirect way to establish the right to pornography. It is common to hear a defence of an unhindered discretion to look at pornography on the grounds that that right can be inferred from either the right to privacy or the right to freedom of expression.[24] If it can in fact be inferred from either of those two rights and those rights in turn can be defended as natural extensions of the abstract right to integrity, then there would indeed be a right to pornography. This approach presupposes, however, that the right to freedom of expression and the right to privacy are composite derivative rights and the fact that there are such rights establishes in turn that there are the simple derivative rights of which they can be said to be composed. I have already indicated above why I think this sort of view of compositive derivative rights is mistaken; what must be directly established is that there is a right to pornography, not that there is a composite derivative

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24 This approach is examined with respect to freedom of expression in *Obscenity and Film Censorship*, pp. 53-57.

right from which that right might be inferred. To establish that there is a certain composite right derivable from the abstract right to integrity requires first establishing that there are the simple rights said to make up the composite right. We thus reach the conclusion not that according to the integrity conception of liberty rights pornography should be censored but only that the abstract right to integrity does not ground a requirement not to censor pornography.

Language Rights

9. Language rights are typically claim rights requiring others to provide certain services in a particular language. For example, language rights are often appealed to by French Canadians in the course of their demand that French should be the language of instruction in the schools their children attend. Often at issue are legal rights; sometimes, however, the language rights at issue are moral rights. Can these language rights be derived from either the abstract right to agency or the abstract right to integrity?

Before proceeding, it is worth noting that there is something quite peculiar about the idea of language

rights. Ordinarily the language I speak is the language I grew up with; speaking that language reflects participation in the cultural practice into which I was born. Rarely is it the case that people have deliberately chosen to speak the language that dominates their lives. And since it is generally the case that one only speaks that language, this means that one has no choice but to speak that language. It might be said that people have chosen not to learn another language but this proposition is nonsense if, as will often be the case, they never had the genuine opportunity to do so.

Language rights can, I think, be easily derived from the abstract right to integrity. This becomes evident if one tries to imagine an objective list of urgent commitments not including some cultural commitments such as one's commitment to speaking one's native language. I have already distinguished between identity-conferring and defeasible commitments. There is another distinction between commitments that cuts across this distinction and is very relevant to the issue of language rights. *Primordial* commitments are those commitments that arise from the cultural situation into which one is born whereas *reflective* commitments involve some degree of choice. A typical example of a primordial commitment is the first

language one speaks. Religious practices are also (or at least until recently) typically primordial. A clear example of a reflective commitment might be the project of running a four-minute mile. Reflective and primordial commitments can be either identity-conferring or defeasible. For many people, the occupation they choose is identity-conferring. For others, of course, their chosen occupation is defeasible. Family commitments, although generally primordial, are typically identity-conferring; but the painter Paul Gauguin is an example of someone well-known for whom such commitments were defeasible. At root, language rights suppose that certain primordial commitments warrant the ascription of corresponding derivative rights. And this poses no special problem for the integrity conception of rights.

The fact, however, that what are at issue are primordial commitments suggests that the agency conception of rights cannot accomodate language rights quite so easily. As we have seen, the rationale for liberty rights on the agency conception is that they allow actions to flow from higher-order choices. Now, it certainly is true that primordial commitments do reflect particular standards of goodness. Moreover, there is a sense in which we can decide whether or not to act on those

commitments. Rather than speaking the only language one knows, one could choose not to speak at all. The problem is that primordial commitments by their very nature are not chosen; the primordial commitments one has do not reflect deliberation. One's first language is something one is born into - it is simply there. The point is that language rights in most cases cannot be derived from the abstract right to agency because there are no higher-order choices to protect; the rationale for those language rights cannot be that they allow actions to flow from higher-order choices.

This conclusion has implications for other controversies involving cultural practices. In England, for example, there has been a strong campaign for Muslim state-funded schools. It is sometimes argued that Muslim parents and children have the right to be schooled in an enviroment where the dominate commitment is to Muslim religious values. Like one's language, religion, especially in the case of Muslims, is a primordial commitment. It is a cultural practice into which most Muslims are born; rarely is there deliberate choice about making it identity-conferring. Much of the criticism of the idea of Muslim schools has focused on the belief that they would function to undermine the value of agency by

indoctrinating the children, especially girls, with the view that commitments should not reflect choice. For those inclined to the agency conception of liberty rights, there is another response. It can be argued that the abstract right to agency cannot be extended to cover this case because what is at issue is a primordial commitment, not a reflective one.

Private Property

10. Private property is an external object that is owned. A right in private property gives an exact specification of the extent of that ownership. The particular rights in private property that shall concern me are the rights of full liberal ownership.[25] Let us assume that at the core of full liberal ownership is the idea that the right-holder has exclusive control over the use of some external object and that others are required

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25 Tony Honore, 'Ownership' in *Making Law Bind* (Oxford, Clarendon Press, 1987), pp. 166-71. For an extension of Honore's account, see Lawrence Becker, 'The Moral Basis of Property Rights' in *Property: NOMOS XXII*, ed. J. Roland Pennock & John Chapman (New York, New York University Press, 1980), pp. 190-191.

not to interfere with his or her use of that object.[26] The non-exclusive discretion to use and dispose of an external object is an alternative form of ownership in private property.

Full liberal ownership of private property makes it difficult to justify some of the traditionally accepted actions of the government. For example, taxation of private property in which a person has a full liberal rights of ownership appears to violate those rights.[27] It is thus tempting to deny full liberal ownership in any private property. But this strategy of rejecting all such ownership runs into a certain problem. For it seems that most people believe that everyone has the rights of full liberal ownership in one's own body - the thesis of self-ownership.[28] Given this belief, it seems worthwhile

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26 For a defence of this claim, see Nozick, *Anarchy, State, and Utopia*, p. 171.

27 Nozick, *Anarchy, State, and Utopia*, p.169-170.

28 For the idea that the thesis of self-ownership enjoys a certain deeply rooted appeal, see G.A. Cohen, 'Self-Ownership, World-Ownership, and Equality' in *Justice and Equality, Here and Now*, ed. Frank S. Lucash (Ithaca, Cornell University Press, 1986), pp. 109-112.

to consider whether it is possible to distinguish between private property that one can have full liberal rights of ownership in and private property that one cannot have full liberal rights of ownership in. The value of this distinction is that it is able to explain why the taxation of some private property would not violate anyone's rights. Can the integrity and agency conceptions of liberty rights sustain such a distinction?

The integrity conception is, I think, able to sustain a private property system in which people are able to enjoy full liberal rights of ownership in some things but not others. Start with a more basic distinction between *personal* and *fungible* private property.[29] This distinction can be expressed in terms of commidification. Personal property is property we closely associate with our personhood, with who we are. A wedding ring or a

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29 Margaret Jane Radin, 'Property and Personhood', *Stanford Law Review 34* (1982), pp. 960 & 986-988. For an application of this distinction to a controversial issue, see her 'Residential Rent Control', *Philosophy and Public Affairs 15* (1986), esp. 362-366. A similar but less worked out distinction is suggested by C.B. Macpherson, although without the very important emphasis on personhood, in 'Human Rights as Property Rights' in *The Rise and Fall of Economic Justice* (Oxford, Oxford University Press, 1986), p. 79.

family heirloom or a home might be examples of personal property.[30] Because personal property is so closely linked to our personal identity, it cannot be completely replaced by money or some other commodity. In this sense, we can say that personal property is not completely commodifiable. Fungible property is, in contrast, completely commodifiable. This means that money or some other commodity can be substituted for that property without any loss. Stocks or a car or a piece of land might be examples of fungible property. A feature of fungible property is that its ownership is not intrinsic to one's personal identity. Clearly, this distinction between personal and fungible private property corresponds to the distinction between identity-conferring and defeasible commitments. Personal property involves identity-conferring commitments whereas fungible property

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30 I am inclined to say, somewhat intuitively, that our own bodies are also personal property because they are so closely linked to our personal identity. This would explain the wide spread acceptance of the thesis of self-ownership. Some people have, however, expressed doubt about how closely related our own bodies are to our personal identity. See the discussions by Locke and Nagel in *Personal Identity*, ed. John Perry (Berkeley, University of California Press, 1975) as well as Derek Parfit, *Reasons and Persons* (Oxford, Oxford University Press, 1984), chapter 10.

involves more defeasible commitments. On the integrity conception of liberty rights, the urgency of particular identity-conferring commitments gives rise to derivative rights. The point then is that there can be full liberal rights of ownership in personal private property but not in fungible property. Thus, taxation of fungible private property would not involve the violation of any rights.

The agency conception of liberty rights is unable to make relevant the distinction between personal and fungible property. It requires instead a distinction between uses of private property involving rudimentary decisions and uses of private property involving higher-order choices that reflect judgements of goodness. Here the point is that this would allow us to say that there are full liberal rights of ownership in the latter sort of property but not in the former. The problem is that this sort of distinction between types of private property is difficult to sustain. Both the selling of shares on the stockmarket and the pawning of a wedding ring at the pawnbroker involve important choices that might be integral to agency. It is not clear how we can sensibly separate private property along the lines required. This suggests a dilemma for proponents of the agency conception of liberty rights: they must either

embrace a private property system which allows for full liberal rights of ownership in everything or deny that there should be full liberal rights of ownership in anything.[31]

Conclusion

11. The purpose of this chapter has been to outline two rival conceptions of liberty rights. It is my feeling that anyone who takes liberty rights seriously must adopt one or the other of these two conceptions. As will become apparent in chapter seven, both of these conceptions have an important role to play in the development model of rights and deprivation. There, I argue that certain rights to have one's needs met can be derived from both the abstract right to agency and the abstract right to integrity.

But I believe that the distinction I have drawn in this chapter between the agency conception of liberty rights and the integrity conception of liberty rights is

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31 Nozick in *Anarchy, State, and Utopia*, passim, and Dworkin in *Taking Rights Seriously*, esp. 264-265 & 277-278, are representatives of these two alternatives.

important for reasons quite independent of the role they play in the development model of rights and deprivation. Implicit in the discussion above is the theme that among rights theorists the integrity conception has been neglected. This neglect strikes me as unfortunate, given the recent communitarian critique of liberty rights. Some communitarians such as Michael Sandel have expressed scepticism about the idea that people make higher-order choices about what sorts of lives to lead and have argued instead that one's life is principally a journey of self-discovery, not choice.[32] This leads them to question in turn the value of liberty rights.[33] The fact, however, that the rationale for liberty rights could be that they allow for actions to flow from identity-conferring commitments - the integrity conception of liberty rights - means that even if one agrees with the communitarians that the idea of people making higher-order choices about what sorts of lives to lead is a mistake,

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32 Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge, Cambridge University Press, 1982), esp. p. 152.

33 Michael Sandel, 'The Procedural Republic and the Unencumbered Self', *Political Theory 12* (1984), p. 94. See also Amy Gutmann, 'Communitarian Critics of Liberalism', *Philosophy and Public Affairs 14* (1985), pp. 310-311.

this is no reason to dismiss liberty rights as unimportant.

CHAPTER FIVE

DISTRIBUTIONAL EQUALITY AND RIGHTS

Introduction

1. So far, I have assumed that if there is a rights-based argument capable of justifying the redistribution implied by the belief that justice requires the state to help the needy, the relevant abstract right must be either a welfare right or a liberty right. In this chapter, I propose to consider what I take to be an important challenge to this assumption. Ronald Dworkin has argued that the abstract right most basic to political morality is not any sort of general right to liberty but rather the right to equal respect and concern. Indeed,

Dworkin has traced the traditional differences between liberals and conservatives to differences over what it is for the government to treat all its citizens with equal respect and concern.[1] On his own interpretation, the right to equal respect and concern requires in terms of distribution what he calls 'equality of resources'.[2] Without yet elaborating more fully on what Dworkin means by equality of resources, it is enough to say that it would entail a redistribution of wealth more extensive than that now undertaken by the modern welfare state.[3] The character of the challenge made by Dworkin to my approach is, I hope, apparent, for the right to equal respect and concern cannot readily be said to be either a welfare right or a liberty right; it seems to elude both of these categories. Yet, on Dworkin's interpretation, it appears to fulfill the role of justifying certain

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1 Ronald Dworkin, 'Liberalism' in *A Matter of Principle* (Cambridge, Mass., Harvard University Press, 1985), esp. p. 190.

2 I have assumed throughout this chapter that there is a basic coherence on Dworkin's part in his treatment of the idea of equal respect and concern over the past fifteen years. This assumption might be challenged.

3 Ronald Dworkin, 'Why Liberals Should Care About Equality' in *A Matter of Principle*, p. 208 and 'What is Equality? Part 3: The Place of Liberty', *Iowa Law Review 72*(1987), p. 43.

redistributive institutions of the welfare state.

Because the right to equal respect and concern counts as neither a welfare right nor a liberty right, the two most obvious strategies for accommodating this challenge are not open. That is to say, I can neither dismiss the right to equal respect and concern out of hand by referring to the case against welfare rights outlined in chapter three nor can I present it as one possible liberty rights-based argument. So instead I will pursue a third strategy: although I am basically sympathetic to Dworkin's interpretation of the right to equal respect and concern and I support many of his conclusions, I do not think that an argument for redistribution that begins with the claim that there is this right should be counted as a rights-based justification for redistribution. Rather it should count as what I crudely describe as an equality-based justification for redistribution.

I propose in this chapter two theses, one negative, the other positive. The negative thesis says that an argument that appeals fundamentally to the "right" to equal respect and concern does not constitute a rights-based justification for redistribution. The positive thesis says that there is an important distinction to be drawn among justificatory accounts for

redistribution between *rights-based redistribution* and *equality-based redistribution*. Support for the negative thesis comes from Dworkin himself who has emphasized that the right to equal respect and concern is not properly a right.[4] It is somehow of more ultimate value. But, of course, the fact that the negative thesis is true does not mean that the positive thesis is also true; one does not entail the other. Thus, it is my object in this chapter to defend that positive thesis. I shall argue that rights-based and equality-based justifications for redistribution can be distinguished functionally by the basic sorts of redistributive transfers they require. I follow up this distinction in two ways. First, I suggest an important place in issues of redistribution for rights-based considerations. Second, to conclude, I consider what the distinction between rights-based and equality-based redistribution implies for justificatory accounts of the redistributive social policies characteristic of the modern welfare state.

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4 Ronald Dworkin, *Taking Rights Seriously, New Impression* (London, Duckworth, 1978), pp. xv & 368.

A General Right to Liberty?

2. In a well known essay in *Taking Rights Seriously*, Dworkin makes the case for the right to equal respect and concern by showing how it can ground traditional liberty rights such as the right to freedom of speech or religion better than the more commonly invoked idea of a general right to liberty. His objections to a general right to liberty are restricted only to the stronger sense of that right by which it would entail that it is wrong for the government to interfere with someone doing something even though it is in the collective interest to do so.[5] Dworkin points out that there are laws justified by the collective interest that do restrict people's freedom in the required sense but are obviously not wrong. He gives the example of a traffic regulation against driving the wrong way up a one way street. Clearly, this law does not violate some moral right to drive in that direction. It follows, therefore, that there cannot be a general right

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5 Dworkin, *Taking Rights Seriously*, p. 269.

to liberty.

Now, Dworkin admits that his understanding of the general right to liberty could be mistaken. It might be said that it is only a right to certain important or basic liberties such as freedom of speech, sexual orientation, etc. The issue then becomes quite different. What is required is some criterion for distinguishing important liberties from other liberties not protected by the general right to liberty. An appeal to the quantity of liberty involved is clearly inadequate. This point is made particularly well by Charles Taylor in his essay 'What's Wrong with Negative Liberty'.[6] Taylor proposes a comparision between Albania and Britain in terms of freedom, limiting consideration to bans on public religious practice and traffic regulations. Albania does have a general ban on public religious practice but has few traffic lights. Britain, in contrast, has many more traffic lights but no ban on public religious practice. Although traffic lights are probably much more of an everyday part of most people's lives, we are nevertheless

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6 Charles Taylor, 'What's Wrong with Negative Liberty' in *Philosophy and the Human Sciences, Philosophical Papers 2* (Cambridge, Cambridge University Press, 1985), p. 219.

inclined to think of Britain as freer than Albania. This example shows two things. First, that there does seem to be a common-sense distinction between fundamental liberties and other liberties and, second, that the difference between them is not to be understood in terms of the quantity of freedom. Return now to Dworkin. He argues that this distinction can be grounded only on some value or interest other than liberty. But if that is the case, it does not make sense to claim that there is a general right to liberty. Instead, there is a general right to that value or interest which in turn grounds rights to particular liberties - liberties that might then be described as fundamental or basic.

The particular value Dworkin proposes is equality; the general right, the right to equal respect and concern. This abstract right can be viewed in two basic ways. It might be taken to mean the right to equal treatment whereby in the distribution of any good everyone should be treated the same. Alternatively, it could mean the right to treatment as an equal whereby everyone receives equal consideration in the decision-making about the distribution of goods but everyone may not receive the identical bundle. Dworkin concerns himself mainly with the second interpretation of the right to equal respect

and concern. Not only does it underlie his account of equality of resources, as we shall see, it is also on this interpretation that equality can be shown to ground the familiar liberty rights. The case Dworkin makes for those rights is that they are necessary in any decision-making procedure that treats everyone as equals. For example, the right to sexual orientation might be defended on the grounds that this ensures that homosexuals, for instance, are considered as equals in the distribution of goods. Similarly, freedom of speech and assembly could be defended on the grounds that they are important devices for ensuring equal consideration. Other common liberty rights can be defended in a similar manner.[7] It is because the right to equal respect and concern grounds collective goals as well as these rights that Dworkin is hesitant to view that right as itself a trump.[8]

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7 Dworkin, *Taking Rights Seriously*, pp. 272-277.

8 *Taking Rights Seriously*, p. xv. This point raises a puzzle: Why call the "right" to equal respect and concern a right at all? Dworkin seems sensitive to this, now using the phrase more sparingly, seeming to prefer other descriptive terms like "principle" or "entitlement". (See, for example, 'Liberalism', p. 190.) This puzzle touches another issue I do not address: Why should we value equality? For some of Dworkin's views, see especially his 'In Defence of Equality', *Social Philosophy and Policy 1(1)* (1984), pp. 25ff and his forthcoming *Tanner Lectures*, 'Foundations of Liberal Equality' (15 January, 1990

3. There is here an important point to take note of and to which I will return later on in this chapter. Dworkin is here offering only one possible ground for common liberty rights.[9] He does not rule out other grounds. I have argued in chapter four that agency and integrity are two possible rationales for liberty rights. The importance of agency and integrity is that they allow us to distinguish between important and unimportant liberties. For this reason, Dworkin's critique of the general right to liberty applies to neither the abstract right to integrity nor to the abstract right to agency. There is, however, a very important difference between these two abstract rights and the right to equal respect and concern as rationales for liberty rights. The two I

Manuscript), esp. pp. 109-119.

9 Dworkin, *Taking Rights Seriously*, p. 272. He has emphasized this more recently on p. 12 of 'The Place of Liberty' where he says, 'my argument does not claim to supply the only or the most intuitively powerful argument for the liberties I discuss.'

suggest defend certain liberties as fundamental because of their relevance to the interests of individuals whereas Dworkin offers a defence that views them more as a procedural requirement for ensuring that a justifiable decision is made. My approach is the more conventional.[10]

Equality of Resources

4. Equality of resources is an interpretation of how to treat people as equals in so far as we are concerned with the distribution of resources that are to be owned privately by individuals. Recall that treating people as equals is what Dworkin understands the right to equal respect and concern to require. This means, then, that for Dworkin the right to equal respect and concern requires equality of resources.

Dworkin distinguishes broadly between two general theories of how to distribute resources among people so as to treat them as equals. Equality of welfare 'holds that a distributional scheme treats people as equals when it

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10 H.L.A. Hart, 'Between Utility and Rights' in *Essays on Jurisprudence and Philosophy* (Oxford, Oxford University Press, 1983), p. 211.

distributes or transfers resources among them until no further transfer would leave them more equal in welfare.' Equality of resources 'holds that it treats them as equals when it distributes or transfers so that no further transfer would leave their shares of the total resources more equal.'[11] Both of these theories have been subject to different interpretations. For example, interpretations of equality of welfare differ principally on two dimensions: with respect to what welfare is, and with respect to whether in equalizing welfare they are restricted or comprehensive. The principal issue among competing interpretations of equality of resources is what constitutes an equal share. The fact that there are different interpretations of equality of resources may be blurred by the fact that Dworkin describes his own position as "equality of resources", even though it is only one possible interpretation of that theory. What must be kept in mind is that Dworkin is making two distinct claims: (1) That equality of resources is a better general theory of how to treat people as equals

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11 R. Dworkin, 'What is Equality? Part 1: Equality of Welfare', *Philosophy and Public Affairs 10* (1981), p. 186.

than equality of welfare. (2) That his suggested interpretation of that general theory which he also calls equality of resources is better than other possible interpretations.

My concern is mainly with claim (2) because I think that it reveals the most about equality of resources in so far as the concern is with distinguishing equality-based redistribution from rights-based redistribution. Claim (1) involves Dworkin's critique of equality of welfare. I do not have much to say about that critique. However, it is important to recognize that by posing only two alternatives Dworkin is offering a stronger case for equality of resources than there might actually be. It seems perfectly plausible that there is a third alternative general theory of distributional equality. If so, claim (1) does not entail the stronger claim: equality of resources is the best general theory of how to treat people as equals in a distribution scheme. I am not exactly sure what the implications are for the distinction I draw in the next part of this chapter if that stronger claim is unsustainable. Ultimately, I suspect that it depends on how much the best theory will resemble equality of resources. For the most part, however, I leave this issue alone.

5. At the core of Dworkin's interpretation of equality of resources is the distinction between a person's personality and his or her circumstances. Among a person's personality, Dworkin includes features such as convictions, ambitions, tastes, and perferences. A person's circumstances include his or her resources, talents and skills, and physical and mental capacities.[12] The peculiarity of including talents, skills, and capacities among a person's circumstances rather than as features of his or her personality will be discussed below. On Dworkin's view, simply put, people are treated as equals when transfers or initial distribution would leave them equal in their circumstances. This is how he interprets the equal share required by equality of resources.

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12 R. Dworkin, 'What is Equality? Part 2: Equality of Resources', *Philosophy and Public Affairs 10* (1981), p. 302 and 'The Place of Liberty', pp. 18-19. Note that Dworkin sometimes expresses this distinction in terms of the contrast between a *person* and his or her *circumstances*. G.A. Cohen in 'On the Currency of Egalitarian Justice', *Ethics 99* (July 1989), esp. pp. 916-44, argues that Dworkin has misdescribed this crucial cut and that the correct one should be between choices and brute bad luck. This relocation does not have any serious implications for my argument below. For Dworkin's response to this criticism, see 'Foundations of Liberal Equality', pp. 120-125.

But 'equal' itself requires some qualifications. A basic axiom of Dworkin's position is this: equality of resources is concerned fundamentally with the share of resources devoted to the whole life of an individual.[13] People are treated as equals when their share of resources across their lives as a whole are equal. The guiding principle for determining what constitutes an equal share builds on this basic axiom. It requires that any distributive scheme be sensitive to the cost of each person's life to other people. That cost is to be measured by how valuable the resources and other elements of circumstances consumed - interpreted broadly to suggest also use, etc. - by that person are to those other people. Dworkin terms this cost the opportunity cost of one's life. Clearly, though, people will choose to do different things with their circumstances. These differences will reflect their personalities. One person might prefer to use his or her resources to produce something, someone else might prefer only to consume. The

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13 Dworkin, 'Equality of Resources', p. 310.

first person will then have more resources than another. But this does not mean that one would therefore have been treated as less than an equal. Provided that each is equal in the circumstances devoted to the whole of their lives, the differences resulting from differences in personality do not undermine them having equal shares. It is in this sense that we might say that equality of resources is "personality-sensitive" or, to use Dworkin's preferred expression, "ambition-sensitive".[14]

6. If we accept, as Dworkin suggests, that distributional equality be ambition-sensitive, what then is the best way to distribute resources? What is the best way to measure opportunity costs? This role is assigned, in the first instance, to the economic market for goods. An illustration of how it determines opportunity costs is provided by Dworkin. Imagine the situation of a group of shipwrecked survivors washed up on a desert island with an abundance of resources. The issue is how to distribute equally those resources that are to be privately owned.

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14 Dworkin, 'Equality of Resources', pp. 333 & 338.

Some form of auction or market is proposed. One basic requirement is that all of the shipwrecked immigrants enter the market on equal terms.[15] This requirement is met if everyone has the same number of counters to be used for bidding in the auction. Clamshells are suggested as counters provided that no one values them apart from their role as counters and therefore no one wants to buy them in the auction. To ensure that the auction works properly, it is also necessary that each person receive a large number of clamshells. The most difficult task is proposing a set of prices for the resources to be sold. The person who has this task must post a set of prices that "clear the markets". Technically, this requires that only one person among the bidders is willing to pay the price for each resource and that all resources are sold. The importance of price-setting in this way is that it determines how valuable each resource is to other people. We have then a way of measuring opportunity costs. Of course, if you are the buyer of a resource at the price of x clamshells, this means that you have fewer clamshells to

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15 Dworkin, 'Equality of Resources', p. 289.

buy other resources. Suppose that after the prices have been set to clear the markets, the auction is run. Each person has a bundle of resources based on their bids during the auction. Unfortunately, someone is unhappy because someone else has a bundle of resources they would have preferred. In that case, the distribution would have failed what Dworkin calls the "envy test": 'No division of resources is an equal division if, once the division is complete, any immigrant would prefer someone else's bundle of resources to his own bundle.'[16] So the auction should be run again so that the person has the opportunity to purchase the envied bundle of resources. And again and again until the envy test is passed. The consequent bundle of resources each person would have after the last successful run of the auction would constitute an equal share.

It is very important to recognize that the auction is not, for Dworkin, a mere instrument for achieving distributional equality. The market pricing mechanism upon which it is predicated is integral to the very idea of

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16 Dworkin, 'Equality of Resources', p. 285.

equal shares:

> The market character of the auction is not simply a convenient or *ad hoc* device for resolving technical problems that arise for equality of resources in very simple exercises like our desert island case. It is an institutionalized form of the process of discovery and adaptation that is at the center of the ethics of that ideal. Equality of resources supposes that the resources devoted to each person's life should be equal. That goal needs a metric. The auction proposes what the envy test in fact assumes, that the true measure of the social resources devoted to the life of one person is fixed by asking how important, in fact, that resource is for others.[17]

Dworkin's actual claim in this passage about the significance of the hypothetical market device to distributional equality is unclear. What puzzles me is how central exactly does he see that device. It is worthwhile, I think, to note the possibilities.

Let us begin with a distinction drawn by John Rawls between different ideals of procedural justice.[18] The ideal of perfect procedural justice obtains when there is

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17 Dworkin, 'Equality of Resources', p. 289.

18 John Rawls, *A Theory of Justice* (Oxford, Oxford University Press, 1972), pp. 85-86.

both an independently conceived notion of the correct outcome and a procedure for reaching that outcome. Consider the well known problem of dividing a cake. The correct outcome, let us assume, is that everyone receives the same size piece. Given certain assumptions about rationality, self-interest, etc., a procedure which guarantees the right result would be this: one person would cut the cake and then take the last piece. Imperfect procedural justice obtains when there is an independently conceived notion of the correct outcome but no feasible procedure for reaching it. In contrast to both perfect and imperfect procedural justice, pure procedural justice obtains when there is no independently conceived correct outcome. Instead, the correct outcome counts as such because it ensues from a correct or just procedure. Supppose that we now impose this three-fold distinction on distributional equality. Perfect distributional equality obtains when there is both an independently conceived idea of equal shares and a procedure for dividing privately-owned resources so as to achieve that result. Imperfect distributional equality obtains when there is an independently conceived notion of equal shares but no feasible procedure for achieving it. Pure distributional equality obtains when there is no

independently conceived notion of equal shares. An equal share on this ideal is the outcome of a procedure that treats everyone as equals. My question is then this one: How does Dworkin see the ideal of distributional equality? Only when we have an answer to this question can we have a clear understanding of the significance of the hypothetical market device to equality of resources.

If Dworkin holds to the ideal of pure distributional equality, then the importance of the market would be unquestionable, for it would have the role of defining equal shares. And there does seem to be some support for this reading. As we have seen above, particularly when considering the idea of a general right to liberty, treating people as equals is largely a procedural matter whereby everyone is given equal consideration in decision-making. Elsewhere, however, Dworkin seems to rely on some sort of independently conceived notion of equal shares to make his argument. For example, compensation for expensive tastes presents a problem for equality of welfare precisely because this is contrary to our intuitions about distributional equality.[19] If there

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19 Dworkin, 'Equality of Welfare', p. 228.

is an independently conceived idea of equal shares such as is presupposed in the expensive tastes problem, then the issue at stake is very different. Does the hypothetical market achieve the right result? Does Dworkin's own interpretation of the general theory of equality of resources, in other words, meet the ideal of perfect distributional equality or is it imperfect?

I believe that Dworkin is committed to the view that when it comes to the distribution of transferable resources the market is capable of achieving perfect distributional equality. This reading of Dworkin is, I think, supported by the following passage:

> The auction, bringing to bear information about the resources that actually exist and the competing preferences actually in play, is the *only true measure* of whether any particular person commands equal resources.[20]

The fact that Dworkin says in this passage that the auction is the *only true measure* of equal resources indicates that he is concerned with distributional

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20 Dworkin, 'Equality of Resources', p. 302. Emphasis added.

equality based on some independently conceived notion of equal (transferable) resources; the market pricing mechanism is unique because it can track that notion. If Dworkin thought that there is no independently conceived idea of equal (transferable) resources, I believe he would have said in this passage that the auction *defines* equal resources. In other words, Dworkin's account of equality of transferable resources does not sketch an ideal of pure distributional equality but rather an ideal of perfect distributional equality.

7. After the auction, the markets will stay open. This presents a problem for Dworkin's ideal of perfect distributional equality. Everyone, it was presumed, entered the auction as equals if they each had the same number of clamshells. Clearly, however, people do not have the identical endowments and capacities; some will have physical or mental handicaps, others will have highly valued talents and skills. Recall now that Dworkin includes talents and capacities among the circumstances that equality of resources seeks to equalize. Wouldn't this mean that people would not be entering the market as equals? The problem is that because talents and handicaps cannot be transferred among persons, they cannot,

therefore, be bid for in the auction like other sorts of more contingent goods.[21] Suppose, however, that the use of each talent and each skill was bid for in the auction just like any other resource. What the bidder would be proposing to buy is the command over the labour power of the person who has the talent in question. If, for example, I were to make a successful bid for your talent at building houses, then the consequence would be that I could command you to build a house for me. Auctioning talents and skills would then, for various other reasons, result in what Dworkin describes as 'slavery of the talented'.[22] How else might circumstances be equalized with respect to talents and handicaps?

Dworkin points to two problems with a simple transfer, through the economic market for goods, of extra resources to the handicapped and less talented with the aim of bringing them up to normal.[23] The first problem

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21 Dworkin, 'The Place of Liberty', p. 18n19.

22 Dworkin, 'Equality of Resources', p. 312.

23 Dworkin, 'Equality of Resources', p. 300.

is with defining what is "normal". How many extra resources do we need to transfer to a handicapped person to make him or her normal? This is not really a genuine problem because, as Amartya Sen has pointed out, we do not need a sense of "normal" in order to make the comparis on between persons necessary for distributional equality.[24] The second problem with simply transferring extra resources to the handicapped is more serious. It notes that no amount of extra resources could fully compensate someone who suffers from a physical or mental handicap. It follows from this observation that no matter how many extra resources we transfer to the person with the handicap, the amount of resources transferred is going to be morally arbitrary.

As I understand it then, from the perspective of distributional equality, the principal issue of how to make people equal with regard to non-transferable resources revolves around the problem of determining, in a way that is not morally arbitrary, the amount of extra resources that should be transferred to those with

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24 Amartya Sen, 'Rights and Capabilities' in *Resources, Values, and Development* (Oxford, Basil Blackwell, 1984), p. 322.

handicaps and deficient skills. Dworkin's innovative solution to this problem is to have some sort of hypothetical insurance market, in which people are imagined to have insured against being handicapped or untalented, operating alongside the economic market for transferable goods. Although his sketch of this insurance market is very complex, the basic idea that informs it is simple. Imagine that people pay an insurance premium against being handicapped or untalented based on how much each disvalues suffering from a specific handicap or being untalented in some respect. The actual rate of coverage provided by the insurance market will be the same for everyone, regardless of whether some of those who buy the insurance are among a higher risk group because of genetic considerations or some other form of brute bad luck.[25] If a person turns out to suffer from a disadvantage that would have been insured against, then the insurance scheme will compensate him or her accordingly. The actual level of compensation paid out will depend on how many other people collect. This is because, in order for an

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25 See especially Dworkin, 'Equality of Resources', pp. 297, 301, & 331

insurance market to function properly, it is necessary for the premiums paid in to the scheme to be at least equal to the compensation paid out. And since it is important to keep premiums low, compensation is unlikely to bring the amount of resources enjoyed by someone who suffers the relevant disadvantage up to the same level of those who do not suffer the relevant disadvantage.[26]

Dworkin maintains that a tax system can be based on this hypothetical insurance market. Now, suppose that we determine the average level of insurance coverage people would buy and then set this premium as a tax.[27] There are two sorts of problems with this suggestion. The first concerns the deeply inegalitarian implications of this tax, for it would seem that everyone, regardless of their income, would pay the same amount. Dworkin's response is that premiums would not in fact be flat but would rather be graduated; high earners would be required to pay more.[28] His argument in support of this response is very

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26 This is what Dworkin on p. 325 of 'Equality of Resources' calls co-insurance.

27 Focusing on the average level of coverage is, according to Dworkin, a simplifying device. See 'Equality of Resources', p. 327n15. See also footnote 31 below.

28 Dworkin, 'Equality of Resources', p. 324-26.

complex and I am not sure that I fully understand it. What is evident, however, is that on Dworkin's tax system those who suffer from deficiencies in capacities or skills are compensated for losses in their income potential and nothing else.[29] This point is reinforced by Dworkin's response to the second sort of problem with translating the hypothetical insurance market into a tax scheme. This second sort of problem at root is whether the scheme should tax people for the talents they have or only tax the income they realize by using those talents. The problem with taxing people for the talents they have is that this will result in something like what was above referred to as 'slavery of the talented'. Not surprising, then, Dworkin favours taxing only income:

> Notice that our analysis of the problem that differential talents presents to equality of resources calls for an income tax, rather than either a wealth or a consumption tax. If people begin with equal resources, then we wish to tax to adjust for different skills so far as these produce different incomes, because it is only in that way that they threaten equality of resources.[30]

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29 The implications of this very important point are considered later on in this chapter.

30 Dworkin, 'Equality of Resources', p. 312n9.

Regardless of the exact details about the working of such a tax scheme, it should be evident that the compensation paid to the handicapped and the untalented on this scheme does not aim to bring them up to "normal" or to transfer sufficient extra resources to make them no more disadvantaged than if they did not suffer from the handicap or deficiency in talent. The objective is to compensate them for the low earnings they attract as a result of their handicap or lack of talent. The fact that the tax scheme is modelled on the hypothetical insurance market ensures that the level of compensation is not morally arbitrary. This is because the coverage provided by the insurance market is supposed to reflect the actual value each person places on not having a certain talent or suffering from a certain handicap.[31]

The hypothetical insurance market plays a very

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31 One serious problem here with translating the hypothetical insurance market into a tax scheme is that the rate of taxation reflects the average level of coverage. This means that the actual compensation any one person receives will not in fact reflect how much he or she personally disvalues not having the relevant talent or capacity.

important role in Dworkin's ideal of distributional equality, for it is assigned the task of making people more equal with respect to nontransferable resources. Does this insurance market achieve the ideal of perfect distributional equality in the distribution of nontransferable resources? Dworkin does not make such a bold claim; all he claims is that the hypothetical insurance market is superior to the alternatives. It might seem to follow that the hypothetical insurance market achieves only imperfect distributional equality.[32] The difficulties of translating the insurance market into a tax scheme would seem to reinforce this conclusion. The problem, however, with saying that the hypothetical insurance market achieves only imperfect distributional equality is that that statement presupposes that there is an independently conceived notion of equal shares of nontransferable resources. The idea that there is such an independently conceived notion seems deeply problematic.[33]

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32 Indeed, Dworkin says on p. 45 of 'Foundations of Liberal Equality' that 'We cannot compensate for these inequalities [of nontransferable resources] perfectly.' See p. 299 of 'Equality of Resources for the claim that a hypothetical insurance market is merely superior to the alternatives.

33 John Roemer has also pointed out that there is no obvious definition of equality of nontransferable resources

What would such shares look like? Is the problem of making people equal with respect to their capacities and skills simply a matter of finding a device that successfully tracks the right distribution? The point is that when it comes to making people more equal with regard to nontransferable resources, the ideal cannot be perfect distributional equality because there seems not to be an obvious independently conceived notion of equal shares of nontransferable resources. Instead, the ideal must be pure distributional equality. Thus, the appropriate question to ask of Dworkin is this: Does the hypothetical insurance market achieve the ideal of pure distributional equality in the distribution of nontransferable resources?

8. How does Dworkin's interpretation of equality of resources compare with other possible interpretations of that general theory?[34] First compare it to what can be

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in 'The Mismarriage of Bargaining Theory and Distributive Justice', *Ethics 97* (1986), p. 103.

34 I ignore the comparisions Dworkin makes to what he calls 'equality of opportunity' and 'starting-gate theories'.

described as an objectivist interpretation of equality of resources. This view requires an equal distribution of what are deemed to be important resources.[35] Much depends obviously on what is judged to be important. The basic characteristic of this judgement is that it is made from an objective point of view and not from the perspective of what a person does or should want. It is an unavoidable result of equality of resources on this interpretation that people may be distributed resources that they themselves do not think of as valuable. The objectivist theory of equality of resources has two distinct advantages over equality of welfare.[36] First of all, it avoids the difficulty of having to distribute extra resources to people with expensive tastes. Expensive tastes make this demand only if non-objectivist standards for distribution are used. Others do not

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35 Dworkin, 'Equality of Welfare', p. 226. The classification of the objectivist view as an interpretation of equality of resources may be overlooked because Dworkin includes it in his treatment of equality of welfare. He points out, however, that this view is, 'a statement of equality of resources in the (misleading) language of welfare.'

36 T.M. Scanlon, 'The Significance of Choice', *The Tanner Lectures on Human Values VIII* (1988), pp. 200-201.

therefore have to carry the burden of that person's costly life. Secondly, it better secures the individual from interference by the government and other individuals. This is because on equality of welfare it is in the interests of others for you to have inexpensive tastes because those preferences determine your share of the resources. On an objectivist account of equality of resources, the preferences you actually have play no role in determining the share of resources you actually receive.

It is precisely on this last point that we can differentiate Dworkin's interpretation of equality of resources from the objectivist one. For what Dworkin makes central is the idea that the bundle of resources each person receives under equality of resources is a reflection of his or her personality in the following sense: the auction allows people to acquire resources they deem valuable at a price determined by the opportunity cost to others. Dworkin's principal objection to an account of distributional equality that does not give one's personality any place in determining one's bundle of resources is that it can be said to not treat everyone as equals.[37] On any objectivist distribution of

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37 Dworkin, 'Equality of Resources', pp. 285-87. I have in

resources, some preferences are going to be favoured over others because they are judged to be more important or valuable. This has the consequence, however, of not treating as equals those who have the less favoured preferences. For, according to Dworkin, treating everyone as equals, 'must impose no sacrifice or constraint on any citizen in virtue of an argument that the citizen could not accept without abandoning his sense of his equal worth.'[38] Now, suppose that you prefer tennis to poetry but on an objectivist distribution of resources you are distributed poetry books but not a tennis racket on the grounds that a life of poetry is much more important than a life of tennis. How can you accept this distribution without abandoning your sense of equal worth? The virtue of the auction is that it treats everyone as equals by allowing each to play an equal role in the determination

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mind especially his arguments against (1) transforming all available resources into a stock of plover's eggs and claret and (2) the divider creating bundles that will favour some tastes over others.

38 Dworkin, 'Why Liberals Should Care About Equality', p. 205.

of equal shares. There is then a very important lesson here. Treating people as equals in distributive justice requires, as a matter of procedure, that people have some control over the content of their share of the resources. To determine those shares objectively has the consequence of not treating everyone as equals.

9. In a similar manner, Dworkin's equality of resources can be contrasted to Rawls's "difference principle" which also counts as an interpretation of the general theory of equality of resources. In its simplest form, the difference principle stipulates that inequalities in income and wealth be to the benefit of the least advantaged members of society.[39] Although Dworkin

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39 John Rawls, 'Social Unity and Primary Goods' in *Utilitarianism and Beyond*, eds. A. Sen and B. Williams (Cambridge, Cambridge University Press, 1982), p. 162. Compare this to Dworkin's interpretation of the difference principle in 'Equality of Resources', , p. 339: 'no variation from absolute equality in "primary goods" save as works to the benefit of the worst-off economic class.' Rawls has recently been quite explicit about his rejection of equality of welfare: 'To avoid misunderstanding, observe that fair shares of primary goods are not intended as a measure of citizen's expected overall psychological well-being, or of their utility, as economists might say. Justice as fairness rejects the idea of comparing and maximizing overall well-being in matters of political justice.' See 'The Priority of Right and the Ideas of the Good', *Philosophy and Public Affairs 17* (Fall 1988), p. 258.

contrasts his position to Rawls's on a number of different points, only one will be elaborated on here.[40] On Dworkin's interpretation, equality of resources is concerned with equalizing circumstances among people, taking into account the whole of their lives. Differences in shares thus reflect choices about consumption, occupation, etc, but not differences in talents and capacities. One problem with Rawls's difference principle is that it makes no room for such considerations. It allows only for differences that make the worst-off better off. Dworkin thus describes the difference principle as 'one-dimensional' and 'flat'. And since it is flat, it fails to treat people as equals. For equal shares, on the difference principle, do not reflect the costs of one person's life to others.[41]

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40 Two others are the role of the original position and the emphasis on group rather than individual comparisions. See 'Equality of Resources', pp. 339-45.

41 Dworkin, 'Equality of Resources', p. 343.

Cash Transfers and In-kind Transfers

10. Redistribution is ordinarily achieved through what economists and public policy analysts call redistributive transfers. A redistributive transfer can, for our purposes, be understood as, 'a payment to an individual or institution that does not arise out of current productive activity.'[42] Among political philosophers, the most commonly adopted way of thinking about how much redistribution justice requires is what can be called the Rawlsian approach. On this approach, we first determine what allocations justice would require in the ideal world and, only then can we move towards some suggestions about redistributive transfers in the real world.[43] Although an unjust distribution is what we face

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42 Marilyn Moon, 'Introduction' to *Economic Transfers in the United States*, ed. M. Moon (Chicago, Chicago University Press, 1984), p. 1.

43 This approach can, I believe, be inferred from Rawls's discussion of the difference between strict compliance theory - everyone is presumed to act justly and to uphold just insitutions - and partial compliance theory. 'The latter studies the principles that govern how we are to deal with injustice... Obviously the problems of partial compliance theory are the pressing and urgent matter. These are the things that we are faced with in everyday life. The reason for beginning with ideal theory is that it provides,

everyday, we are not able to gain a critical edge on this injustice until we have a view of distribution in the ideal world. This approach, I think, also underlies Dworkin's sketch of distributional equality. Although it is not my intention to question this basic Rawlsian model for thinking about redistributive transfers in the real world, I intend to show that a distinction commonly made among redistributive transfers in the real world can have implications for distribution in the ideal world.

11. In the realm of contemporary public policy, there is a well known distinction between *in-kind transfers* and *cash transfers* as means for redistributing income and wealth.[44] Benefits, as I shall use the term,

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I believe, the only basis for the systematic grasp of these more presssing problems.' See *A Theory of Justice*, pp. 8-9. Dworkin in 'The Place of Liberty, pp. 38-54, approaches this problem by distinguishing between three stages: the ideal world, the ideal real world, and the real real world.

44 This distinction can also be expressed in terms of restricted and unrestricted transfers. Unrestricted transfers are in cash whilst restricted transfers might involve either in-kind state provision or a voucher scheme. See Lester C. Thurrow, 'Government Expenditure: Cash or In-kind Aid?', *Philosophy and Public Affairs 5* (1976), p. 364.

denote particular in-kind or cash transfers. In-kind transfers involve the transfer of specific goods in some form or another. Typical in-kind benefits are education, health care, housing, and food stamps. These differ from benefits in cash. Typical cash benefits are child benefit, tax credits, unemployment insurance, and old age pensions. It is then up to the recipient what to spend that cash on. For the operation of cash transfers, it is obviously necessary for there to be economic markets which allow people to buy goods with their cash benefits.[45]

Sometimes the issue over whether to use cash transfers or in-kind transfers for redistribution is reduced to an ideological issue dividing right and left. Cash transfers supposedly entail a capitalist market system whilst in-kind transfers supposedly require provision by a large bureaucratic state, sometimes pejoratively described as "socialism". But this presentation of the issue over whether to use cash

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45 To sustain the distinction between cash and in-kind transfers, it is absolutely essential that in-kind benefits are not exchangeable. See R.A. Musgrave & P.B. Musgrave, *Public Finance in Theory and Practice, Third Edition* (New York, McGraw-Hill, 1980), p. 103n19. I discuss this requirement in more detail in section 16 below.

transfers or in-kind transfers is misleading. In-kind transfers do not necessarily entail direct state provision. Consider the case of health care. It is, of course, possible for the government to provide health care, perhaps along the lines of the National Health Service (NHS). Alternatively, health care could be provided by private competing companies but with the government issuing health care vouchers for people to use as payment for these services. While direct state provision of health care is the more familiar policy, private provision of other in-kind benefits is more common. For example, the use of food stamps to allow the poor to buy food at reduced prices generally presupposes that food will be supplied by private firms. There is another very important point to make. Cash transfers also do not require a specifically capitalistic market. It is perfectly plausible that through some scheme of negative income tax everyone be guaranteed a minimum income which they can spend as they wish on any goods available in a market system where all the means of production are publicly owned, i.e. in some sort of market socialism. The upshot is that the choice between cash and in-kind transfers is not reducible to the ideological debate over the virtues of public and private provision.[46]

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46 A.R. Prest and N.A. Barr, *Public Finance in Theory and*

In political practice today, of course, decisions to use private provision often go hand-in-hand with a preference for cash transfers. For example, the UK government in 1988 legislated both for the provision of state school lunches by private firms and for a change from in-kind transfers whereby the government paid schools directly for lunches for less well-off children to cash transfers whereby the government pays the parents of those children a sum of cash which they can use at their own discretion, *inter alia*, for their children's school lunches. Whereas on the old scheme the children were assured of a school lunch, this is no longer the case. Confusing the debate over cash and in-kind transfers with the debate over using state or private provision is probably a reflection of the fact that cash transfers and private provision are typically defended on similar grounds. Private market provision is generally defended on either the economic argument for efficiency or on the ethical argument from maximal freedom. The economic

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Practice, Seventh Edition (London, Weidenfeld and Nicolson, 1985), ch. 14, confuse these two debates in precisely this fashion.

argument of, for instance, von Mises and Hayek is that the private market is able to distribute efficiently because it alone can gather the dispersed information about the demand for goods.[47] The ethical argument says that under a private market system people are freer because they are free from state interference in their preference-satisfaction. Two similar arguments are often made for cash transfers. The economic argument from efficiency makes central 'the idea that people are better at spending their own money than somebody else is at spending it for them.'[48] "Better" might seem ambiguous. Here it means that people will get more of what they really want if they have cash benefits to spend at their own discretion than if they have in-kind benefits. It follows that cash transfers are more efficient because they achieve a greater increase in the welfare of the

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47 John Gray, *Hayek on Liberty, Second Edition* (Oxford, Basil Blackwell, 1986), pp. 34-40.

48 Thomas Schelling, 'Economic Reasoning and the Ethics of Policy', *The Public Interest 63* (1981), p. 60. For a detailed but clear summary of the efficiency argument for cash transfers, see David Heald, 'The Rehabilitation of the Market in Social Policy' in *Social Welfare: Why and How?*, ed. Noel Timms (London, Routledge & Kegan Paul, 1980), pp. 58-64.

recipient. The ethical argument holds that cash transfers, unlike in-kind transfers, are non-paternalistic. By paternalistic, I mean doing something for a person contrary to his or her own personal wishes on the grounds that it is objectively in his or her best interests.[49] In-kind benefits appear to be paternalistic because they transfer goods to people that they may not want or that they may not prefer over other goods. Foods stamps are an example of this. Ordinarily, food stamps cannot be redeemed for sweets or alcohol. The underlying judgement is apparently that even though a person may prefer to eat sweets over bread or drink alcohol over milk, it is in their best interests not to. The supposed virtue of a cash transfer is that it would free people from paternalistic interference because they can then buy whatever they want.

It is not my intention to focus on the debate over whether provision should be private or undertaken by the state nor particularly to dwell on the similarity between the typical arguments for private provision and for cash

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49 Gerald Dworkin, 'Paternalism' in *Morality and the Law*, ed. Richard A. Wasserstrom (Belmont, California, Wadsworth, 1971), p. 108. Note, however, that this article explicitly excludes discussion of paternalism in in-kind transfers.

transfers. I shall in this chapter concentrate only on the issue of whether redistributive transfers should be in-kind or cash. What I shall argue is that whether redistributive transfers should be in-kind or cash depends on the initial justification for the redistribution. Since in-kind transfers are perfectly consistent with private provision and cash transfers with market socialism, this argument has no significant implications for the choice between state and private provision. I have introduced the private/public provision debate simply to make sure that it is not confused with the one over cash and in-kind transfers.

12. Discussions of public policy generally distinguish between the aims or ends of a policy and the means or methods for achieving those aims or ends.[50] For any transfer policy, then, we would want to know first the aims of it and then how best to achieve those aims. The aims are ethical judgements reflecting distributive justice: What is a fair share? What then is the best

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50 Nicholas Barr, *The Economy of the Welfare State* (London, Weidenfeld and Nicolson, 1987), p. 97.

means of transfer? This is the way that the choice between cash transfers and in-kind transfers is often perceived. The economic argument from efficiency for cash transfers has this character. It presumes that the aim of the transfer is to increase the welfare of the recipient. Cash transfers are better able than in-kind transfers to achieve this aim. Therefore, they are the preferred method. But, and this is very important, if it could be shown that in-kind transfers are a more efficient way to increase the welfare of the recipient, then they would be preferred. On this approach, the choice between cash and in-kind transfers is a purely technical one to be decided by experts who do the necessary calculations.[51]

In my view, this approach rests on a mistaken presupposition. The presupposition in dispute is that an ethical judgement that justifies the basic policy for a transfer does not also sometimes require a particular means of transfer. I believe, on the contrary, the

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51 Barr, *The Economy of the Welfare State*, p. 98. This view of means as a mere technical issue is also prevalent among political theorists. Isaiah Berlin on p. 118 of *Four Essays on Liberty* (Oxford, Oxford University Press, 1968) writes: 'Where ends are agreed, the only questions left are those of means, and these are not political but technical, that is to say, capable of being settled by experts or machines like arguments between engineers or doctors.'

following: sometimes the justification for a redistributive policy entails whether to use a cash transfer or an in-kind transfer.[52] If what I believe is true, then it is a mistake to view the choice between them as a mere technical issue. It follows from my claim that we can distinguish functionally between three sorts of justifications for redistributive transfers. First of all, there are justifications for redistribution that require cash transfers. Secondly, there are justifications for redistribution that require in-kind transfers. Thirdly, there are justifications for redistribution that treat the choice between cash and in-kind transfers as a mere technical matter. It strikes me that this three-fold distinction is going to hold in both the real world and the ideal world, that is to say, for both redistribution and initial allocations. The elementary argument upon which it is predicated would seem to be sustainable in either. It is my intention to use this distinction to distinguish between equality-based and rights-based justifications for redistribution. This

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52 See for a similar claim Steven Kelman, 'A Case for In-kind Transfers', *Philosophy and Economics 2* (1986), pp. 57-59.

involves defending two distinct theses. The first is that equality-based justifications for redistribution require cash transfers. The second is that rights-based justifications for redistribution require, at least sometimes, in-kind transfers.

13. The first thesis needs a significant qualifier. It is restricted to Dworkin's interpretation of distributional equality or something very close to it. The main pillar of Dworkin's equality of resources has to be retained: the determination of equal shares requires that everyone be treated as equals and as such be ambition-sensitive. In other words, a person's share of resources must reflect his or her personality - preferences, goals, ambitions - and the cost to others. It is my view that this pillar of Dworkin's account is basically on the mark. I have tried to emphasize above how for Dworkin the market is the distributional mechanism that meets these requirements. In the desert island example, each person was provided with some clamshells with which he or she could bid for the various resources on offer. In actual markets, cash has very much the same function as Dworkin's clamshells. We can use it to buy goods in those markets. In effect, then, the initial

allocation of clamshells on the desert island is like a cash transfer in the ideal world.

As we have seen, Dworkin offers good arguments in favour of this sort of cash transfer. What he shows is that distributional equality requires it. The general case for giving the immigrants clamshells and having the auction rather than having some individual simply divide up the resources into bundles is that this second approach would not treat everyone as equals in the sense that the relative value each person places on the resources would not have been taken into account in the division of the resources. Presumably this also counts as a general objection against an in-kind transfer justified by a consideration of distributional equality. An in-kind transfer that aims to equalize people in terms of particular goods has been described as 'specific egalitarianism'.[53] This, however, clearly depends on what I have termed an objectivist interpretation of equality of resources because some resources are deemed to be important - those to be equalized - without

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53 J. Tobin, 'On Limiting the Domain of Inequality' in *Economic Justice*, ed. E.S. Phelps (Hammondsworth, Penguin, 1973) and Albert Weale, *Political Theory and Social Policy* (London, MacMillan, 1983), ch 6.

consideration of the recipient's own relative ordering of resources. It would, therefore, seem consistent to apply Dworkin's criticisms of that interpretation to in-kind transfers, that is, that objectivist approaches fail to treat people as equals. Dworkin's critique of Rawls is also telling. Although Rawls may not be able to accept all arguments in favour of in-kind transfers, nevertheless, because the difference principle is flat and not ambition-sensitive, there may not be an inherent objection to all in-kind transfers. The fact, however, that Dworkin's equality of resources does have this added complexity is what makes it a better interpretation of that abstract distributional theory. So we reach the sought conclusion: equality-based redistribution requires cash transfers, not in-kind transfers.

14. Additional support for this conclusion can be found in some of Dworkin's own reflections on the policy implications of equality of resources in his article 'Why Liberals Should Care About Equality'. There he notes that in the United States more redistribution would be necessary than that which presently exists. He goes on to say,

> This does not mean, of course, that we should continue past liberal programs, however inefficient these have proved to be, or even that we should insist on "targeted" programs of the sort some liberals have favored - that is, programs that aim to provide a particular opportunity or resource, like education or medicine, to those who need it. Perhaps a more general form of transfer like a negative income tax, would prove on balance more efficient and fairer, in spite of the difficulties in such schemes.[54]

The two points in favour of cash transfers Dworkin entertains in this passage are efficiency and fairness. I have so far tried to show how as a matter of fairness equality of resources requires cash transfers. If we accept that cash transfers are indeed fairer than in-kind transfers, then the choice between them is not merely a technical one, to be decided on the grounds of efficiency. But the point about efficiency is problematic anyway. If all Dworkin is getting at is that in-kind transfers may be administratively more expensive, than I see no problem. Of course, establishing that in-kind transfers are more expensive administratively is difficult. It is less than obvious that the administrative costs of a vouchers scheme for education and medicine with private provision would be

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54 Dworkin, 'Why Liberals Should Care About Equality', p. 208.

higher than a negative income tax with all of its projected incentive costs. If, however, Dworkin has in mind the economic argument from efficiency in favour of cash transfers I noted above in section 11, then I do have an objection. For that argument holds that cash transfers are more efficient than in-kind transfers because they achieve higher welfare increases for their recipients. And Dworkin has ruled out welfare considerations in the determination of distributional equality.

Although in 'Why Liberals Should Care About Equality', Dworkin seems to favour cash transfers, more recently he has suggested that they might be combined with a programme of tax-financed medical care.[55] Such a programme would obviously constitute an in-kind benefit. The main thrust of my argument about equality of resources has been that in-kind transfers are inconsistent with it. So Dworkin is posing a serious challenge and I propose to show why he is wrong to think that a tax-financed medical care programme is consistent with equality of resources. It is my belief that if there is an equality-based

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55 Dworkin, 'The Place of Liberty', p. 45.

justification for any in-kind benefits, the case for medical care is probably the strongest. By showing that it is flawed, a more general claim against in-kind transfers can be made.

Dworkin's own concern is whether in addition to the tax-financed medical care programme (public medicine), it should also be possible for people to pay for additional medical care in the market (private medicine). He says,

> Permitting private transactions in medicine allows people to make their own choices about the relative value of immediate and therefore expensive medical care as against less immediate care and other goods. Permitting private medicine therefore makes distribution more sensitive to opportunity costs in the way equality of resources approves.[56]

I think that Dworkin's argument in this passage is quite sound and generally characteristic of equality of

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56 Dworkin, 'The Place of Liberty', p. 45. It is important to recognize here that this argument for private medicine holds only in the ideal world. In the real real world, the issue is more complicated. Dworkin allows that sometimes private medicine can be banned. ('The Place of Liberty', pp. 49-51.) I think that this issue is a red herring that detracts from the more fundamental question I am trying to get at: Why compensate on an equality-based insurance scheme with medical care rather than simply with cash?

resources. All I propose is that we carry it to its logical conclusion.

Let's start with an obvious point. The proposed tax-financed medical care programme can best be seen as a compensatory insurance scheme against illness (as a form of bad luck).[57] Consider now the case of someone who has through bad luck contacted a serious illness. An operation can be performed that will cure this illness and presumably the compensatory insurance scheme against illness will pay for this operation. But the ill person is peculiar because he says that he would rather have the money spent on something else, some good he values more than medical care. Why shouldn't the insurance scheme compensate him in this form rather than by paying for the operation? Suppose that Dworkin responds that the wishes of the recipient should be ignored and that the operation should be paid for. Wouldn't this position be "perverse" because, like in a situation where private medicine is abolished, it is not allowing people 'to make their own choices about the relative value of...medical care'?[58]

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57 Dworkin, 'The Place of Liberty', p. 43.

58 "Perverse" is how Dworkin describes equality of welfare if increasing welfare is the initial grounds for a transfer to a paraplegic but then it requires that he be transferred

So Dworkin must accept that the person can be compensated with the good he values more than health care. But then the compensatory insurance scheme against illness should cease to operate through an in-kind transfer. Instead, it should compensate with cash transfers that would allow for recipients to make their own choices about the value of medical care relative to other goods. If that is the case, then we would no longer have an in-kind medical care programme. The general point is this one. The logic of Dworkin's argument with its stress on allowing people to make their own choices about the relative value of goods rules out the possibility of any in-kind transfers being justified on equality of resources.[59]

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a piece of equipment that would enable him to lead a more normal life instead of the Stradivarious violin (costing the same) that he prefers and would increase his welfare more. (See 'Equality of Welfare', pp. 243-44.) My argument shows that the same logic of "perversity" applies to Dworkin's account. If making a person equal in his or her circumstances is the initial grounds for a transfer to the ill person and if equal circumstances must reflect to relative value of medical care to that person, then it is perverse to transfer medical care to the ill person instead of what he or she values more. The example of the paraplegic is taken up again in section 18.

59 In private correspondence (2 October 1989), Dworkin has admitted that equality of resources establishes a *prima facie* case for cash transfers but he thinks that in-kind transfers might be justifiable on grounds either of (1) efficiency or (2) what he calls "superficial" paternalism - forcing people to take precautions that are reasonable

15. Consider now my argument for the second thesis which says that rights-based redistribution requires, at least sometimes, in-kind transfers.[60] Assume that there is some derivative welfare right such as the right to health care. This right would justify a redistributive transfer to the right-holder when he or she is in need of health care. Indeed, it seems to justify a very specific type of (in-kind) transfer: health care. It would seem barely intelligible to say that it justifies a cash transfer. Consider, however, what would happen if we did

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within their own structure of preferences. In the case of (1), providing in-kind rather than cash benefits would reflect a trade-off between equality and efficiency; it could not be defended in the name of distributional equality. In-kind transfers justified on the grounds of superficial paternalism are more complicated. Quite clearly, such transfers would treat people as equals since by definition they are "ambition-sensitive". The problem is that in the case of the ill patient who would prefer some good other than medical care, we cannot justify health care on the grounds of superficial paternalism since the provision of health care does not reflect his or her own structure of preferences. In other words, an appeal to superficial paternalism does not resolve the problems presented by this example.

60 This argument follows closely Kelman, 'A Case for In-kind Transfers', pp. 59-68 & 70-71.

in this case treat the choice between a cash transfer and in-kind transfer as a mere technical matter to be determined by considerations of efficiency, and that we found the cash transfer to be more efficient. Suppose further that the ill right-holder in question would prefer to spend his or her cash benefit on some good which he or she values more than health care.[61] This would put us in a very awkward position. How could we appeal to his or her right to health care to justify the relevant redistributive transfer if that benefit is to be then used towards acquiring some good other than health care? Transfering in cash would seem to have the consequence of undermining the very justification for the transfer policy. It would seem that if the initial basis for the redistributive transfer is the right to health care, than the transfer should be in-kind rather in cash. Only a transfer of health care could ensure that the very justification for the transfer policy would not be

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61 The emphasis here on the impact of in-kind and cash transfers on consumption patterns is fundamental. For defenders of cash transfers, it is precisely because cash allows for variable consumption patterns that it is superior to in-kind benefits. My argument here is that it is because cash can be spent on something other than health care that makes it an inappropriate type of transfer.

undermined.

The same point can be made in another way. Consider again the case in which an ill person has a right to health care. Suppose that he or she said that he or she would prefer something other than health care but costing the same amount. Could he or she be said to have the right to that something else? Quite obviously not. Having the right to health care means that what the right-holder has a right to is health care and not something of the equivalent cash value.

The argument for the thesis that rights-based redistribution requires, at least sometimes, in-kind transfers is simple. When a right is used to justify a redistributive transfer, the justified entitlement is to a specific good. An in-kind transfer is thus required because a cash transfer may have the consequence of not transfering that good but some other one instead. The contrast is to an entitlement grounded on the right to equal respect and concern. Such an entitlement is not to be understood, at least in the abstract, as an objectively determined bundle of goods but instead as a bundle of goods reflecting opportunity-costs. So explains Dworkin: 'equality is in principle a matter of individual right...Not, of course, in the sense that each has a

predetermined share at his disposal regardless of what he does or what happens to others. On the contrary, the theory ties the fates of people together in the way that the dominant devices of actual and hypothetical markets are meant to describe.'[62] The context of Dworkin's point is not quite mine. However, as I have tried to show above, the logical implications of Dworkin's position is precisely in favour of cash transfers. The flexibility cash transfers allow for is necessary to ensure that everyone is treated as an equal; one consequence of using cash transfers is that everyone's share of resources is not "predetermined". A powerful objection to representing rights-based entitlements as cash is precisely the implied flexibility of cash. While equality-based redistribution demands that flexibility, rights-based redistribution seems in some cases to forbid it.

16. There are in principle, I think, two main lines of criticism that might be developed against my efforts to distinguish between rights-based and equality-based

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62 Dworkin, 'Equality of Resources', p. 340.

redistribution by reference to cash and in-kind transfers. It might be argued, on one line of criticism, that the distinction between cash and in-kind transfers is unsustainable. This is because in-kind benefits are merely a form of cash benefits. In-kind transfers can therefore be conflated to cash transfers. Another possible line of criticism would be to show that rights-based redistribution collapses into equality-based redistribution. I will respond to these two lines of criticism in turn.

Consider the first criticism. Cash benefits are, by definition, exchangeable. It must, in other words, be possible to trade off some of the cash benefit you receive for some good or goods. If not, then it would not be cash. Indeed it is precisely because recipients can spend their cash benefits on goods of their own choosing that they are valued. Cash allows people to buy what they want. Suppose that in-kind benefits were exchangeable in the same sense. Suppose that you could trade an in-kind benefit for some other good you value more. Wouldn't the consequence be that the distinction between in-kind and cash benefits would disappear? In-kind transfers would then collapse into cash transfers. As a matter of contemporary practice, in-kind benefits are often

transferred in a manner akin to cash benefits. For example, in the United States it was a common practice for food stamps to be exchanged for other goods or for cash even though this was forbidden. Does this not show that the distinction between cash and in-kind transfers cannot be sustained?

This is a powerful objection. It quite rightly puts pressure on the exchangeable status of benefits. The real problem it poses, however, is not to the initial distinction between in-kind and cash transfers but to how in-kind benefits can be prevented from acquiring an exchangeable status akin to cash benefits. The most obvious way to prevent in-kind benefits from acquiring an exchangeable status is to have regulations against such exchanges. Of course, as the example of food stamps shows, this type of regulaton is not always very effective. To a large extent, however, this is a technical problem that can conceivably be resolved. Indeed, the difficulties of enforcing the regulations against the exchange of food stamps are exceptional. The non-exchangeable status of other typical in-kind benefits such as housing, health care, and education has proven much easier to enforce.[63]

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63 Tobin, 'On Limiting the Domain of Inequality', p. 461.

Consider now the objection that my attempt to distinguish between equality-based and rights-based redistribution fails because rights-based justifications collapse into equality-based ones. This objection might be defended in at least two ways. First of all, it might be argued that the rights we can be said to have are grounded on the principle that everyone be treated as equals. Dworkin's argument outlined in section 2 above becomes relevant. Recall that Dworkin argues that the familiar liberty rights can be defended on the grounds that they are procedurally necessary in order for everyone to be treated as equals. It follows that any justification for redistribution based on these rights fall under the more general category of equality-based redistribution. Now, although this is conclusion is correct, it fails to establish that all rights-based redistribution collapses into equality-based redistribution. This is because, to recall a point made earlier, although equality might be one possible ground for common liberty rights, it is not the only one. Agency and integrity are also suitable grounds. But in that case not all rights-based redistribution necessarily collapses into equality-based redistribution, for there is the

possibility that there are distinct rights-based justifications for redistribution involving welfare rights derived from the abstract rights to agency and integrity.

The objection that rights-based redistribution collapses into equality-based redistribution might be defended in another way. Suppose that we take seriously the suggestion that everyone be considered to have either the abstract moral right to agency or the abstract moral right to integrity. Is it not the case that everyone equally can be said to have one or the other of these two abstract rights? Thus, it would seem to follow from this observation that any justification for redistribution based on welfare rights derived from these abstract rights would result in an equal distribution. It would, therefore, seem appropriate to say that any such justification for redistribution is properly an example, not of a distinctly rights-based redistribution, but rather of an equality-based redistribution.

In my view, this line of criticism confuses quasi-egalitarian arguments with genuine egalitarian arguments.[64] Although these arguments both entail

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64 These are David Miller's terms. See his 'Arguments for Equality', *Mid-West Studies in Philosophy 7* (1982), pp. 74-75. For a similar distinction, see Joseph Raz, *The*

equality of outcome, they differ because of what they value in that outcome. A genuine egalitarian argument values the fact that the outcome is equal. A quasi-egaliatarian argument, in contrast, values a certain non-comparative feature of the outcome. For example, utilitarians might defend equality of outcome not because of the fact that the outcome is equal but because the outcome maximizes the general utility. While equality-based redistribution reflects genuine egalitarian arguments, redistribution based on welfare rights reflects quasi-egalitarian arguments. This is because what is valued in the case of rights-based redistribution is the fact that the right-holder achieves a certain absolute condition and not that he or she achieves a condition relative to others. The point is that even if rights-based redistribution results in equality of outcome, it cannot be collapsed into equality-based redistribution.

17. I have so far only defended the thesis that

Morality of Freedom (Oxford, Clarendon Press, 1986), pp. 227-233.

rights-based justifications for redistribution require, at least sometimes, in-kind transfers. This thesis when conjoined with the thesis that equality-based justifications for redistribution require cash transfers is enough to ground a distinction between equality-based and rights-based redistribution. Above, I made a three-fold functional distinction between justifications for redistributive transfers: justifications that require cash transfers, justifications that require in-kind transfers, and justifications that treat the choice between them as a mere technical matter. Equality-based justifications for redistribution fall into the first category, rights-based ones apparently into either the second or third. I have not provided an argument showing that rights-based redistribution always requires in-kind transfers. I now put forward that stronger thesis without any defence other than to note one very strong point in its favour, that I am unable to come up with any counter-examples to it.

A Suggestion About Capacities

18. The discussion has until now concentrated on seeing whether a justificatory principle for a transfer requires either a cash or in-kind benefit or treats the choice between these two methods as a technical matter. Suppose now that we think about redistributive transfers in a different way. Are there any in-kind redistributive transfers we find particularly compelling? If so, on what grounds can they be justified? The relevance of the distinction between equality-based and rights-based redistributive is clear. If there is an in-kind transfer we find particularly compelling, then it cannot be justifed by some concern with distributional equality. Perhaps though it can be justifed by some rights-based consideration. The implications of this observation may not be far-reaching. Maybe there are not any particularly compelling in-kind transfers. Suppose, however, that there are.

Earlier, I argued that on pain of logical consistency Dworkin's equality of resources can only allow for a medical insurance scheme that compensates with cash and not with medical care. I find this conclusion disturbing because I do think that the idea of medical care as an

in-kind benefit is compelling. Consider another disturbing example drawn from Dworkin's critique of equality of welfare. Suppose that we face the issue of deciding on the appropriate transfer to a paraplegic. There is available an expensive piece of equipment which would enable him to live much more of a normal life. We might then provide him with this in-kind benefit. Alternatively, we could provide him with what he would prefer: a Stradivarius violin of the equivalent cost. If our aim is to increase his welfare, the choice would be obviously in favour of the violin. Equality of resources would favour a cash transfer which would allow him to buy the violin, although on grounds different from equality of welfare, namely, that it reflects the paraplegic's own relative ordering of the value of the two goods. Contrary to both of these positions, I am inclined to think that we should transfer the piece of equipment to the paraplegic. Giving him the violin or the cash with which he could buy the violin strikes me as a mistake. Indeed, my inclination might be generalized to all deficiencies in mental and physical capacities: remedy for handicaps with the appropriate in-kind transfers.

I do not have the same inclination when it comes to deficiencies in talents and skills. Cash transfers seem

to be perfectly appropriate as means of compensation. And this seems to be reflected in current practice. Most of the compensatory schemes for talent deficiencies now in operation in most welfare states involve cash benefits: unemployment benefits, supplementary income benefits, tax credits, etc.

This suggests a contrast between talents and capacities: talent deficiencies require cash transfers whilst handicaps require in-kind transfers. It is my view that the proper contrast is not so sharp. Consider the following approach. When we remedy for a handicap, our objective is to remove or mitigate or compensate for that handicap. So in the case of the paraplegic, the expensive piece of equipment serves this function. The fact that the paraplegic would prefer a Stradivarius violin instead is neither here nor there; satisfying that preference would not further the objective of remedying for the handicap. Compare this to an analagous argument that might be made about talents. When we compensate for deficiencies in talents, our objective is to remedy for that lack of skill or talent. It follows that the contrast between capacities and talents disappears. The problem, I think, with this argument is that our concern is not generally with the lack of skill or talent *per se* but

rather with how that lack of skill or talent effects one's income. It is this effect that we wish to compensate for. But we also have a similar concern with capacities. One of our concerns is with how lacking certain capacities effects one's earnings. This shared concern underlies Dworkin's observation that handicaps and talent deficiencies can somehow be seen on a continuum.[65] A difference between talents and capacities still remains, however. Unlike with talent deficiencies, our concern with handicaps is not solely to compensate for losses of earnings. We are also compelled to remedy for the handicaps *per se*. Suppose that we also are compelled to remedy, contrary to my suggestion, for lack of talents *per se*. In that case, a basic contrast would still exist. Only now it would be between the continuum in which our concern is with the effect of talent or capacity deficiencies on income and the continuum in which our concern is with those deficiencies *per se*.

I have argued that we are compelled to undertake redistributive transfers to help those with deficiencies

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65 Dworkin, 'Equality of Resources', pp. 314-315.

in physical and mental capacities with two distinct objectives in mind: (1) to compensate for the effects of those deficiencies on income and (2) to remedy for the deficiencies *per se*. Cash transfers seem to appropriately serve objective (1) but not objective (2). In-kind transfers seem to be more appropriate for that remedial role because cash transfers may be used to buy some good quite incidental to the handicap in which case the justification for the transfer would be undermined. It follows that while concern with equality might underlie (1), it cannot underlie (2). Here then might be a place for a rights-based concern in a theory of distributive justice.

Conclusion

19. Even if my suggestion about mental and physical capacities is not convincing, the functional distinction I have drawn between equality-based and rights-based redistribution still has some important implications. It is quite common, I think, to try to justify on genuine egalitarian grounds many of the institutions of the welfare state that undertake in-kind redistributive transfers. This strategy is bound to fail, given that

distributional equality is taken seriously and, therefore, that something like Dworkin's equality of resources is accepted.[66] Rights are a much more promising starting point.

Moreover, rights-based redistribution may be more acceptable in the real world. I say this because today opponents of redistributive transfers characteristically use the language of rights to condemn redistribution. For them, redistribution is morally unjust because it compromises the freedom they identify with private property. I suggested in the previous chapter that anyone who takes seriously familiar liberty rights such as freedom of religious worship is ultimately committed to either the abstract right to agency or the abstract right to integrity. If it can be shown that certain welfare rights capable of justifying redistribution can be derived from those abstract liberty rights, then opponents of redistribution face the following dilemma: they must

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66 This point has important implications for Dworkin's general argument in 'Liberalism'. There he argues that the political morality of New Deal Liberalism can be best understood to be founded on the abstract priniciple of equal respect and concern. Since the New Deal involved certain in-kind programmes, Dworkin's argument must be mistaken.

either accept that at least some redistributive transfers are justified or meet the charge that they do not take seriously the liberty rights that are so central to our common-sense ideas of political morality.

CHAPTER SIX

RIGHTS AND DEPRIVATION: THE ENABLING MODEL

Introduction

1. In the previous chapter, I argued that we feel compelled to undertake redistributive transfers to help those suffering from deficiencies in physical or mental capacities with two distinct objectives in mind: (1) to compensate for the effects of those deficiencies on income, and (2) to remedy for those deficiencies *per se*. While concern with distributional equality might underlie the first objective, it cannot underlie the second. That concern also cannot be captured by the effect of those deficiencies on a person's welfare or utility. We would not be inclined to say that because a person with a

deficiency of this sort is particularly cheerful or happy, he or she therefore foregoes any claim to compensation he or she might otherwise have had.[1] What then is our concern when we feel compelled to compensate in such cases?

In this chapter and the next one, I propose to explore this concern from the perspective of what I shall call 'deprivation'. In its ordinary sense, deprivation is associated with starvation and poverty. Those who are starving have been deprived of food; those who are stricken by poverty have been deprived of something more comprehensive. Deprivation, as I shall use the term, has a much broader application. The example of starvation is none the less instructive. Amartya Sen has pointed out, 'Starvation is the characteristic of some people not having enough food to eat. It is not the characteristic of there being not enough food to eat...Food supply statements say things about a commodity (or a group of commodities) considered on its own. Starvation statements are about the relationship of persons to the commodity (or

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1 Amartya Sen, 'Rights and Capabilities' in *Resources, Values, and Development* (Oxford, Basil Blackwell, 1984), p. 318.

that commodity group).'[2] Starvation statements are, as I understand it, statements about deprivation, food statements are not. This is because deprivation can be best thought of as a sub-standard relationship between a person and a commodity or resource.[3]

Ordinarily, deprivation can be remedied through a distributive mechanism that supplies the deprived person with the relevant commodity or group of commidities. This is not, however, always the case. Sometimes people intentionally suffer deprivation. For example, starvation by hunger strikers in prison is not brought about by the lack of food; hunger strikers, by their very nature,

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2 Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford, Clarendon Press, 1981), p. 1.

3 The following question might be asked: On what basis do we judge a relationship between a person and a commodity or resource sub-standard? There have, historically, been two competing answers: absolute deprivation and relative deprivation. Absolute deprivation holds that there is a cross-cultural standard from which to make such judgements. Relative deprivation holds that what might be appropriately judged sub-standard in one society might not be so judged in another. For one of numerous discussions, see W.G. Runciman, *Relative Deprivation and Social Justice* (Cambridge, Cambridge University Press, 1966), esp. pp. 250-51. Recently, Amartya Sen has argued that a compromise is possible: an account of deprivation that recognizes both absolute and relative standards. See 'Poor, Relatively Speaking' in *Resources, Values, and Development*, pp. 323-38.

refuse food before them. In this case, the fact that the individuals are starving cannot be remedied by making the food available to them; instead, some other conditions must be met in order to convince them to consume the food. I shall not be concerned with deprivation of this sort. Indeed, the fact that hunger strikers have freely chosen to starve and can change their minds at any time raises the problem of whether or not their situation can even be properly described by propositions about deprivation. Rather than address this somewhat thorny issue, let us simply assume that it is a case of deprivation and then put it to one side. I am more concerned here with what has often been called *material deprivation*: the provision of some commodity or resource is a sufficient remedial treatment for this kind of deprivation.[4]

Now, since not every instance in which a person lacks a commodity or resource counts as material deprivation, any serious account of material deprivation must be able to distinguish, by an appeal to some standard of value, between instances of deprivation and instances where

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4 Stein Ringen, *The Possibility of Politics* (Oxford, Clarendon Press, 1987), p. 145.

someone lacks a commodity or resource but cannot be said to be deprived. I believe that those who have handicaps suffer from deprivation.[5] From the perspective of material deprivation, when we feel compelled to help someone who suffers from certain handicaps with the objective of remedying for deficiencies in physical or mental capacities *per se*, our concern is with how those deficiencies deprive that person of something which is valuable. The issue among competing theories of deprivation is what exactly of value it is that that person is deprived. Notice that the distinction emphasized at the outset between two objectives for undertaking redistributive transfers still holds. Failure to obtain a certain level of earnings is not a matter of material deprivation because income in itself is not about the relationship between a person and a commodity or

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5 This view has also been held by prominent British social policy analysts. For example, T.H. Marshall on p. 188 of *Social Policy, New Edition* (London, Hutchinson, 1975) says, 'Disablement is not povery in the ordinary sense, but it is a form of deprivation which poverty exacerbates. It took a vigorous, single-minded campaign to win recogntion of the extent and urgency of the needs of those included in this admittedly far from homogeneous category. But categorizatin was a necessary prelude to action...So pressure developed for a policy, or one might say a charter, for the disabled, in deference to which the Labour government of 1974 appointed a Minister for the Disabled.'

resource.

I shall, in the present chapter, consider an account of deprivation that focuses on the value of what a person is able to do. I shall call this the enabling model of rights and deprivation. What prompts our concern with deficiencies in physical or mental capacities *per se*, on this model, is that people who are handicapped are correspondingly limited in what they can do. For example, the paraplegic cannot run a 100 metre dash nor walk to the top of Mount Moriah. Similarly, a blind person cannot look at beautiful paintings nor stare into the eyes of a loved one. The ordinary language description of deficiencies in physical or mental capacities as "disabilities" seems to call up these sorts of limitations. Through remedial action we hope to remove or mitigate or compensate for these disabilities. Paying for a cornea transplant for a blind person might achieve this objective. Likewise, providing the paraplegic with a piece of equipment that will facilitate his movements would seem to reflect a similar concern. Redistributive transfers have in these two cases the effect of enabling the persons to do what they could not have otherwise been able to do and, thus, have a remedial effect on their deprivation.

The virtue of this account of deprivation is the ease in which it can be said to flow from an account of liberty rights. Interference with a person doing something he or she has a right to do is generally regarded as a violation of that right. Suppose, however, that liberty rights can also be violated in another way, namely, by the right-holder being deprived, perhaps unintentionally, of the resources actually needed to do what he or she has a right to do. In that case, his or her having the right to do something would justify the transfer of those resources to him or her. Since physical and mental capacities can be seen to be among the resources necessary for a person to exercise his or her rights, providing remedial treatment for deficiencies in those capacities should, therefore, be regarded as a requirement of his or her rights.

My aim in this chapter is to criticize the enabling model of rights and deprivation. It is, I think, a characteristic of the popular attacks on this sort of perspective to be preceded by a wholesale rejection of the basic idea of using redistributive transfers to remedy for the deficiencies people suffer in physical and mental capacities. Typically, these attacks follow one of two lines: it is argued either that compensating people for

what they are unable to do is appropriate only when that disability is the result of other people's intentional action[6] or that rights-based justifications for redistribution are invalid because, barring the possibility of manna falling from Heaven, any such redistribution would violate the rights over things of others.[7] The critique I make below depends on neither of these two approaches. My motive for avoiding them, aside from finding them unconvincing, is that, unlike most critics of the enabling model of rights and deprivation, I do not reject its fundamental starting-point, the objective of providing remedies for deficiencies people suffer in mental or physical capacities *per se*. My qualm is only with how to represent that concern. In the next chapter, I will propose an alternative model of rights and deprivation.

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6 Frederick Hayek, *The Constitution of Liberty* (London, Routledge & Kegan Paul, 1960), pp. 17-21, 71-72, 83-84, 99-100, and 133-4. See also Robert Nozick's discussion of compensation in *Anarchy, State, and Utopia* (Oxford, Basil Blackwell, 1974), pp. 57-87.

7 Nozick, *Anarchy, State, and Utopia*, esp. p. 238. For some critical comments on this argument, see the concluding section of chapter three above.

I have divided the discussion in the rest of this chapter into three parts. First of all, I outline in more detail the enabling model of rights and deprivation and present the principal argument in its favour, what I call the worth of liberty argument. Next, I defend a qualified version of the enabling model of rights and deprivation from a very powerful series of counter-examples. The worth of liberty argument also seems to support this qualified version of the enabling model. Finally, in the most important part of the chapter, I offer a knock-down critique of the worth of liberty argument. This leads me to dismiss all versions of the enabling model of rights and deprivation.

The Enabling Model of Rights and Deprivation

2. It is quite easy to find a general statement of the enabling model of rights and deprivation in the literature. The following are two representative statements.

> To say that A has a right to do x means, negatively, that no one ought to interfere with A's doing x and, positively, that A ought to have the effective power

> to do x (so that other persons ought, if necessary, to see to it that A can do x).[8]

> A right is ordinarily a justified demand that some other people make some arrangements so that one will still be able to enjoy the substance of the right even if - actually **especially** if - it is not within one's own power to arrange on one's own to enjoy the substance of the right[9]

The substance of the right to which the second statement makes reference can, for our purposes, be taken to be a liberty.[10] A general point about both statements is that the relevant right involves a Full Liberty, and not just a Half Liberty.[11] The liberty right to x should,

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8 Alan Gewirth, 'Civil Liberties as Effective Powers' in *Human Rights: Essays on Justification and Applications* (Chicago, University of Chicago, 1982), p. 318.

9 Henry Shue, *Basic Rights* (Princeton, Princeton University Press, 1980), p. 16.

10 Shue, *Basic Rights*, p. 15.

11 L.W. Sumner, *The Moral Foundation of Rights* (Oxford, Oxford University Press, 1987), p. 27. H.L.A. Hart in 'Legal Rights' in *Essays on Bentham* (Oxford, Clarendon Press, 1982. Pp. 166-67.) makes a similar distinction between unilateral and bilateral liberties.

therefore, be understood as involving the discretion to do x or not to do x.[12] If understood as a Half Liberty, it would only involve the discretion to do x.

The enabling model of rights and deprivation holds that a liberty right to x requires (1) that the person actually be able to do x and (2) that he or she not be interfered with in his or her doing of x. The second requirement demands straightforward forbearance on the part of others. That it is a constitutive element in any liberty right is not to be seriously doubted. The first requirement is more problematic, for it demands of others that they may sometimes have to aid the right-holder so that he or she is able to do x. The form of this aid will generally be the provision of the resources necessary for the right-holder to be able to do what he or she has a right to do.

3. The worth of liberty argument provides, in my

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12 It is important to realize that a Full Liberty should not be represented, as it sometimes has been, as the permission to do x or not-x since that would in effect be the permission to do anything since every possible action would be a member of one or the other of these two sets.

view, the most powerful defence of the enabling model of rights and deprivation possible.[13] Consider this argument by way of John Rawls's distinction between liberty and the worth of liberty.[14] Interference by others counts as a constraint on liberty; it can thus be said to diminish a person's liberty.[15] Distinct from constraints on liberty are things such as poverty. They

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13 An alternative defence of the enabling model might be to establish a *prima facie* case for that model by rejecting what I described in chapter 2.6 as the limited scope of rights. Liberty rights could thus be said to require not only forbearance but also aid in the form of protection against others. Why, it might then be asked, does this aid not extend to ensuring that the right-holder actually has the resources to do what he or she has the right to do? Since I have already defended the limited scope of rights in chapter two, I shall not discuss this line of defence. For statements of this defence, see Sen, 'Rights and Capabilities', pp. 313-315 & Raymond Plant, 'Need, Agency, and Welfare Rights' in *Responsibility, Rights, and Welfare: The Theory of the Welfare State*, ed. J. Donald Moon (Boulder, Westview Press, 1988), pp. 62-71.

14 John Rawls, *A Theory of Justice* (Oxford, Oxford University Press, 1972), pp. 204-205. Isaiah Berlin in the 'Introduction' to *Four Essays on Liberty* (Oxford, Oxford University Press, 1969), pp. liii-liv, draws a very similar distinction between liberty and its conditions.

15 Throughout this chapter, I use the terms 'liberty' and 'freedom' more or less interchangeably.

worry Rawls not because they directly diminish a person's liberty but rather because they affect the worth of a person's liberty, which is to say that they affect how well he or she can exercise it, and, hence, can advance his or her ends. Having money and other similar goods is valuable for Rawls because those goods are necessary means for achieving one's ends in life.

But (it might be argued) there is something morally arbitrary about this distinction.[16] What difference is there, morally speaking, between being concerned for another's freedom and being concerned for the worth of his or her liberty? Consider the requirement that a person not be interfered with in the pursuit of his or her ends. The concern underlying this requirement is that, if he or she is free from interference by others, then he or she will be better able to pursue his or her ends in life. But this rationale would also seem to justify concern by others for a person's worth of liberty - the means he or she actually has to advance those ends.

This conclusion supports the enabling model of rights

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16 See for the idea that this distinction is morally arbitrary, Norman Daniels, 'Equal Liberty and Unequal Worth of Liberty' in *Reading Rawls*, ed. N. Daniels (Oxford, Basil Blackwell, 1975), pp. 259-63.

and deprivation. It seems indisputable that liberty rights reflect a concern for a person's freedom - others are required not to interfere. But in view of what has just been claimed about the moral arbitrariness of the distinction between liberty and the worth of liberty, others should also, therefore, be concerned with whether the right-holder is actually able to do what he or she has the right to do. In turn, then, this concern grounds the requirement that, should the right-holder be unable to do the relevant act x, then others should provide him or her with aid to the extent necessary to enable him or her to do x. What I call the worth of liberty argument is simple. We cannot separate the concern for a person's liberty which grounds the requirement of forbearance from the concern for the worth of his or her liberty which grounds the requirement of positively aiding the person so he or she is actually able to do what he or she has the right to do.[17]

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17 For an example of this argument, see Raymond Plant's *Citizenship, Rights, and Socialism* (Fabian Society No. 531, October 1988), pp. 4-6 and 'Needs, Agency, and Welfare Rights', pp. 59-60.

Qualifying the Enabling Model

4. The enabling model of rights and deprivation as I have outlined can, I think, be subject to a very serious objection. The difficulty is that sometimes we do ascribe liberty rights to people without holding that others are required to aid them in the exercise of those rights, should they not enjoy the means to do so. For example, I might agree that you have the right to travel to Australia. Yet, our ordinary understanding of that statement is not that, therefore, others should provide you with the means to go to Australia, should you lack them. All we generally mean by this statement is that you should not be prevented or obstructed or interfered with in any way, should you attempt to go to Australia. This simple example, then, defeats the view that any liberty right requires from others both forbearance plus aid should the holder be unable to do what he or she has a right to do. There are other examples which make the same point. Suppose that someone seeks to build a temple to Heaven.[18] We may think that he or she has a right to do

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18 This is an adaptation of Thomas Scanlon's example in

so but it seems very unlikely that we are therefore committed to helping him or her to advance that end, should he or she lack the means to do so as is indeed very likely.

The enabling model of rights and deprivation can be qualified to meet these sorts of counter-examples. It requires a shift from a concern for the specific requirements of an individual to advance his or her own particular ends to a concern for the basic requirements of any individual, regardless of the exact nature of his or her particular ends. So Raymond Plant writes,

> Respect requires that the person be provided not with the specific means to meet specific goals but, rather, with the basic goods of agency that are required for the pursuit of any good at all.[19]

And Alan Gewirth,

The connection of rights with goods derives in the

'Preference and Urgency', *Journal of Philosophy LXXII*, 1975, pp. 659-60.

19 Raymond Plant, 'Needs, Agency, and Welfare Rights', p. 71.

> first instance from the generic purposive features of human action: that persons act for purposes they regard as good. But the Objects of rights are not these particular apparent goods but rather the freedom and well-being which are, respectively, the procedural and substantive necessary conditions of acting for any purposes either at all or with general chances of success.[20]

Although there are some differences between these two passages, each expresses basically the same idea. It is, I think, characteristic of this qualified version of the enabling model that there is a distinction being drawn between different sorts of goods which can be expressed in terms of urgency. Certain goods are singled out as urgent because they might be used by an individual to advance his or her ends, regardless of the exact nature of those ends. Other goods are non-urgent because, although some people may require them to advance their ends, not everyone does. For Plant, basic goods can be said to meet this standard of urgency. Freedom and well-being are urgent, according to Gewirth, for precisely the same reason. Putting it in terms of urgency drives home that what is at stake is an account of deprivation. When people are deprived of

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20 Alan Gewirth, 'Introduction' to *Human Rights*, p. 4. See also his *Reason and Morality*, (Chicago, University of Chicago, 1978), chapter 2.

certain goods that are urgently required, their rights have been violated. What must not be overlooked here, however, is that the fact that certain goods are urgently required is not determined without regard to the ends people actually have.

This distinction between those goods that are urgently required and those goods that are not urgent can also be read - correctly I think - into Rawls's account of primary goods. Amartya Sen has criticised Rawls's account because it has a 'fetishist handicap':

> Primary goods suffers from [a] fetishist handicap in being concerned with goods, and even though the list of goods is specified in a broad and inclusive way, encompassing rights, liberties, opportunities, income, wealth, and the social basis of self-respect, it still is concerned with good things rather than with what these goods things do to human beings.[21]

Although expressed here in very general terms, Sen's basic objection to primary goods is as a way of measuring 'advantage' among persons. Rawls, he thinks, is committed to using primary goods for that measurement. But, objects

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21 Amartya Sen, 'Equality of What?' in *Choice, Welfare, and Measurement* (Oxford, Basil Blackwells, 1982), p. 368.

Sen, different people relate differently to goods. Some gain more nutrition from the same amount of food than others; some require more clothing to keep warm than others; etc. If this is all Sen is claiming, then I am in agreement. Indeed, even Rawls seems to concede this point, saying that he assumes for his purposes that all people are basically the same in their relationship to certain goods.[22]

But the 'fetishist handicap' of primary goods might be understood as a stronger objection, namely, that primary goods do not reflect what matter to people. What matters to people are their ends, their conceptions of the good, not primary goods *per se*. Yet, by proposing an index of primary goods, Rawls seems to lose sight of this. It can be shown, however, that this stronger charge of fetishism against Rawls's account of primary goods - but

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22 John Rawls, 'Social Unity and Primary Goods' in *Utilitarianism and Beyond*, eds. A. Sen and B. Williams (Cambridge, Cambridge University Press, 1982), p. 168. This is not exactly what he says but rather, 'assume that all citizens have physical and psychological capacities within a certain normal range'. It strikes me that troublesome differences in the measurement of advantage by a metric of primary goods - Sen's concern - would only come into play if there were significant differences among people in how they relate to goods, not just differences restricted to a 'normal range'. Of course, by making this assumption, Rawls restricts the practical scope of the metric of primary goods.

not Sen's charge - is mistaken. Rawls's idea of the primary goods rests on the belief that there is a partial similarity between all citizens' conceptions of the good:

> [T]heir particular conceptions of the goods, however distinct their final ends and loyalties, require for their advancement roughly the same primary goods[23]

> [T]he assumption is that though men's rational plans do have different final ends, they nevertheless all require for their execution certain primary goods, natural and social.[24]

Rawls, then, is not valuing primary goods for their own sake nor losing sight of the fact that ultimately what people value depends on their conceptions of the good. Rather, what counts as a primary good is determined by the overlapping of those conceptions of the good. Since urgently required goods can be used by any individual to advance his or her ends regardless of the particular nature of those ends, Rawls's index of primary goods can

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23 John Rawls, 'Social Unity and Primary Goods', p. 161.

24 John Rawls, *A Theory of Justice*, p. 93.

then be read as an account of what goods are in fact urgently required. The ultimate grounding for what counts as urgent or primary is, it must be emphasized again, a factual claim about the ends people actually do or will have.

This qualified version of the enabling model of rights and deprivation with its shift of focus to urgently required goods accomodates the objection about the right to go to Australia. Others are required to provide you with the resources to go to Australia only if those resources are urgently required, which seems unlikely. Nor does the model still entail the counter-intuitive requirement that the person with the project of building a temple to Heaven be provided with the extensive resources necessary to advance that end. For it is doubtful that those resources would be urgently required since, in order for them to meet the relevant standard of urgency, *everyone* would have to require them for the advancement of their own ends.

A Critique of the Worth of Liberty Argument

5. I now propose to formulate a critique of the worth of liberty argument. That critique presents a powerful argument against any perspective on rights and deprivation that places the primary emphasis on what a person is able to do. It demands, I think, a shift in emphasis to something quite different which I will address in the next chapter.

It is a distinguishing feature of liberty rights that they are potentially rights to do what is morally wrong. As Ronald Dworkin puts it, 'Someone may have the right to do something that is the wrong thing for him to do.'[25] For example, you may have the right not to make a donation to held aid famine victims in Sudan even though not to do so is the morally wrong thing to do. Hereafter, I shall refer to this characteristic of liberty rights as the right to do wrong.[26]

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25 Ronald Dworkin, *Taking Rights Seriously, New Impression* (London, Duckworth, 1978), p. 188.

26 Another way to represent this idea is by distinguishing between an objective and subjective sense of right. See H.L.A. Hart, 'Are There Any Natural Rights?' in *Theories of Rights*, ed. J. Waldron (Oxford, Oxford University Press, 1984), p. 83n10 & Richard Tuck, *Natural Rights Theories* (Cambridge, Cambridge University Press, 1979), pp. 7-8.

That it is a characteristic of liberty rights is sometimes overlooked. For some think that the Full Liberty - the discretion - protected by a liberty right means that a person who has the right to do x has neither a moral duty to do x nor a moral duty not to do x. It is my view that the principal source of this mistake comes from modelling moral rights too closely on legal rights. Consider the following statement by Joel Feinberg: 'If I have a right to do x, then I cannot also have a duty to refrain from doing x.'[27] Perhaps as a description of a legal right, as indeed is the context of Feinberg's statement, there is no problem. But, when extended to moral rights, the description is incorrect, for it fails to recognize the right to do wrong.[28] However, because this is such a common mistake, my claim that there can be a right to do wrong requires elaboration and defending.[29]

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27 Joel Feinberg, *Social Philosophy* (Engelwood-Cliffs, New Jersey, Prentice-Hall, 1973), p. 58.

28 Typical here is L.W. Sumner in *Abortion and Moral Theory* (Princeton, Princeton University Press, 1981), esp. p. 43, who extends Feinberg's description from legal rights to moral rights in this way.

29 The more general but largely unexplored thesis advanced in this paragraph is that moral rights should not be modelled too closely on legal rights. This thesis is also

6. Initially, the idea of the right to do wrong may appear paradoxical. How can one have a basic moral right to do something that one also has a moral duty not to do? There are at least three different ways to express this apparent paradox. Jeremy Waldron in his excellent paper 'A Right to Do Wrong' has, I think, satisfactorily accounted for one way of expressing this apparent paradox

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defended by Joseph Raz. Raz argues in 'Legal Rights', *Oxford Journal of Legal Studies 4* (1984), pp. 1-21, that contrary to the traditional approach, we should, first, sort out the correct view of a right from a moral point of view and, then, use it as a model for legal rights. The general fault with Raz's approach is that he still makes the traditional assumption that models of moral rights and legal rights are commensurable. I suspect that this traditional assumption is mistaken. The reason why I think that models of moral rights and models of legal rights are incommensurable is that the latter, unlike the former, are unable to make sense of the idea of a right to do wrong, let alone give it a central place. The fact that any theory of legal rights is unable to make room for a right to do wrong is evident if one considers the proposition that there is a legal right to do the legally wrong thing. Raz recognizes - indeed emphasizes - the idea of a moral right to do wrong on pp. 20-21 but seems to overlook the difficulty of explaining how it could be possible to have a legal analogue.

and I propose to begin with his account to explain and defend my own position.[30] Waldron neatly characterizes the paradox by suggesting that it arises out of the conjunction of two propositions:

1. Person A has a moral right to do x.

2. A's doing x is morally wrong.

Now, inherent in the very idea of a person having the liberty right to x is that other agents including the government should not interfere with that person doing x or not doing x. Hence, proposition 1 entails proposition 3:

3. It is morally wrong for anyone to interfere with A's doing x.

Waldron points out that propositions 2 and 3 are not incompatible. In order for them to be in contradiction, proposition 2 would have to entail proposition 4:

4. It is morally permissible for someone to interfere with person A's doing x.

But it seems obvious that proposition 2 does not entail proposition 4. To actually justify interfering with person A doing x, we require more than that doing x is

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30 Jeremy Waldron, 'A Right to do Wrong', *Ethics 92* (1982), esp. pp. 29-30.

morally wrong. Doing x must harm others significantly or put them at risk and so on.

We can also go beyond Waldron. These considerations about the paradox of conjoining propositions 1 and 2 may seem to miss why the conjunction appears paradoxical. The basic problem with that conjunction, it might be argued, is that person A having the liberty right to x provides him or her with a reason to do x. And this is paradoxical because he or she would then have a reason to do what is morally wrong. This argument amounts to the claim that proposition 1 entails proposition 5:

5. Person A has a reason to do x.

But, as a matter of fact, proposition 1 does not entail proposition 5. This can be clearly illustrated with an example. It surely is not the case that if we agree that I have a right to look at pornography, that therefore we can also say that I have a reason to look at pornography. What is true rather is that my having that right provides others with a reason not to interfere with me looking at pornography. The point, therefore, is that liberty rights provide people other than their holders with reasons for acting. Thus, this way of expressing the apparent paradox of the right to do wrong rests on the mistaken assumption that liberty rights provide their holders with reasons for

acting.

The third way to express the tension in the claim that there can be a right to do wrong is to focus on the peculiarity of having a protected discretion to do wrong. Why should there be such a discretion? In the discussion of two conceptions of liberty rights in an earlier chapter, I have tried to account for why we should value such a permission. Remember that that discretion only adds up to the requirement of non-interference. My argument was that a liberty right is designed to protect either the holder's agency or the holder's integrity. Agency involves a person acting on his or her choices about what is valuable. Integrity involves a person acting on his or her commitments. Interfering when the choices or commitments of that person are debased or morally wrong would also be an infringement on his or her agency or integrity. An appeal to agency or integrity constitutes a justification for the right to do wrong.

There is a more general point to be made here about theories of moral rights. John Plamenatz in *Consent, Freedom and Political Obligation* has defined a right in the following way:

> A right is a power which a creature ought to possess,

> either because its exercise by him is itself good or else because it is a means to what is good, and in the exercise of which all rational beings ought to protect him.[31]

Expressed here is the familiar idea that if we have a right to do something, then our doing it is either good in itself or a means to what is good. The fact, however, that there is the right to do wrong eliminates the first possibility as a general grounds for the right: having the right to do x cannot be justified because x is good. Even the possibility of the grounds for the right being that doing x is a means to what is good seems problematic. Suppose that doing x is the means to what is good. How then could it be wrong to do x as the right to do wrong requires? The general point for theories of rights is that all attempts to found moral rights on what is good - especially consequentialist or utilitarian accounts of rights - are going to stumble over the right to do wrong and, yet, all liberty rights allow for some situations in which one does have the right to do wrong.

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31 John Plamenatz, *Consent, Freedom, and Political Obligation, Second Edition* (Oxford, Oxford University Press, 1968), p. 82.

7. Although I have shown that there is nothing inherently paradoxical about the right to do wrong, some defenders of liberty rights nevertheless still deny that the right to do wrong is a basic characteristic of liberty rights. This denial can be defended in two distinct ways, both of which I believe to be flawed. One approach is predicated upon the rejection of moral realism. It is sometimes claimed, for example, that if you have a right to look at pornography, then it simply cannot be morally wrong for you to look at pornography. If you choose to look at pornography, then it is morally acceptable for you to look at pornography. If you choose not to look at pornography, then it is morally acceptable for you not to look at pornography. It would follow from this position that there cannot be a right to do wrong since you could never be exercising your liberty rights so as to do wrong. A similar conclusion is reached by another approach. This second approach requires that a person cannot have a liberty right to x, making it permissible to do x or not to do x unless neither of these two alternatives are, by independent judgement, morally wrong or controversial.

The approach predicated on the rejection of moral realism would be defeated if there are any

counter-examples which show that even though someone is exercising their moral rights, they are doing what is morally wrong. Consider the example of a right to abortion. The choice to have an abortion is often viewed by advocates of this right as a choice that is made morally acceptable by the fact that the woman chose it. Occasionally these descriptions are correct. However, if there is a case where choosing to have an abortion is morally wrong, then this would refute the argument. Let us try to imagine such a case. Suppose that there is a country which recognizes the legal right to abortion because there is a moral right to abortion and imposes strict population control requiring that women can each only bear one child. As well, there is a general preference for male children among these women. (Until recently, the situation in China met at least two of these conditions.) Because of the advent of medical research, it is possible to know the sex of the fetus very early in pregnancy; this test is readily available to all women in our imaginery society. The resultant wide-spread choice to abort female fetuses would be, I suspect, widely condemned as morally wrong.[32] Because the women would be

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32 In China, of course, the technological condition was not

exercising their moral rights, this indicates that the example reveals a right to do wrong.

The example I have used might be faulty. It might be said that there is no moral right to abortion. I have already mentioned some other examples of a right to do wrong. Perhaps these are also faulty. It might be said in defence of the approach predicated on the rejection of moral realism that we can never have a right to do something that is morally controversial. Now, the approach is very similar to the second approach I mentioned above, the one that stipulates that a person cannot have a liberty right to x, leaving it at his or her discretion whether to do x or not to do x, unless neither of these two alternatives are, by independent judgement, morally wrong or controversial.

The difficulty with both of these approaches is that if either of them are on the mark, it is hard to see how the scope of liberty rights can then include anything other than that which is peripheral and unimportant to most people's lives. Rights discourse on this account

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met. The consequence was the wide-spread practice of infanticide.

would be trivial. Of course, if there are some things that we can have a right to do that are not morally controversial and of central importance to some people's lives, then my objection is seriously weakened. One such example is given by William Galston: the right to choose among religious commitments.[33] But I find this a puzzling example. Suppose that you are a devout Christian Fundamentalist. It is hard to see how you could not view an atheist as not having made the wrong choice. At least in our society, I would have thought that there can be no doubt that the choice of religious convictions is controversial. Indeed, the Western practice of religious toleration is dependent on the idea that toleration is a challenge for each of us precisely because we believe that others have made the wrong choice about religous convictions.[34] Most of the other common liberty rights

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33 William Galston, 'On the Alleged Right to do Wrong', *Ethics 93* (1983), p. 322. I draw here on Waldron's 'Galston on Rights', *Ethics 93* (1983), p. 327.

34 *The Blackwell Encyclopedia of Political Thought*, eds. David Miller, Janet Coleman, William Connolly, and Alan Ryan (Oxford, Basil Blackwell, 1987) defines toleration on p. 521 as 'the deliberate choice not to prohibit, hinder, or interfere with conduct which one disapproves, where one has both the requisite power and knowledge.'

also seem to allow people to make choices that likewise others may think are morally wrong. The right to freedom of expression makes it permissible for a person to express morally debased views. Rights in property make it permissible for people to be uncharitable with their money. I doubt, in fact, that there are any liberty rights that do not allow for a right to do wrong.

Those who deny the right to do wrong present quite an uncomplicated theory of moral rights. I have suggested here why I think two possible defences of that denial fail. And we should also note how widespread and important are the opinions which fit the view I have defended. An excellent example are the liberal Roman Catholics in the United States such as Mario Cuomo who, on the one hand, believe that abortion is morally wrong but, on the other hand, defend a woman's right to abortion.[35] That there is nothing paradoxical about this position has been shown in the previous section.

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35 The views of American liberal Roman Catholics on abortion are discussed by Eric Mack in 'Liberalism, Neutralism, and Rights', *NOMOS XXX: Religion, Morality, and the Law*, eds. J.R. Pennock & J. Chapman (New York, New York University Press, 1988). This view of abortion has also received popular expression in Britain. See, for example, Julia Neuberger, 'Abortion Absolutes Drown Out Reason', *The Sunday Times*, 29 October 1989.

8. Finally, let me try to demonstrate the relevance of the right to do wrong as a feature of liberty rights to the worth of liberty argument and, more generally, to the enabling model of rights and deprivation. Earlier it was argued that proposition 2 does not entail proposition 4:

> 2. A's doing x is morally wrong.
>
> 4. It is morally permissible for someone to interfere with person A's doing x.

It does not seem necessary to rehearse the reason for denying this relationship of entailment. Consider now whether proposition 2 entails proposition 6:

> 6. It is not morally required of someone that he or she provide person A with the resources necessary to do x.

It seems clear that proposition 2 might entail proposition 6. The right to pornography illustrates this point. Many people who defend the right to pornography also think that looking at pornography is morally wrong and debased. (Apparently many people who actually consume pornography also believe this.) It strikes me as readily apparent that it would be a mistake to claim that it is morally required of them to provide pornography to someone who wants to look at it on the grounds that this is necessary

for that person to be able to do what he or she has a right to do. Another question: Is the government required to operate sex shops in regions where private enterprise has failed to establish them? Surely the point of this example is to show that if looking at pornography is in fact morally debased, then it cannot be morally required of some specific person or the government to undertake the project of providing pornography, regardless of whether or not someone has a right to look at it.

My claim that proposition 2 does entail proposition 6 depends on there being no counter-examples showing that there is no such relationship of entailment. There are plenty of examples where we may believe that someone is doing something wrong but nevertheless think it morally required or permissible not to interfere with their doing so. But this sort of example supports the argument that proposition 2 does not entail proposition 4; it suggests very little about proposition 6.

There are also many times when we may feel that someone is making a choice that is morally wrong but nevertheless believe it to be morally permissible to help them to act out that choice. This helps to clarify what is incorrect about one reason for being hesitant to accept that proposition 2 entails proposition 6. Consider a

situation in which all abortions are paid for by the government. By arguing that proposition 2 entails proposition 6, it might be thought that the suggestion is the following: when the choice to have an abortion is morally wrong, then the government is acting wrongly because of its universal funding of abortions. But this inference involves a misunderstanding of my claim. In order for that inference to follow, I would have to be arguing that proposition 2 entails the proposition that it is morally wrong to provide person A with the resources necessary for the doing of x; I am defending the much weaker claim that it is not morally required. This weaker claim is completely compatible with the view that it is *permissible* to provide A with the resources necessary to act wrongly.

This weaker claim is also compatible with the view that we are required to protect someone doing something morally wrong with their property. Suppose, for example, that you have a great deal of money and you act wrongly by refusing to give any of it to charity. Other people may try to take your money from you. It is generally thought that in this sort of situation the government should protect you in the exercise of your rights in that money even though you may exercise those rights in a manner that

is morally wrong. I take it, however, that there is a difference from a moral point of view between helping someone have that to which he or she has an independent right and that to which he or she has no independent right.[36] The point is that in the case at hand we can assume that you have an independent right to your money; this is the reason why the government should help you.

The only possibly serious counter-examples to the claim that proposition 2 entails proposition 6 involve what I called in chapter three, following Hart, special rights. Consider a situation in which I promise to help you to do something which is morally wrong. Recall that promising is a paradigmatic example of a voluntary action that creates a special right. The fact that I promised you something creates for you a special right held against me to fulfill that promise. If in this case I am required to help you, then this would show that proposition 2 does not entail proposition 6. But it seems doubtful that I am required to help you to do something which is morally wrong because I promised to. These doubts can be

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36 Frances Myrna Kamm, 'Harming, Not Aiding, and Positive Rights', *Philosophy and Public Affairs 15* (1986), p. 18.

powerfully expressed by noting the difference between a moral duty and a moral obligation.[37] Obligations, unlike duties, are voluntarily assumed. Promises can thus be said to create obligations, not duties. Now, a distinctive feature of obligations is that there is no contradiction in saying that although I have an obligation to do p, I ought not to do it. This contrasts to duties: duties by their very nature identify what we ought to do. I suspect that ultimately the difference between obligations and duties in this regard reflects the fact that obligations can be created through voluntary actions and can thus involve doing what is morally wrong. Promises can be said to create obligations, not duties. It follows that it is a mistake to infer from the fact that I made a promise to you to do p and thus created for you a special right against me to do p, that I ought to do p.

9. The claim that proposition 2 entails proposition 6 makes room for an account of the moral significance of

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37 See H.L.A. Hart, 'Are There Any Natural Rights?', pp. 80n7 & 86, and Geoffrey Warnock, *The Object of Morality* (London, Methuen, 1971), pp. 114-116.

the distinction between liberty and its worth. Because proposition 2 does not entail proposition 4, we can fully understand how a liberty right can involve a discretion to do something wrong free from interference by others. But the worth of liberty argument requires that proposition 1 entails proposition 7:

> 1. Person A has a moral right to do x.
>
> 7. It is morally required of someone that A be provided with the resources necessary and sufficient for him or her to be able to do x.

The problem is that when there is a right to do wrong, propositions 6 and 7 must be conjoined and they are in contradiction. The claim that proposition 1 entails proposition 7 must, therefore, be rejected and so too the worth of liberty argument.

The difference between the general version of the enabling model of rights and deprivation and the qualified version of that model may now seem relevant. It might be said that whilst this argument holds against the general version of the enabling model, it does not hold against the qualified version. The reason for this (it might be said) is simple. The qualified version of the enabling model of rights and deprivation distinguishes between goods that are urgently required and goods that are not. The relevant criterion for urgency is that anyone can use

the goods in question regardless of the particular nature of the ends they seek to advance. Cash readily meets this criterion. Anyone can use it to advance his or her ends because he or she can spend it on whatever he or she needs to advance those ends. A proponent of the qualified version of the enabling model of rights and deprivation might then argue that everyone should be provided with cash which allows them to exercise their liberty rights. Thus, the fact that some of them use the cash to acquire the means to do what is morally wrong is beside the point.

My doubts about this response are two-fold. First of all, I do not think that providing cash is allowable on the enabling model of rights and deprivation. I argued in the previous chapter for the thesis that rights-based justifications for redistribution require in-kind benefits, not cash. It follows that in order for the enabling model to be a rights-based model, it must require in-kind benefits. Secondly, even if cash benefits are allowable, the argument must be that the cash enables people to do what they have a right to do. The point is that the fact that people have the right to do wrong cannot be dismissed so easily. In some cases, the cash enables people to do what is wrong and it is impossible to see how others can be required to provide that cash.

Conclusion

10. The conclusions to be drawn from this chapter are largely negative ones. Although the enabling model of rights and deprivation appears on first sight quite attractive and enjoys a certain amount of popular appeal, it cannot I think be sustained.[38] I have shown by examining the right to do wrong that the distinction which it challenges between forbearance and providing the resources neceesary to actually enable a person to do what he or she has a right to do is not morally arbitrary. This conclusion can be put into a broader perspective. In the preceding chapter, I argued that distributional equality on Dworkin's interpretation is unable to justify the in-kind transfer programmes which we typically identify with the modern welfare state. In this chapter, we have found that a model of rights which highlights the

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38 The popular appeal of the enabling model of rights and deprivation is made evident by the fact that it has received expression in recent Labour Party documents. See, for example, Neil Kinnock and Roy Hattersley, *Democratic Socialist Aims and Values* (London, The Labour Party, 1988), esp. pp. 3-4 & 7.

worth of liberty is also inadequate for this purpose. What values other than liberty and equality might be appealed to in order to justify redistributive social programmes?

CHAPTER SEVEN

RIGHTS AND DEPRIVATION: THE DEVELOPMENT MODEL

Introduction

1. Is there an alternative theory of rights and deprivation? In this penultimate chapter, I propose to bring together various strands of the argument made in the preceding chapters to present what I shall call the development model of rights and deprivation. The central insight of this model is that both the agency conception of liberty rights and the integrity conception of liberty rights are committed to the value of being a certain kind of person and that this commitment justifies the conclusion that certain derivative rights to have one's needs met flow from and are a natural extension of both

the abstract right to agency and the abstract right to integrity. This conclusion is not inconsistent with the case against welfare rights advanced in chapter three because the target in that chapter was not the general idea of welfare rights but rather the proposition that fundamental moral rights to welfare, not derived from other more fundamental moral rights or principles, are capable of justifying redistribution.

My defence of the development model of rights and deprivation involves a two-step argument. The first step is concerned with justifying redistribution from those not in need to those in need. What I shall show is that certain derivative rights *against others* to have one's needs met flow from and are a natural extension of both the abstract right to agency and the abstract right to integrity. The second step in the argument is concerned with when and why justice requires the state to meet certain needs. I shall argue that in at least three instances coercive collective provision designed to meet needs is justified.

This chapter is divided into five principal parts. The first three are concerned with advancing and defending a number of distinctions and claims which inform the development model of rights and deprivation. The central

tenets of that model are outlined in the fourth and fifth parts of the chapter where I defend the two-step argument mentioned above.

Meeting Needs: Justice or Charity?

2. The development model of rights and deprivation is concerned with what I earlier referred to as material deprivation. It treats material deprivation as a problem of unmet needs: to be deprived is to lack something one needs.[1] Treating deprivation in this way allows us to identify the connection between the commonly held view that the state is required to provide certain remedies for deprivation and the redistributive transfer programmes of the modern welfare state. For it is often said that the primary function of the welfare state is to satisfy needs.[2] (The contrast supposedly is to the profit motive

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1 This view of deprivation is wide spread. See, for example, Albert Weale, *Political Theory and Social Policy* (London, MacMillan, 1983), p. 36.

2 Robert Goodin, *Reasons for Welfare* (Princeton, Princeton University Press, 1988), pp. 3-22. Raymond Plant, H. Lesser, and P. Taylor-Gooby, *Political Philosphy and Social Welfare* (London, Routledge & Kegan Paul, 1980), pp. 20-22. These authors presuppose that the state providing remedies for material deprivation is a distinctly modern function. Michael Walzer in *Spheres of Justice* (Oxford, Martin

which drives the market in any capitalist society.) It may seem doubtful that the primary function of the modern welfare state really is to satisfy needs.[3] Nevertheless,

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Robertson, 1983), pp. 68-69, argues, on the contrary, that there is nothing modern or unique about the state meeting needs. He claims that it has always been an important function of the state to take care of the needy - citing as evidence Athens in the 4th and 5th centuries B.C. and Jewish communities in Europe in the Middle Ages - but that it is only recently that this role has become controversial. The historical support Walzer offers for this claim has been challenged by Desmond King and Jeremy Waldron in their article 'Citizenship, Social Citizenship, and the Defence of Welfare Provision', *British Journal of Political Science 18* (1988), p. 438.

3 Many people have expressed doubt about the proposition that the primary function of the welfare state is to meet needs. James O'Connor in *The Fiscal Crisis of the State* (New York, St. Martin's Press, 1973), argues that in the United States, although the welfare programmes have in fact met minimum needs, their primary function is to 'legitimate' the capitalist state: 'the welfare system...is designed chiefly to keep social peace among unemployed workers.' (p. 7) For a similar argument in a British context, see Ian Gough, *The Political Economy of the Welfare State* (London, MacMillan, 1979), esp. chs. 3-4. Likewise, Claus Offe in his essay 'Social Policy and the Theory of the State' in *Some Contradictions of the Modern Welfare State* (London, Hutchinson, 1984), pp. 97-98, claims, 'The most decisive function of social policy is the regulation of the process of proletarianization.' Implicit in all of these discussions is an appeal to functional explanation. For some critical remarks about its use in this context, see G.A. Cohen, *History, Labour, and Freedom* (Oxford, Clarendon Press,1988), pp. 13-14.

there does seem to be something basically on the mark about the idea that redistributive transfers can gain their point and purpose from the fact that they meet unmet needs and, therefore, provide remedies for deprivation. The reason is that the language of needs has a certain normative appeal. When we identify something as an unmet need, it seems to follow logically that that need should be met.[4]

Although few people deny that needs should be met, some do say that the *real* issue is not whether we are required to help the needy - Who contests that? - but rather whether that requirement is one of charity or justice. Supposedly, if helping the needy is only an act of charity, then it is at the discretion of the benefactor whose needs are to be met, when, and how. Neither the state nor anyone else is justified in enforcing a charitable act. And should the benefactor decide to help nobody at all, then that is within his or her

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4 Not everyone agrees that needs in themselves provide reasons for action. Harry Frankfurt in an article, 'Necessity and Desire', in *The Importance of What We Care About* (Cambridge, Cambridge University Press, 1988), p. 105, maintains, 'The mere fact that something is needed, considered in isolation from the value of what it is needed for, has no independent justificatory force.'

discretionary powers.

I have two critical remarks to make about this view of charity. The first is that it reflects a failure to appreciate the complexity of moral acts. In ordinary moral practice, we do, I think, distinguish between at least four classes of moral acts. (1) There are acts arising from requirements of justice. Performance of these is said to be a moral duty. (2) There are acts the performance of which are a moral duty but are not said to be requirements of justice. Charity falls into this class. I shall discuss the exact difference between (1) and (2) below. (3) There are things we ought to do but which we do not have a duty to do. Perhaps *I ought* to pick up the hitchiker even though *I do not have the moral duty* to do so.[5] (4) Finally, there are supererogatory acts. Although neither duties nor things we *ought* to do, these are acts which are nevertheless morally commendable. For example, we would morally commend someone who jumps on a handgrenade to save many other people even though we would not say he or she has a duty or ought to do so.[6] A

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5 See Geoffrey Warnock's discussion in *The Object of Morality* (London, Methuen, 1971), pp. 94ff

6 See the classic discussion of supererogatory acts in J.O. Urmson's 'Saints and Heroes' in *Moral Concepts*, ed.

distinctive feature of supererogatory acts is that, unlike the three other types of moral acts mentioned above, it is at our own discretion whether or not we do them at all. Sometimes charity is thought to fall into class (3) or (4) rather than class (2). This is a mistake because it overlooks the moral imperative we associate with charity. Few people deny that we have a duty to be charitable. The point is that a person's discretionary powers with regard to charity are not such that he or she can decide, free from moral condemnation, not to be charitable at all; he or she has to be charitable, his or her discretions extend only to whom and when.[7]

My second critical remark concerns the widely received idea that an imperative of charity, unlike a requirement of justice, cannot be enforced by the state. This received view is mistaken. There seem to be a number

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Joel Feinberg (Oxford, Oxford University Press, 1968).

7 A recent article that makes the mistake of including charity among supererogatory acts and draws interfences about the welfare state from this classification is Jeffrey Obler's 'Moral Duty and the Welfare State', *Western Political Quarterly 39* (1986), pp. 212-235.

of good reasons for enforcing an imperative of charity. It is worthwhile, however, to ponder what might be the case against enforced charity before considering them. Acting charitably is commonly understood to be something left to one's own discretion. The state enforcing charity is wrong because it removes this choice; spending government revenues raised through compulsory taxation on charity forces us to act charitably. But this account misrepresents the dimension of choice that an imperative of charity allows; as we have already seen, what is left to our own discretion is to whom and when to be charitable, not whether to be charitable at all. There is indeed a *prima facie* case for allowing us this discretion. It may, however, be overridden by other considerations.

One argument for enforced charity might run as follows.[8] Imperatives of charity are morally obligatory; we are bound to practice charity. The imperatives of charity allow us the discretion of to whom and when to be charitable. There are, however, many different ways to act charitably: an endless number of worthwhile causes

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8 Thomas Nagel, 'Libertarianism without Foundations' in *Reading Nozick*, ed. J. Paul (Oxford, Basil Blackwell, 1981), pp. 199-200.

coming up all of the time. In fact, to make an informed choice would be extremely difficult and very time-consuming. This suggests that the discretion of to whom and when to be charitable might be regarded as an excessive moral demand on the individual. The great virtue of collective charity through the state is that it would relieve the individual of this excessively demanding burden.[9]

There is another line of argument for enforced charity which is even more powerful than this one.[10] The

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9 It could be objected that this argument misses the value of that discretion. It might be said that what is important is that people think about how they can help others. But I do not see why state-enforced charity excludes this possibility. State charity can be complemented through direct voluntary givings by individuals. In that case, one's actions might even be described as supererogatory. I have only once heard it seriously suggested that there should be state-regulations against supererogatory givings. This was in reference to the Royal Society for the Prevention of Cruelty against Animals (RSPCA). The context, however, was a comparision between the voluntary givings to the RSPCA and the Royal Society for the Prevention of Cruelty against Children in Britain today. The former received 12.5 million pounds in legacies in 1988, the latter less than half that amount. I suspect that in a just world there would not be the discrepancies that motivate the calls for restrictions on supererogatory givings. See Greg Hadfield's discussion in 'Why donkeys win in the legacy lottery', *The Sunday Times*, 15 October 1989, p. A13.

10 See Allen Buchanan, 'The Right to a Decent Minimum of Health Care', *Philosophy and Public Affairs 13* (1984), pp. 68-72, and 'Justice and Charity', *Ethics 97* (1987) pp. 562-569. My account differs slightly from Buchanan's

imperative to be charitable to the needy is founded on the belief that it is good to help the needy as much as possible. Consider a situation in which everyone acts charitably independently. It is easy to imagine that the result would be that the needs of some are not met while others receive too much. The goal of helping the needy as much as possible is not, therefore, being achieved. The basic problem is one of coordination. The obvious solution is collective provision whereby the meeting of needs is achieved efficiently. The case for coercive collective provision is simply a logical extension. It assures each person that everyone else is partaking in the same coordinated action and that therefore he or she is acting rationally by doing so.[11]

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because I do not introduce charity as a public good that generates a collective action problem.

11 This sort of solution has been objected to by Robert Nozick in *Anarchy, State, and Utopia* (Oxford, Basil Blackwell, 1974), pp. 90-95 and esp. 265-68. However, as I read Nozick's objecton, it depends on the crucial premiss that the givings are supererogatory and not in fact morally required. This makes his claims not relevant to the argument at hand because being charitable is morally required.

The point of rehearsing these two arguments for enforced charity is to show that the difference between imperatives of charity and justice cannot be explained by reference to state enforcement. Wherein then does the difference lie? The correct analysis is, I think, the traditional one. This analysis, which can be found both in Kant and in Mill, rests on the distinction between perfect and imperfect duties.[12] Although both sorts of duties are equally obligatory, they differ with respect to the determinacy of the obligation. A perfect duty is owed to a specific person or persons in virtue of a right he or she has.[13] An imperfect duty, although equally obligatory, is not owed to a definite person at any particular time. Whereas justice can be said to be a case of a perfect duty, charity is a case of an imperfect duty.

Now, someone might resist this traditional analysis of the difference between charity and justice by denying

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12 Immanuel Kant, *The Metaphysics of Morals* (Indianapolis, Bobbs-Merrill, 1964), p. 48, and John Stuart Mill, *Utilitiarianism* in *Utilitarianism, Liberty, and Representative Government* (London, Dent, 1910), p. 46.

13 I mean here a right in both the pre-determined sense I have assumed through out the previous chapters as well as the sense identified at the end of section 15 of chapter five.

that an imperative of charity is always an imperfect duty. A challenge to this effect has recently been made by Allen Buchanan. Buchanan points out that if you accept that charity can sometimes be enforced by the state, as indeed I have, then the indeterminacy ordinarily characteristic of charity would no longer be there, for it would seem that the institutional arrangements that accompany state enforced charity would eliminate it.[14] Buchanan thinks it follows from this that charity could then no longer be represented as an imperfect duty. This argument is, I think, an interesting one. It certainly seems true that state enforced charity would eliminate the indeterminacy commonly associated with charity. Does it, however, follow from this that we no longer have a case of an imperfect duty? I submit that Buchanan misunderstands the nature of state enforced charity. As I have characterized it, and I believe that Buchanan would agree, charity ordinarily is an act which allows for some discretion - to whom and when - by the benefactor. State enforced charity solves a coordination problem among

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14 Buchanan, 'Justice and Charity', p. 570

individual benefactors and relieves them of the burden of deciding which causes are the most worthwhile ones. Principally, what it involves is the transfer of the discretionary powers of individuals to the state. It is then at the *state's discretion* who to help, when. This is what Buchanan overlooks. And this is of great importance, because what it means is that even state enforced charity is not owed to a specific individual. This is why so many people object to describing the activities of the welfare state as charitable acts. That description suggests that an individual does not have a right to state welfare benefits; whether or not he or she receives them is at the discretion of the state. This is why historically there has been such a vigorous campaign to gain recognition for the view that justice requires that those benefits be paid to specific individuals in fulfillment of a perfect duty.[15]

Since it is my intention to argue that certain derivative rights to have one's needs met flow from and are a natural extension of both the abstract right to

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15 See, for a representative statement, Tony Lynes, *Welfare Rights* (London, Fabian Tract 395, 1969), pp. 3-4.

agency and the abstract right to integrity, the development model of rights and deprivation should be regarded as an attempt to show that the meeting of needs by the state is a requirement of justice, not charity.

Two Theories of Needs

3. Now, although talking about needs is problematic because it is contested what exactly should be counted among a person's needs, there does seem to be general agreement that certain needs - especially the minimal conditions for physical survival - are immediate and obvious.[16] Starvation, for example, seems to be one of the purest cases of deprivation. These sorts of needs form a baseline for all theories of needs. Rarely, however, are they conceived of as exhausting an account of needs. The task for any theory of needs is to formulate a principle which explains what should and should not be included among a person's needs. The development model of rights and deprivation presupposes a theory of needs. It

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16 John Baker in *Arguing for Equality* (London, Verso, 1987), p. 15, correctly points out as proof of this that relief workers during famines generally do not have any deep philosophical disputes about what constitutes a need.

is my intention here to outline such a theory - *the Aristotelian theory* - by contrasting it to another more familiar theory of needs - *the liberal theory*.[17]

It has often been thought that the most promising way to identify an individual's needs is through an appeal to some sort of principle of harm. Thus, Harry Frankfurt writes, 'A person's need has moral interest only if it will be a consequence of his failure to meet the need that he incurs or continues to suffer some harm.'[18] Similarly, Joel Feinberg says, 'to say that S needs X is to say simply that if he doesn't have X he will be harmed.'[19] The issue among those who place the emphasis

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17 I am in no way claiming that these two theories exhaust the possibilities. What one might call the conservative theory of needs holds that an individual's needs are determined by the position and station one has in society. The norm-related theory of needs holds that to be in need is to fall below a conventional standard of living. For a discussion of the norm-related theory, see David Miller, 'Social Justice and the Principle of Need' in *The Frontiers of Political Theory*, ed. Michael Freeman and David Robertson (Brighton, Harvester Press, 1980), pp. 174-75.

18 Frankfurt, 'Necessity and Desire', p. 109.

19 Joel Feinberg, *Social Philosophy* (Engelwood Cliffs, N.J., Prentice-Hall, 1973), p. 111. See, for other similar claims, David Wiggins, 'Claims of Needs' in *Morality and Objectivity*, ed. Ted Honderich (London, Routledge & Kegan Paul, 1985), p. 157, and Garrett Thomson, *Needs* (London, Routledge & Kegan Paul, 1987) pp. 8-9.

on a principle of harm is how the relevant harm is to be construed. What I shall call the liberal theory of needs offers one such construal.

David Miller defends a representative account of the liberal theory of needs in his book *Social Justice*. Miller defines the relationship between needs and harm in this way: '"A needs X" = "A will suffer harm if he lacks X."'[20] Harm for Miller is a matter of not fulfilling one's plan of life: 'the aims and activities which are central to that person's way of life.'[21] The following passage explains how this can be filled out into a theory of needs:

> Harm, for any given individual, is whatever *interferes directly or indirectly* with the activities essential to his plan of life; and correspondingly, his needs must be understood to comprise whatever is necessary to allow these activities to be carried out. In order, then, to decide what a person's needs are, we must first identify his plan of life, then establish what activities are essential to that plan, and finally investigate the conditions which *enable* those activities to be carried out.[22]

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20 David Miller, *Social Justice* (Oxford, Clarendon Press, 1976), p. 130.

21 Miller, *Social Justice*, pp. 132-33.

22 Miller, *Social Justice*, p. 134. Emphasis added.

Now, in this passage there is an important ambiguity concerning what exactly counts as a need. The first part of the first sentence suggests that since harm is a matter of interference with the activities essential to a person's plan of life, his or her needs are met so long as nothing interferes directly or indirectly with him or her partaking in those activities. The rest of the passage suggests that meeting needs is a much more demanding requirement because a person needs that which is necessary to *enable* him or her to partake in the activities essential to his or her plan of life. I shall take Miller to be proposing this second stronger sense of needs. In sum then, the liberal theory of needs holds that a person's needs are a matter of what is necessary for him or her to carry out his or her plan of life.

The Aristotelian theory of needs is much less familiar than its liberal counterpart.[23] It does not

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23 It cannot even be attributed to Aristotle since, as David Wiggins has pointed out on p. 166 of 'Claims of Needs', Aristotle never had a theory of needs, although it may be possible to construct one based on what he said about 'necessity'. Michael Ignatieff in *The Needs of Strangers* (London, Chatto and Windus, 1984), pp. 12-15, draws in a very rough fashion the distinction I make between liberal

offer a construal of harm nor does it view needs as the conditions that have to be satisfied to carry out the particulars of one's plan of life. Instead, it seeks to make needs, in a sense, more fundamental and thus proposes to narrow the range of their application, although not so much so as to restrict needs discourse only to the conditions necessary for physical survival. My exposition of the Aristotelian theory can begin by noting a distinction, commonly drawn in philosophical discussions of controversial issues such as abortion, between being a human being and being a certain kind of person.[24] To be a human being is "natural"; it is something you are born as. Being a certain kind of person is, in contrast, an achievement; it is something a human being matures into and it is something that must be sustained. In ordinary language, being a certain kind of person is used in both

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and Aristotelian theories of needs but leaves it largely unexplored.

24 See Michael Tooley, *Abortion and Infanticide* (Oxford, Clarendon Press, 1983), pp. 50-61. The importance of this distinction to the issue of abortion is evident if one considers the following probing questions: Even if fetuses are human beings, are they persons? If they are not persons, can they be properly said to have rights?

more and less specific senses. In a rather specific sense, we speak, for example, of the kind of person who can play the piano. Being the kind of person who can play the piano is indisputably an achievement; he or she has learned certain skills and developed certain talents. In a more general sense of being a certain kind of person, we speak, for example, of the kind of person who has a plan of life. (Playing the piano might be part of one's plan.)

The Aristotelian theory of needs is concerned with the achievement of being a certain kind of person in the general sense. Indeed, there are two distinct ways in which being a certain kind of person in the general sense is an achievement. It is obviously an individual achievement; it is something which an individual human being matures into. But it is also in a very important sense a social achievement.[25] This is because being a

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25 It is quite common to claim that the existence of persons of a certain kind, in the general sense, is a social achievement. See, for example, Charles Taylor, 'The Nature and Scope of Distributive Justice' in *Philosophy and the Human Sciences, Philosophical Papers 2* (Cambridge, Cambridge University Press, 1985), p. 309, and Larry Siedentop, 'Political Theory and Ideology: the case of the state' in *The Nature of Political Theory*, eds. David Miller and Larry Siedentop (Oxford, Clarendon Press, 1983), esp. p. 57. I assume throughout this chapter that this claim is basically correct.

certain kind of person requires a particularized set of social institutions and practices to nurture it; it is, like gender, a socially constructed category. Different societies are capable of yielding different kinds of persons. Needs, according to the Aristotelian theory, are those conditions - personal and social - necessary for a human being to become this or that kind of person. The specific needs of any individual are, thus, relative to the kind of person judged to be of value. If, for example, the kind of person P is judged to be of value and the achievement of P requires the set of conditions A, B, and C, then among an individual's needs are A, B, and C.

The core idea of the Aristotelian theory of needs can be illustrated with a more concrete example. Consider the example, drawn from the discussion of Miller's theory of needs, of a person with a plan of life. This kind of person can be correctly said to require certain necessities in order to carry out his or her plan of life - needs on the liberal theory. Distinct from these requirements are the very conditions necessary for him or her to be the kind of person who can be said to have a plan of life and be capable of following it. Central to the Aristotelian theory of needs is the belief that one is not born as the kind of person who has life-plans - it is

not "natural"; it has to be achieved.[26] Suppose that it is of value for an individual to be the kind of person who has a plan of life and is capable of following it. The Aristotelian theory identifies his or her needs as those personal and social conditions necessary for him or her to mature into and sustain that kind of personhood.

Now, it must not be thought that needs on the Aristotelian theory are what have sometimes been described as *fundamental* - as opposed to *instrumental* - needs. The distinction between instrumental and fundamental needs is noted by Garrett Thomson, among others.[27] 'An instrumental need,' explains Thomson,'is always relative to some purpose or goal. To say that a person A has an instrumental need for X is to assert that X is necessary

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26 Relevant to this is the following point made by S.I. Benn and W.L. Weinstein on p. 210 of their well known article, 'Being Free to Act, and Being a Free Man', *Mind LXXX* (1971): 'The concept of a man presupposed by the concept of freedom of action is that of the free (autonomous) chooser. Not to have this freedom is to be defective. Nevertheless, it may be more accurate to regard it as something to be achieved; to see it clearly as a possibility may be only the first step towards having it.'

27 Thomson, *Needs*, pp. 7-8. See James Griffin, *Well-being* (Oxford, Clarendon Press, 1986), pp. 41-42, for a similar distinction.

for the completion of some goal or aim of A's.' Distinct from needs of this sort are fundamental needs which relate 'to the overall quality of a person's life rather than to a particular goal that he happens to have.' What the Aristotelian theory identifies as needs falls into neither of these two categories. They certainly are not relative to some purpose or goal. Nor can they be said to relate to the overall quality of one's life. They are in an elementary but important way too fundamental to be captured by either description.

The Aristotelian theory may result in certain counter-intuitive conclusions about what should be counted among an individual's needs. For example, it is often said that the poor are, by definition, in need. The Aristotelian theory resists this view. This is because it seems perfectly conceivable that an individual may, despite being poor, still be a valuable kind of person in the general sense. One might, for example, still sustain one's existence as a person with a plan of life. Although it seems inevitable that poverty will affect how successful one is at carry out one's plan of life, poverty may not always have an effect on being that kind of person. The virtue of construing needs narrowly, albeit sometimes counter-intuitively, is that it avoids the

accusation often directed at theories of needs that they proliferate to the point of distortion what should be counted among an individual's needs.

4. Assessing different theories of needs is not my intention here. Principally, my concern is to construct a theory which informs a rights-based argument that can justify redistribution. The Aristotelian theory of needs can, I think, be shown to meet this requirement.

It is worth noting, however, that in at least two respects the Aristotelian theory is superior to the liberal theory. This is because the Aristotelian theory avoids two serious objections that can be raised against the liberal theory. The first objection is that although it is generally accept that needs are more urgent than wants, the liberal theory conflates them. The conflation of needs and wants seems an inevitable consequence of too closely identifying an individual's needs with his or her plan of life. It is hard to see how a rigorous distinction between needs and wants that recognizes the urgency of the former can ever be formulated by a proponent of the liberal theory.[28] There is, in so far

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28 See the discussions of this problem in Goodin, *Reasons*

as I can see, no sense in which the Aristotelian theory can be accused of conflating needs and wants.

The second objection that can be raised against the liberal theory concerns the problem of what counts as the needs of someone who has formed a debased plan of life. As I noted above, needs seem intuitively to carry some sort of normative claim that they be met. But how can this be true if, as on the liberal theory, what a person needs is decided by his or her plan of life, a plan which might be morally debased? (Relevant here of course is my criticism of the enabling model of rights and deprivation based upon the right to do wrong.) Since the Aristotelian theory does not base an indivdual's needs on his or her plan of life, the possibility of an individual having a debased life-plan poses no problems for it. All it requires to explain the intuitive normative force of needs is that the kind of person upon which an individual's needs are contingent is in itself of moral value.

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for Welfare, chapter 2, and D. Harris, *Justifying State Welfare* (Oxford, Basil Blackwell, 1987), chapter 7.

Rights and Persons

5. The Aristotelian theory of needs distinguishes between the conditions necessary to mature into a certain kind of person and those conditions necessary to act out one's life as that kind of person. The underlying point is that being a certain kind of person is an achievement, the fulfillment of which requires certain needs to be met. It is because of this fact that the thesis I shall now defend is of moral significance: both the agency conception of liberty rights and the integrity conception of liberty rights are committed to the value of being, in the general sense, a certain kind of person.

Let us begin with a review of the distinction between the agency conception of liberty rights and the integrity conception of liberty rights. These two conceptions offer rival interpretations of the concept of a liberty right. Each explains the moral force of liberty rights by providing an account of what those rights are designed to protect. Whereas the agency conception claims that the rationale for liberty rights is that they allow actions to flow from important higher-order choices, the integrity conception holds that their rationale is that they allow

actions to flow from identity-conferring commitments. I argued in chapter four that these two rationales for liberty rights give rise to two distinct abstract rights, the abstract right to agency and the abstract right to integrity. The abstract right to agency leaves it to the discretion of the right-holder whether or not to exercise his or her agency and grounds the moral requirement on others not to interfere with his or her doing so. The abstract right to integrity leaves it to the discretion of the right-holder whether or not to act with integrity and grounds the moral requirement on others not to interfere with his or her doing so. Much of the discussion about public policy issues focuses not on these abstract rights but rather on rights said to flow from these abstract rights. These more concrete rights I called derivative rights.

The examination of the right to do wrong helps, I think, to clarify the exact moral status of the rationales for liberty rights held by the agency and integrity conceptions. Against Plamenatz's definition of rights, I argued in chapter six that the right to do wrong in effect rules out the possibility that the moral force of liberty rights lies in the fact that their exercise is itself good or is a means to what is good. In my account of the

abstract rights to agency and integrity, I have been careful not to claim that the exercise of either agency or integrity is always itself good or a means to what is good. Because the right to do wrong is necessarily a feature of both those rights, this is just as well. The question is: What is it then that gives the abstract rights to agency and integrity their justificatory force?

Consider the general proposition: it is of significant moral value to be a certain kind of person. Liberty rights could be said to have moral force if they are designed to promote and protect the right-holder being that kind of person.[29] On the agency conception, it is of significant moral value to be a person with what I shall call the faculty for agency and derivative liberty rights gain their justificatory force from the fact that they are designed to allow a person to act on his or her higher-order choices. On the integrity conception, it is of significant moral value to be a person with what I shall call the faculty for integrity and derivative liberty rights gain their justificatory force from the

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29 See especially Charles Taylor's discussion of rights and human capacities in 'Atomism' in *Philosophy and the Human Sciences, Philosophical Papers 2*, pp. 192-95.

fact that they are designed to allow a person to act on his or her identity-conferring commitments. My reference here to agency and integrity as faculties depends on an important distinction that needs to be explained. A human faculty is complex in nature, made up of various constitutive parts which I shall call capacities. The faculty for agency and the faculty for integrity both fit this model. Each is best thought of as a combination of many different capacities such as the capacity for rationality, the capacity to evaluate ends, the capacity to hold long term commitments and to be able to distinguish between past, present and future, and the capacity to undertake practical deliberations. Generally, what distinguishes the faculties for agency and integrity is not so much the particular capacities each involves but where the emphasis is placed.

The upshot then is that a normative defence of either the agency conception of liberty rights or the integrity conception of liberty rights necessarily commits one to holding as valuable being, in the general sense, a certain kind of person.

5. Since the moral significance of this point rests on the fact that the existence of a certain kind of person

is an achievement of sorts, let me try to bring into sharper focus, through a pair of distinctions, the idea of maturing into a certain kind of person. The first distinction is between the *development* of a capacity and the *exercise* of a capacity. The development of a capacity involves the unfolding of some latency. To exercise a capacity is to actually use it. Consider the capacity to evaluate ends. The development of this capacity would involve among other things coming to know what it means to have value and learning what this implies when weighing ends of different value. The exercise of this capacity involves actually making value judgements, deciding when an end is good or evil, right or wrong, just or unjust.

Two points of clarification. Firstly, it should be noted that the exercise of a capacity may be a necessary condition for developing and a means of developing that capacity. Nevertheless, although some cases of developing a capacity are also cases of exercising it, there are also cases of each which are not also cases of the other. The second point is to acknowledge that perhaps human beings do have some capacities that can be genuinely exercised without development, but then emphasize that the ones that will concern us do have to be developed.

Now, if this first distinction is granted, then we

can expect to find a parallel distinction between the development and exercise of human faculties such as the faculty for agency and the faculty for integrity. The relationship between the development and exercise of a faculty can be illustrated with a Venn Diagram. Simply imagine two overlapping spheres, one representing the development of a faculty, the other its exercise. I shall use this image of a Venn Diagram frequently to refer to this distinction. This second distinction corresponds very well to the two theories of human needs sketched above. Needs on the liberal theory seem largely to be restricted to conditions necessary for the exercise of one's faculty for agency. Likewise, the enabling model of rights and deprivation is largely concerned with the exercise sphere. The Aristotelian theory of needs reflects, in contrast, a concern for the development of a faculty. For example, to mature into the kind of person with agency requires the development of one's latent capacities that make up the faculty for agency. An individual's needs are those conditions necessary for that development. The development model of rights and deprivation is concerned with the demands on others that an individual can make with regard to his or her needs, so understood. Are others required to help meet those needs?

A Rights-based Case for Others Helping the Needy

6. I now turn to the first step in the two-step argument mentioned at the outset of the chapter. I argue here that certain derivative rights against others to have one's needs met flow from and are a natural extension of both the abstract right to agency and the abstract right to integrity. I do not claim to establish here that the state also has a rights-based responsibility to meet needs and, therefore, is required to provide some remedies for deprivation. This second step in the argument is addressed in the next part of the chapter. The combination of these two steps constitute the core of the development model of rights and deprivation.

The Aristotelian theory has been assigned the general perspective from which needs are to be viewed on this model. An individual's needs are to be thus construed as those conditions necessary for him or her to develop into and sustain his or her existence as a certain kind of person. The relevant rights are the abstract right to agency and the abstract right to integrity. As we have just seen, both the agency and the integrity conceptions of liberty rights are committed to holding as valuable

being a certain kind of person. In the case of the agency conception, the value is placed on being a person with a developed faculty for agency, that is, an individual who can make higher-order choices and act on them. In the case of the integrity conception of liberty rights, the value is placed on being a person with a developed faculty for integrity, that is, an individual who has certain identity-conferring commitments and can act on them. The important point is that the agency and integrity conceptions of liberty rights locate for us the kind of person upon which any account of an individual's needs, on the Aristotelian theory, is contingent. For the sake of convenience and brevity, the argument I sketch out below and the remarks I offer in its defence make specific reference to the agency conception of liberty rights. (I believe that an argument with the same structure and reaching similar conclusions can also be made about the integrity conception of liberty rights.)

Why might it be said that individuals hold certain derivative rights against others to help foster the development of their faculty for agency? A central theme running through the discussion below is that the development sphere of the faculty for agency is commonly neglected when thinking about the requirements on others

that find their basis in the abstract right to agency.[30] This neglect is rather unfortunate because, as I argue below, help from others is essential for anyone to properly develop their faculty for agency. This fact, combined with the claim that ascribing to someone the abstract right to agency signifies a moral concern that he or she enjoy a developed faculty for agency, warrants the conclusion that certain derivative rights against others to have one's needs met flow from and are a natural extension of the abstract right to agency.

7. It is my intention to try to state this argument in a clear and logical manner. This involves, first, identifying and stating six basic claims. I have, I think, already established the following three claims:

> (I) The abstract right to agency gains its justificatory force from the value of being, in the general sense, a certain kind of person. The relevant kind of person is a person who can make important

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30 One notable exception to this neglect is Joseph Raz's recent book *The Morality of Freedom* (Oxford, Clarendon Press, 1986), esp. 407-408. Raz points out (correctly in my view) that one way to help a person to lead an autonomous life is to help create certain 'inner capacities' required for the conduct of that life.

higher-order choices and have his or her actions flow from those choices - a person who has a developed faculty for agency.

(II) The faculty for agency has two distinct spheres, the development sphere and the exercise sphere.

(III) The abstract right to agency grounds in the exercise sphere the following moral requirement: others should not interfere with an individual's exercise of agency.

The fourth claim is not very controversial. It can be stated as follows:

(IV) A developed faculty for agency is necessary to enjoy agency in the *thin* sense.

What exactly do I mean, in my statement of this claim, by 'agency in the thin sense'? Broadly speaking, there are two basic views about when a person can be said to enjoy agency. The first (which I shall call the *thick* sense) says that in order for someone to enjoy agency, he or she must actually be able to carry out the higher order choices he or she makes. This requires not only a developed faculty for agency and forbearance by others but also the resources necessary to carry out one's higher order choices. The second view (the *thin* sense) says that the enjoyment of agency requires only forbearance from

others and that one be able to, for example, distinguish between a rudimentary choice like what flavour of ice cream to have and a higher order choice involving some sort of normative evaluation. Claim (IV) is saying that in order for this requirement to be met, an individual must have a developed faculty for agency.

8. More controversial are the final two claims. The fifth claim can be stated as follows:

> (V) Ascribing to someone the abstract right to agency signifies a moral concern that that individual enjoy agency in the *thin* sense.

The substantial claim I am making here is that it is nonsense to say that someone should have an abstract right to agency but yet deny that it is important that he or she have the developed capacities necessary to enjoy agency.

I propose to consider two very different objections to claim (V). The first objection says that the distinction between agency in the *thin* and *thick* sense is morally arbitrary. And since I have shown in chapter six that the ascription of liberty rights does not entail a moral concern for agency in the *thick* sense, neither does it entail a moral concern for agency in the *thin* sense.

The fault with this first objection is that it mistakenly supposes that there is a case for restricting the demands on others to non-interference with a person's development of his or her faculty for agency that is analogous to the one made in chapter six for demanding only non-interference from others regarding the exercise of that faculty. The difficulty with drawing such an analogy is that the development of an individual's faculty for agency cannot in itself be morally wrong; it is only the certain ways in which that (developed) faculty can be exercised that can be wrong. The agency conception of liberty rights necessarily holds that the development of a person's faculty for agency is something good: it is of significant moral value that he or she be the kind of person who can make higher-order choices and act on them. If someone is required to help foster the development of another person's faculty for agency so that he or she can mature into that kind of person, there is then no sense in which that requirement can be seen to be a requirement to aid in bringing about something which is bad. The point is that the distinction between the *thin* and *thick* sense of agency is not morally arbitrary because others can be said to be required to help someone develop his or her faculty for agency without raising objections based on the

right to do wrong.

The second objection to claim (V) concedes that it is nonsense to say that someone should have an abstract right to agency but yet deny that it is important that he or she have the developed capacities necessary to enjoy agency. What it denies instead is that anything morally significant follows from this concession. For it denies that we should ascribe liberty rights to those with undeveloped capacities. It says, rather, that liberty rights should only be ascribed to those with the relevant developed capacities.

At issue here are two contrasting views of rights, the dynamic view and the static view.[31] The dynamic view holds that moral rights are ascribed to human beings on the basis of certain latent or unrealized capacities they have, and not on the basis of their actual developed capacities. The static view holds, in contrast, that rights should be ascribed only on the basis of realized capacities. Both of these views have been held by influential rights theorists. John Rawls, for example,

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31 For this distinction, see Vinit Haksar, *Equality, Liberty, and Perfectionism* (Oxford, Clarendon Press, 1979), pp. 96-113.

affirms the dynamic view as does Tony Honore.[32] H.L.A. Hart in his influential article, 'Are There Any Natural Rights?', affirms the static view of rights when he stipulates that to be ascribed the equal right to be free, one must be capable of choice.[33]

This second objection to claim (V) quite rightly reveals the unstated commitment of the development model of rights and deprivation to the dynamic view of rights. I shall defend that commitment by showing that the two principal arguments in favour of the static view are deeply problematic.

The first argument in favour of the static view I shall criticize says that since it is not of moral significance that someone has certain unrealized capacities, it does not make sense to ascribe rights to them on the basis of those unrealized capacities. This argument has received its closest scrutiny in discussions of the rights and wrongs of abortion. Those who oppose a

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32 See respectively, Rawls, *A Theory of Justice* (Oxford, Oxford University Press, 1972), p. 509, and Honore, 'Rights and the Rightless' in *Making Law Bind* (Oxford, Clarendon Press, 1987), pp. 253-55.

33 H.L.A. Hart, 'Are There Any Natural Rights?' in *Theories of Rights*, ed. J. Waldron (Oxford, Oxford University Press, 1984), p. 77. Gregory Vlastos on p. 59n45 of 'Justice and Equality' in the same volume also affirms

woman's right to have an abortion - conservatives - typically rest their objection on the claim that abortion is wrong not because the fetus has certain realized capacities but rather because the fetus has certain latent capacities. For the conservative on abortion, the fact that the fetus has certain latent capacities is of great moral significance. Now, I do not propose to defend the conservative on abortion. Indeed, personally I believe that it is *not* of great moral significance that the fetus has certain latent capacities. Nevertheless, I do think that sometimes it is morally significant that someone has certain latent capacities. Sometimes those who oppose the conservative on abortion feel compelled to deny even this. For example, Michael Tooley in his book *Abortion and Infanticide* seems to advance such a view.[34] Yet, it seems obvious to me that there are situations when it is of moral significance that someone has or had certain unrealized capacities. Legal cases often reflect this

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the static view.

34 Tooley, *Abortion and Infanticide*, ch. 6

concern in their judgements. It is quite common for the court to award damages, for example, to a child who suffered losses not in actually realized capacites but in potentiality. This sort of case clearly defeats the claim that it is never morally significant that someone has certain unrealized capacities.[35] It can then make sense to ascribe to people moral rights on the basis of unrealized capacities they have.

The second and much more familiar argument in support of the static view of rights I shall consider restricts its scope to liberty rights. Liberty rights leave it at the discretion of the right-holder to do certain things free from interference by others. Typically, these things are of fundamental importance to an individual's life. But, although it is true with regard to most people that non-interference of this sort is fundamental, this is not

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35 Although I believe that this case defeats the claim that potentiality is never of moral significance, it must be here acknowledged that there are a number of grades of potentiality and that it is possible that potentiality may be of moral significance at some grades but not others. So far as I can see, it is sufficient for my argument just to show that potentiality at some grade is of moral significance. For a three-fold distinction between grades of potentiality, see G.A. Cohen, *Karl Marx's Theory of History: A Defence* (Oxford, Clarendon Press, 1978), pp. 14-15.

the case with everyone. For example, few of us believe that children should be free from interference while doing certain things.[36] Likewise, with respect to severely mentally retarded adults and the insane, we are often inclined to think that interference is sometimes justified. Generally, in these cases the grounds for interference are paternatistic: the child or mentally retarded adult is prevented from doing something out of concern for his or her best interests, even though he or she believes that his or her best interests lie in doing it. The reason for not ascribing liberty rights to those with certain unrealized capacities - children, the mentally retarded, the insane - is that it is in their best interests not to be ascribed those rights.

At first glance, this seems to be a compelling argument for not ascribing liberty rights to those with certain undeveloped capacities and, therefore, supports the static view of rights. It quite successfully pinpoints why we might feel uneasy about ascribing rights to everyone. But what I find problematic is the proposed

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36 See, for example, Loren Lomasky, *Persons, Rights, and the Moral Community* (Oxford, Oxford University Press, 1987), pp. 160-165, as well as the discussion in Colin Wringe, *Children's Rights* (London, Routledge & Kegan Paul, 1981), chapter 13.

way to resolve that uneasiness, i.e., by denying liberty rights to those with certain unrealized capacities. Many people are attracted to the idea that everyone should be ascribed the same rights; the static view rules out this possibility. The question I should like to raise is whether it is possible to ascribe liberty rights to everyone but nevertheless make room for some paternalistic treatment of children and the mentally retarded that cannot be said to violate their liberty rights. An affirmative answer to this question is possible, given that we adopt a thesis about liberty rights advocated in chapter two.

There, I advanced among others the thesis that liberty rights can provide Partial exclusionary reasons for action. This thesis holds that what liberty rights forbid is not interference *per se* but rather interference for specific reasons. I gave the example of a right to pornography. We might say that that right would be violated if pornography was censored because government officials or others think that looking at pornography is immoral and a debased thing to do. If, however, it was censored because it leads to an increase in violent crimes, then the right to pornography would not be violated. Suppose analogously that liberty rights do not

exclude certain interferences with the actions of children and the severely mentally retarded on paternalistic grounds. Then, this would resolve some of our uneasiness of ascribing liberty rights to those with unrealized capacities without actually completely denying them those rights.

This approach is reinforced by two other considerations. First of all, I think it fits very well with the ordinary practice of rights and the existence of paternalistic measures. We commonly say that it is one's right to spend one's taxed income on whatever consumer goods one wants. Nevertheless, it is very common for the government to regulate the quality of consumer goods on the market by setting certain minimal standards of quality. For example, gas cookers have to meet standards set by the British Standards Institute. The motive for these government regulations is typically paternalistic. But few believe that these regulations violate our rights to spend our money on whatever consumer goods we want.

The second consideration is concerned with justifying the imprisonment of those who commit serious crimes. Do we violate the liberty rights of criminals by imprisoning them? I am inclined to say, somewhat intuitively, that the liberty rights of criminals are not violated by

imprisonment (although their freedom is undeniably diminished). The difficulty is explaining this intuitive belief. The most common explanation is to say that criminals somehow lose or default their liberty rights. The problem with this common explanation is that it raises as many puzzles as it purports to solve. Some of these puzzles are suggested by the following questions: How can someone lose or default rights that are basic and moral? Does a criminal default all of his or her basic moral rights? What then is wrong with torturing criminals and subjecting them to other forms of maltreatment? By construing liberty rights in terms of Partial exclusionary reasons, we are able to say that although criminals do not lose their liberty rights, imprisonment does not violate those rights. The explanation is that an individual's liberty rights are not violated provided that he or she is imprisoned for good reasons - such as he or she murdered someone intentionally - and not for bad reasons - such as he or she committed homosexual acts. The point is that by adopting the thesis that liberty rights provide Partial exclusionary reasons for action we can understand why an important part of law enforcement cannot be objected to on the basis of moral rights to liberty.

The upshot of this discussion is that the two

arguments I have just considered do not establish the superiority of the static view of rights over the dynamic view. Moreover, I have suggested, rather implicitly, a very strong positive argument in favour of the dynamic view. Unlike the static view, the dynamic view does not conflict with the widely held belief that moral rights are universally held by all human beings. The thesis that liberty rights can be understood to provide second-order exclusionary reasons for action suggests an important way to reconcile ascribing liberty rights to everyone with the problems posed by individuals who do not have realized capacities.

9. The sixth and final claim can be stated as follows:

> (VI) Developing one's faculty for agency and sustaining that achievement requires the help of others.

The soundness of this claim becomes clear once we consider the two very different sorts of resources necessary for someone to mature into a certain kind of person. Firstly, there are the cultural resources for development. The reference to these resources as "cultural" is intended to

signify the idea of culture as the social environment in which one lives a way of life. Earlier I emphasized that being a certain kind of person is a social achievement as well as a personal one. The cultural resources for development are those conditions necessary for a certain kind of person to be even a viable option in a given society. If these resources are not accessible, then it is almost inconceivable that anyone could mature into that kind of person. Consider, for example, how difficult it would be to develop into a person with a realized faculty for agency in a rigid hierarchical society where one is born into a station in life and one's actions are expected to flow from the demands of that station and not from the higher order choices one might make. To mature into that kind of person would seem to require very different political, economic, and social institutions, likely ones that highlight individual choice: perhaps a society with an elected representative government, an economic market for consumer goods, and marriages founded on the preferences of the two partners, not their parents.[37]

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37 See Joseph Raz, *The Morality of Freedom*, pp. 392-393.

(The cultural resources necessary to mature into a person with a faculty for integrity would probably be different. Institutions might have to emphasize the practice of tolerance and encourage the virtues of loyalty and honour.)

Furthermore, social institutions and practices are necessary to sustain one's sense of personhood once it has been achieved. This is because in order to be a certain kind of person, we need to have confidence in that identity. This confidence requires social confirmation and support for individuals who can make higher-order choices and have their actions flow from those choices.[38] The actual point at which people lose their confidence in their identity as a certain kind of person is an empirical issue about which I have little to say. Historically, it seems to be true that many people have retained their sense of personhood in very adverse conditions. I doubt, however, that very many people could retain for very long their sense of personhood without the requisite cultural support.

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38 This point reflects an extension of Bernard Williams's conception of confidence in *Ethics and the Limits of Philosophy* (London, Fontana, 1985), pp. 170-71.

Distinct from the cultural resources for development are the personal resources for development. These are the needs of a particular person to develop into a certain kind of person, given that the cultural resources for that development are met. The minimal requirements for physical survival are among the personal resources for development. As well, especially in the case of agency, education is important for the development of, say, a person's capacity for rationality and to undertake careful practical deliberations. Good health and a secure environment including adequate housing would also seem to be among an individual's basic personal needs because they seem important to sustain one's sense of personhood.

Once the conditions necessary for the development of a person's faculty for agency are spelled out in this fashion, the validity of claim (VI) is clear. No one could possibly produce the cultural resources for development on his or her own; he or she is necessarily dependent on others. The case for personal resources is weaker. It seems true that an individual could meet some of his or her own personal needs. But I doubt that even here anyone is completely self-sufficient. Think about an infant or young child developing his or her various

capacities. Dependence on others seems inevitable. Certain other personal needs such as a secure environment which is necessary to sustain one's sense of personhood would seem by their very nature to require help from other people. The real issue about personal needs is not whether the help of others is needed but whether justice requires that help.

10. Let us now review the six claims I have advanced.

(I) The abstract right to agency gains its justificatory force from the value of being, in the general sense, a certain kind of person. The relevant kind of person is a person who can make important higher-order choices and have his or her actions flow from those choices - a person who has a developed faculty for agency.

(II) The faculty for agency has two distinct spheres, the development sphere and the exercise sphere.

(III) The abstract right to agency grounds in the exercise sphere the following moral requirement: others should not interfere with an individual's exercise of agency.

(IV) A developed faculty for agency is necessary to enjoy agency in the *thin* sense.

(V) Ascribing to someone the abstract right to agency signifies a moral concern that that individual enjoy agency in the *thin* sense.

(VI) Developing one's faculty for agency and sustaining that achievement requires the help of others.

These six claims together establish, I think, that derivative rights against others requiring them to help foster the development of the right-holder's faculty for agency and to help sustain that development once it has been achieved flow from and are a natural extension of the abstract right to agency. And since, if an Aristotelian theory of needs is presupposed, it is needs that are at issue, it follows that the right-holder can be said to hold against others certain derivative rights to have his or her needs met. The fact that the needy hold such rights against those not in need means that redistribution from those not in need to those in need can be justified.

The reason why I think these six claims establish this conclusion can be made clearer by considering the argument in a more abstract form. Let us adopt the following notation:

R = the individual who is ascribed the abstract right to agency

C = agency in the *thin* sense

A = others

P = interfere with the right-holder's exercise of agency

Q = help foster the development of the right-holder's faculty for agency and help sustain that development once it has been achieved

Now consider whether it is possible to consistently hold the following five beliefs:

(1) It is valuable that R enjoys C.

(2) A must refrain from action P in order for R to enjoy C.

(3) A must perform action Q in order for R to enjoy C.

(4) A is required not to P because A doing P will cause R not to enjoy C.

(5) A is not required to Q even though A not doing Q will cause R not to enjoy C.

I believe that one cannot consistently hold all five of these beliefs. If one accepts beliefs (1)-(4), then one should reject (5) and accept instead belief (6).

(6) A is required to Q because A not doing Q will cause R not to enjoy C.

Holding beliefs (1)-(5) is inconsistent in this case because there is no difference, from a moral point of view, between A doing P and A not doing Q: both will cause R not to enjoy C.[39]

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39 I am here denying only that there is no *moral* difference

Although claims (I)-(VI) are not of a form identical to beliefs (1)-(4), they do nevertheless reveal a commitment to four beliefs of that form. Claims (I) and (V) show why R enjoying C is valuable. Claim (III) and the discussion of claim (IV) show that the ascription of the abstract moral right to agency implies both the belief that others refraining from P is necessary in order for R to enjoy C and the belief that it is on this basis that others are required not to P. (Also relevant here is the general discussion in chapter 4:2.) Claims (IV) and (VI) establish that others performing Q is necessary in order for R to enjoy C. These four beliefs are inconsistent with a belief of the form (5) which says that A is not required to perform Q even though A not doing Q will cause R not to enjoy C. Instead, from these four beliefs can be

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between doing P and not doing Q. This is not to deny that there are differences between a moral requirement not to P and a moral requirement to Q. For example, David Lloyd-Thomas on p. 22 of *In Defence of Liberalism* (Oxford, Basil Blackwell, 1988) has pointed out that while a requirement to do something specifies in an exacting fashion what an individual is required to do, a requirement not to do something only narrows the set of things it is morally permissible to do. What I doubt is that in the case at hand these differences are *morally* relevant.

inferred belief (6) which says, substituting the statements for the symbols, that others are required to help foster the development of the right-holder's faculty for agency and to help sustain that development once it has been achieved because this is necessary in order for the right-holder to enjoy agency in the *thin* sense. In other words, from the abstract right to agency flow certain derivative rights against others to have one's needs met.

Let me try to clarify this argument with three comments. The first two of these comments are intended to deflect the criticism that the validity of my argument depends upon the rejection of the common-sense moral doctrine of doing and allowing. It must be emphasized, first of all, that I am claiming that beliefs (1)-(5) cannot be consistently held only when the notation I have stated above is assumed. I have nothing to say about the consistency of holding five beliefs of the form (1)-(5) if C, P, and Q are different. In other words, I am not saying that regardless of what P and Q stand for, doing P and not doing Q are morally equivalent; I am claiming that they are morally equivalent only in the case at hand. Even this restricted claim would be defeated if it were true that it is always the case that allowing something to

happen, with certain foreseen bad consequences, is morally less bad than to perform a different act which has the identical foreseen bad consequences. Everyone seems to agree, however, that in some contexts actively doing something and allowing something to happen, with the identical foreseen consequences, are morally equivalent. For example, intentionally allowing one's child to die of starvation is just as morally reprehensible as actually poisoning him or her.[40] Any attempt to distinguish between these two deeds, in so far as the death of the child is concerned, would seem morally arbitrary. I am arguing, likewise, that doing P and not doing Q are morally equivalent because any attempt to differentiate between them in so far as R enjoying C is concerned will prove to be morally arbitrary. I have argued in chapter six, *pace* the enabling model of rights and deprivation, that if it is R enjoying agency in the *thick* sense at issue, it is not morally arbitrary to make such distinction. There is not, as I pointed out in chapter 7:8, an analagous case to be made when it is agency in the

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40 Philippa Foot, 'The Problem of Abortion and the Doctrine of the Double Effect' in *Virtues and Vices* (Oxford, Basil Blackwell, 1978), p. 26.

thin sense at issue.

My second comment concerns a point I made in chapter 2:7 about the relevant scope of the moral doctrine of doing and allowing. Recall that the basis for the discussion of the doctrine of doing and allowing in that chapter was Warren Quinn's recent formulation of that doctrine which says that, 'in situations of conflict it is often more acceptable to let a certain harm befall someone than actively to bring the harm about.'[41] Following H.M. Malm, I distinguished there between comparison examples and conflict examples. Whilst comparison examples require us to assess acts or states of affairs independently of one another and then compare those assessments to see whether or not they are morally equivalent, conflict examples require us to assess and compare acts in light of their being alternatives of an agent, given that one or the other must occur. What I observed in chapter two is that the moral doctrine of doing and allowing is ordinarily applied to conflict examples and is silent on comparison examples. This observation is relevant to the

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41 Warren Quinn, 'Actions, Intentions, and Consequences: The Doctrine of Double Effect', *Philosophy and Public Affairs 18* (1989), p. 334.

present argument. The claim that beliefs (1)-(5) cannot be consistently held involves a comparison example, not a conflict example. I am suggesting that, given the value placed on R enjoying C, if we independently assess A doing P and A not doing Q and then compare these two assessments, we will find them morally equivalent. The upshot, then, of saying that what is at issue is a comparison example is that the validity of the present argument does not depend upon a rejection of the moral doctrine of doing and allowing in its most defensible (and common) form.

My third and final comment concerns belief (4). That belief states that A is required not to P because A doing P will cause R not to enjoy C. Someone might point out that there could be reasons other than this one for requiring A not to P in which case saying that A is required not to P might be consistent with not requiring A to Q. Now, I do not mean to deny that there could be reasons for requiring A not to P other than the reason I have identified. The charge of inconsistency is meant to apply only when the reason for requiring A not to P is that A doing P will cause R not to enjoy C. The relevant question is then this one: Why is there a commitment to the belief that A is required not to P because A doing P

will cause R not to enjoy C? This commitment can, I believe, be inferred from the fact that the abstract right to agency grounds the moral requirement held against A not to P. Ascribing to R the abstract right to agency signifies a moral concern that R enjoy agency in the *thin* sense. (See claim (V).) The point is that A doing P is wrong because it will cause R not to enjoy agency in the *thin* sense. This can be put in another way. The derivative rights necessary to protect and promote the right-holder enjoying agency in the *thin* sense are a natural extension of and flow from the abstract right to agency. Included among those derivative rights are rights to have one's needs met - rights that are concerned with the development sphere of agency - as well as the more familiar liberty rights which forbid interference in the exercise sphere of agency.

11. The discussion so far has been vague about the extent of the requirement on others to help those in need. I now turn to this issue. It is possible, I think, to identify two general theories about the extent of this requirement. The first (which I shall call the development-based approach) holds that others are required to help someone in need to the degree necessary for him or

her to reach some specified level of development. The second general theory (which I shall call the resource-based approach) holds that others are required to help someone in need to the extent that he or she has a certain amount of resources which foster development. It is my view that the resource-based approach is superior to the development-based approach.

The development-based approach is flawed in two important respects. First of all, it fails to recognize that in a very basic sense an individual's level of development is not always within the domain of others. In other words, some people cannot exceed a certain level of development in their capacities, no matter what others do. Thus, the development-based approach may absurdly hold others to a moral requirement that cannot possibly be met. The second flaw arises from the fact that, in conditions of moderate scarcity, it is sometimes unreasonable to channel resources to one person when the consequent gains in development will be only very marginal and the costs to others very high. The development-based approach is problematic because it will in some situations hold that resources should be directed in this unreasonable fashion.

Although the resource-based approach is attractive because it does not have these flaws, it has a different

sort of problem which arises from the necessity of recognizing that there is a fundamental diversity among human beings. For this diversity means that even given similar resources not everyone will have the same opportunity for development or exercise.[42] Although many people, when provided with some sort of set amount of resources, will be able to reach the level of development required for the enjoyment of agency in the thin sense, not everyone will be able to. Especially worrisome here are those with mental and physical handicaps.

Consider those people who can be said to have deficiencies in their mental capacities. They can characteristically be divided into two classes: those who require extra resources - special attention in school, for example - to develop their capacities for rationality, etc., and those who are so impaired that no amount of extra resources will bring them up to a level of a development such that they can enjoy agency in the thin sense. To simplify, we can also include among the second class those for whom extra resources will make only a very

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42 For the emphasis on the moral significance of the fundamental diversity among human beings, see Amartya Sen, 'Equality of What?' in *Choice, Welfare, and Measurement* (Oxford, Basil Blackwell, 1982), esp. p. 357.

small difference. The argument for providing the extra resources required in the first case is quite strong. Those extra resources will make a real difference *and* the circumstances of scarcity are not in fact so grave that they will be sorely missed elsewhere.

The second sort of case is more difficult, for there no amount of extra resources will make a significant difference to development. Does this mean that no remedial treatment is required? I think not. The individual in question is unable to develop his or her capacities so as to be able to enjoy agency in the thin sense. None the less, by providing him or her with extra resources, it may be possible to provide an approximation to that experience for him or her. Let me illustrate this point. A social worker may be able to rationally examine various alternatives and then present them in a very summary form to a person with deficiencies in his or her mental capacities. Although that person does not have the capacity to fully think out those alternatives, through the social worker he or she can achieve some sense of what it is like to enjoy agency. Another example might be the construction of an environment where that person has room to make important choices and carry them out but where he or she is protected from most of the bad consequences that

could result from his or her errors of judgement. I have in mind an extension of the sort of defence that has sometimes been offered for sterilizing a mentally retarded woman. Imagine that the woman wishes to establish a sexual relationship but does not recognize the likelihood of pregnancy. Sterilization allows her to act out her wishes but yet shelters her from some of the bad consequences. Of course, sterilization is a disturbing example because, although it allows her this freedom, it also takes away the possibility of her making another very important choice, i.e. to have a child. There are further examples, where others carry the burden of the person's mistaken choices so that he or she can experience some sense of what it is like to enjoy agency.

Similar remarks can be made about those who suffer from deficiencies in physical capacities. On physical handicaps, the enabling model of rights and deprivation, as we saw in the previous chapter, is very compelling precisely because it pinpoints what is so bothersome about physical handicaps: they prevent people from doing certain things. Can the development model of rights and deprivation match the enabling model in this respect? I shall try to show that it can. Let us begin with the difference most of us feel intuitively between the

situation of a paraplegic who cannot walk at all and the situation of a person who can run 100 metres in sixteen seconds but not ten seconds. How might the development model of rights and deprivation explain this intuitive difference? So far, the argument has depended on a very thin sense of agency such that some development is a pre-condition for its enjoyment. Suppose that we make that sense a bit thicker. Unlike being able able to run 100 metres in ten seconds, having physical control over one's body in the way that a paraplegic does not seems necessary for someone to be said to enjoy agency in the thin sense. It follows that unlike the mediocre sprinter, the paraplegic would seem to have a rights-based claim to extra resources.

It seems then that those with deficiencies in physical capacities fall into two classes similar to the two identified in reference to mental capacities. On the one hand, there are those who with extra resources could overcome some of those deficiencies. This might be the effect of a cornea operation for a blind person or of intensive physiotherapy for a person unable to walk. On the other hand, there are those who, no matter how many extra resource are diverted to them, will never be able to see or walk. Again, I include in this second class also

those for whom extra resources might make some difference in development but not any of real significance. For those in this second class, all we can hope to achieve with extra resources is an approximation to the experiences of walking or seeing. This is the supposed effect of the expensive piece of equipment on the paraplegic in the case mentioned by Dworkin and discussed in chapter five above.[43] The paraplegic is still unable to walk but he is better able to lead a life that is more like one where he could. It is not difficult to imagine comparable devices that would help others with physical handicaps in a similar way.

The argument in this section is, in part, a response to the following question first posed in chapter five: How can we account for the belief that people should receive remedial treatment with the objective of removing, mitigating, or compensating for their deficiencies in mental or physical capacities *per se* and not just for the effect of those deficiencies on their income? The approach I have taken to this puzzle is quite different

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43 Ronald Dworkin, 'What is Equality?, Part 1: Equality of Welfare', *Philosophy and Public Affairs 10* (1981), pp. 243-44.

from the enabling model of rights and deprivation. I have, first, proposed a general model - the resource-based approach - whereby everyone can be said to have a rights-based claim to a certain amount of resources that are necessary for maturing into a certain kind of person. The false assumption underlying that model is that everyone has basically the same potential for developing their faculty for agency. What that assumption fails to recognize is the fundamental diversity of human beings. In light of this consideration, I have then tried to show how the general model can be adjusted to accommodate those with deficiencies in their physical and mental capacities.[44] The adjustment required was a slight thickening of agency in the thin sense so as to include among the conditions necessary for its enjoyment having certain physical capacities. I submit that the more general implications of this adjustment are not serious.

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44 For a similar approach, see John Rawls, 'Social Unity and Primary Goods' in *Utilitarianism and Beyond*, eds. A. Sen & B. Williams (Cambridge, Cambridge University Press, 1982), p. 168.

Why the State Should Sometimes Meet Needs

12. I have shown that certain derivative rights against others to have one's needs met flow from and are a natural extension of the abtract right to agency. The fact that there are these rights would be enough to convince many people that it is a requirement of justice that the state meet needs. For this requirement might be inferred from the widely held belief that the state is required to enforce rights individuals hold against each other. I am inclined to think, however, that this is a faulty inference. The fact that the state is required to enforce rights individuals hold against each other does not mean that the state is required to fulfill those rights if the individuals fail to. For example, although it is true that the state is required to enforce rights that arise from business contracts, it is not true that the state must fulfill those contracts if one of the original parties is unable to. It might be said, in response, that it is a distinctive feature of rights against others to have one's needs met that if the individuals against whom that right is held fail to meet the relevant needs, then the state should step in and

fulfill them. I am inclined to agree with this statement. It seems to me, however, that it needs to be defended and not just postulated. This is my objective in this part of the chapter. The question I want to focus on, given that one holds derivative rights against others to have one's needs met, is when and why is the state itself required as a matter of justice to help meet needs and, therefore, to provide remedies for deprivation. My response to this question constitutes the second step in the two-step argument that sets out the development model of rights and deprivation.

My treatment of the question of when and why the state is required to meet needs assumes that the state meeting needs differs in a very important respect from individuals and other social institutions meeting needs. The distinctive feature of the state meeting needs is that this involves collective provision backed by the threat of coercion. The family is an example of a social institution that meets needs through non-coercive collective provision. My concern is to determine when it is justified to meet needs through coercive collective provision. There are two simple answers to this question which I shall reject. The first says that coercive collective provision is never justified; I refute at

length this answer in the discussion below. The second simple answer defends the reverse claim, that the state has the responsibility to meet all needs.[45] This proposal strikes me as both naive and undesirable. It is naive because it presupposes that at some point in the future it is conceivable that institutions other than the state that presently meet needs will disappear. It is undesirable because it fails to recognize that there is something valuable about having a plurality of institutions that meet needs. I shall defend the more complicated view that the state should meet some needs but not others.

Although I advance below the view that coercive collective provision directed at meeting needs is in many instances justified, I shall say very little about the exact nature of that provision. Let me here try to clarify my position on this issue with two remarks. The first is that because what is at issue is a rights-based justification for redistribution, needs should be met through in-kind redistributive transfers. This is, of

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45 See Ramesh Mishra, *Society and Social Policy: Theoretical Perspectives on Welfare* (London, MacMillan, 1977), p. 123.

course, the upshot of the functional distinction drawn in chapter five between rights-based and equality-based redistribution. My second remark is that the development model of rights and deprivation has nothing distinctive to say about whether the state should set up its own institutions to meet needs directly or use something like a voucher scheme which would involve private institutions meeting needs. The model leaves it open whether the state should, for example, meet health care needs by setting up a National Health Service or by issuing vouchers valid at privately owned hospitals. There are, I think, some good independent reasons for favouring direct state involvement when it comes to meeting needs such as health care and education.[46] But some of the typical right wing criticism of the large bureaucratic state also has merit.[47]

13. The distinction between cultural and personal

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46 See, for example, the arguments from efficiency presented by Nicholas Barr in *The Economy of the Welfare State* (London, Weidenfeld and Nicolson, 1987), ch. 12.

47 For a recent statement, see John Gray, *Limited Government: A Positive Agenda* (London, The Institute of Economic Affairs, 1989), pp. 48-60.

resources for development seems of the utmost relevance. In so far as cultural resources are concerned, the case for enforced collective provision by the state seems indisputable. Certainly, there cannot be any doubt that the meeting of cultural needs is necessarily a collective undertaking. Financing that undertaking through taxation seems to be the most rational way to approach it. Of course, it has sometimes been argued that cultural resources should be provided by the market, not the state. The numerous problems with a non-coercive mechanism such as the market providing culture are well known. I shall briefly consider what is probably the most serious one. It cannot be doubted that culture is the sort of good which is jointly produced and consumed and which it is impossible to exclude from its benefits people who do not contribute to its production. This means, however, that a free-rider problem is inevitable. The market is unable to resolve this problem; the state can, for it can force all those who benefit to contribute.

The actual implications of the claim that the state should take responsibility for ensuring the provision of cultural resources is difficult to gauge. It is possible to distinguish between the structure of a culture and its particular content or character.[48] The state is

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48 Will Kymlicka, *Liberalism, Community, and Culture*

required not just to promote a cultural structure but also particular content. As I have already suggested, this content includes institutions such as elected representative political institutions, an economic market for consumer goods, and marriages based on consenting partners. The promotion and protection of these sorts of institutions is unlikely to be very costly and, therefore, will not have significant redistributive implications. Other institutions such as universities and art museums are more costly. The question is how necessary are these. Are they essential for an individual to mature into the kind of person who has a developed faculty for agency or integrity? If they are, then it is likely that state support for these sorts of institutions would be justified. I defend in the next chapter the idea that this rights-based case for the promotion and protection of a particular culture by the state is more promising than an equality-based justification.

The role of the state in the meeting of personal needs is much more controversial than its role in the

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(Oxford, Clarendon Press, 1989), pp. 166-170.

meeting of cultural needs. No one can meet all of their own personal needs; we are all dependent on others to some degree to meet our needs. I have already suggested that social institutions other than the state can play a valuable role in the meeting of personal needs. Currently, many personal needs are met by the family. It is controversial how desirable this is. Other alternative non-coercive social units such as communes also are able to meet personal needs. It is not my intention to defend the superiority of either the family or its alternatives. My claim (which for convenience I shall develop with specific reference to the family) is that no matter which of these social institutions is dominant, justice requires that the state still fulfill an essential and necessary role in the meeting of personal needs in at least three instances.

The first instance when the state has the responsibility to meet personal needs arises when the prevailing methods of meeting personal needs breaks down. Consider, for example, the situation when a child's family fails to meet his or her needs. The statistical incidence of this in the modern day United States is quite striking. 34.9% of all children in the United States experience at least one to three years of poverty while growing up.[49]

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49 David T. Ellwood, *Divide and Conquer: Responsible*

The two main causes for this experience are marital breakup and unemployment. Even though the child's family is not successfully meeting his or her needs, he or she still has a claim on others to have those needs met. The role of the state is to step in and meet those needs as best it can by using revenues raised through taxation. Both of the arguments I outlined in 7:2 above to justify state charity are relevant here. First of all, the state solves a coordination problem. Through agencies of the state, the needs of the child can be met efficiently without the danger that he or she might be overlooked by people trying to fulfill their duties by acting individually. Secondly, the state taking on this responsibility relieves each of us individually of the burden of trying to determine when someone's needs are not being met and thus whether or not we should act so as to meet them. It is reassuring to know that if someone's needs are not being met, the state will meet them on our

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Security for America's Poor (New York, Ford Foundation Project on Social Welfare and the American Future Occasional Paper 1, 1987), p. 6. See also Isabel V. Sawhill, 'Poverty in the U.S.: Why is it so persistent?', *Journal of Economic Literature XXVI* (1988), p. 1113.

behalf. Of course, the state meeting needs in this instance is a requirement of justice, not charity, because those in need hold a right to have their needs met.

The second case for state involvement arises when extra resources are necessary to provide a remedy for deficiencies in physical or mental capacities *per se*. If we operated only with a system of families meeting needs, for example, the burden of these extra needs would fall on the family of the handicapped individual. This seems unfair because everyone's rights to have one's needs met are *in rem*, not *in personam*.[50] If they were *in personam*, then they would be incumbent on a specific person or persons. But because they are *in rem*, they are incumbent on everyone else.

This raises a general question about how the requirement on others to help foster the development of a person's faculty for agency should be properly understood. Theoretically, since the rights in question are held

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50 For this distinction, see Jeremy Waldron, 'Introduction' to *Theories of Rights*, p. 6. It should not be confused with the distinction between perfect and imperfect duties. Both *in rem* and *in personam* rights are correlated to perfect duties.

against everyone, each of us is required to meet *1/n* of the needs of each person where n is the number of people against whom that right is held. In practice, it is much easier and efficient for us to meet the needs of those near to us and for others to do the same. Now, ordinarily this strategy will not have consequences that differ significantly from the ideal, provided that the needs of people are roughly the same. But it is precisely for this reason that those with handicaps present a problem; their needs are greater. Thus, it is necessary to distribute the burden of the special needs of the handicapped among everyone and not let it fall disproportionately on those close in proximity to them. Herein lies the role for the state. By always meeting the special needs of those with deficiencies in physical or mental capacities, it ensures that no one is unfairly burdened with meeting those extra needs. Again, the arguments for the state meeting these special needs are akin to those considered above for state charity. First of all, knowing that the state will help the handicapped with their special needs relieves each of us of having individually to meet those needs. Secondly, state provision also seems to be the most efficient way to meet those needs. The state is able to coordinate remedial treatment designed to meet the special needs of

those with mental and physical handicaps.

I have just argued that in theory each of us is required to meet *1/n* of the needs of each person where n is the number of people against whom that right is held. This claim might seem to have two disturbing implications. First of all, it might seem to imply that parents are under no stronger of a requirement to meet their children's needs than other people are. This is not the case. The development model of rights and deprivation does, indeed, only establish that parents are under the same requirement as strangers to meet their children's needs. There might, however, be other good reasons for holding parents to a strong particularized requirement to help their children. For example, it seems undeniable that children hold certain special rights against their parents in virtue of the special relationship that exists between them. The point is that although the development model of rights and deprivation does not justify a stronger responsibility for parents to their children, it allows for the possibility that a stronger responsibility might be justified on other grounds.

The second disturbing implication is that the proper way for the state to collect money to pay for the meeting of special needs seems to be a flat or lump-sum tax. This

implication is disturbing because lump-sum taxes are regressive in nature; they demand as much from the least well-off as from the most well-off with the consequence that the burden in proportion to income is much heavier for the former.[51] In egalitarian considerations of redistribution, the case for progressive rates of taxation is obvious. It is less obvious in a treatment of rights-based redistribution. Briefly, the most promising case for a progressive taxation scheme to fund the state meeting needs is this. Everyone holds rights against everyone else to have one's needs met. The extent to which anyone suffers from deprivation is a matter of

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51 Institutes of the welfare state which are said to be designed to meet needs are often paid for through regressive tax systems. In Britain, for example, National Insurance contributions are levelled at 6% for all income to about 16,000 pounds and then not at all for income above that level. One response to this criticism is that National Insurance is not a tax at all, but this just seems to be nonsense. (For a sustained refutation of this response, see A.W. Dilnot, J.A. Kay, & C.N. Morris, *The Reform of Social Security* (Oxford, Clarendon Press, 1984), pp. 64-65.) The fact that welfare state institutions are often funded through regressive taxation schemes reinforces the claim made at the end of chapter five that it is hard to see how the welfare state could be founded on a principle of distributional equality. It does not refute the idea that the welfare state can be founded on a rights-based concern since, as I imply in this paragraph, that concern is not incompatible with a regressive system of taxation.

degree. This is because it seems doubtful that anyone will be in a situation where none of his or her needs are met without the help of the state. The well-off are the most likely not to be in need at all. The worst-off are the most likely group to suffer the greatest deprivation. (This is not the same as saying that by definition the poor are deprived.) To tax the worst-off at the same rate as the well-off in order to pay for the meeting of needs by the state would seem to make the situation worse in so far as unmet needs are concerned because it is the worst-off who most require their resources at hand to meet their own needs. Thus, taxing the worst-off at the same rate as the well-off will result in a situation where there is a greater demand for social programmes to help the worst-off. It is likely that taxing the well-off at a much higher rate will not result in them suffering any deprivation and, therefore, not result in any extra rights-based requirements to meet their needs. Thus, given the objective of meeting needs, a progressive rate of taxation to pay for the meeting of needs seems justified.

A third instance when the state is required to meet needs arises in the case of what I shall call collective needs. The paradigmatic examples of collective needs are

education and health care. It is difficult to envision a society in which these needs are not partially met by the family or a similar such social unit. There are, however, certain intrinsic limits on how far, say, a parent can meet these needs. One such limit is the excessive burden of being required to have the technological knowledge necessary to adequately meet these needs. Collective provision through the state would relieve the individual of this excessive moral demand. Another limit arises from what seems to be the basic institutional nature of education and health care. Education is closely associated with schools, teachers, textbooks, etc. Likewise, health care is ordinarily associated with doctors, nurses, hospitals, etc. Perhaps these associations are relative to our society. But even if they are, they still suggest that *for us* there is something essentially collective about the provision of education and health care. The point is that there is something about our needs for education and health care which makes it inconceivable for them to be adequately met by individuals acting independently or the family alone. In this sense, they are similar to cultural resources. And, as with cultural resources, the burden for meeting these needs would seem to fall on the state for two

reasons. The first is that the state is in the best position to coordinate the meeting of these needs. The second reason is that by doing so the state relieves us of the tremendous burden of having to act collectively on a voluntary basis to provide the needy with these collective resources.

13. I shall now consider two objections to the proposition that the meeting of needs through coercive collective provision is justified in the three instances I have just identified. The first objection is that the state meeting needs is objectionable because it requires the violation of private property rights, rights that can be derived from the abstract right to agency. This objection implies that conflicting rights can be derived from the abstract right to agency. An easy reply to this objection is to simply say that derivative rights only give rise to *prima facie* duties and, therefore, conclude that the conflict is not irresolvable. I am hesitant to say this because it would seriously weaken the rights-based argument for meeting needs offered by the development model of rights and deprivation.

Alternatively, I could suggest that we weaken the strength of derivative private property rights but not

derivative welfare rights. Although this alternative response is attractive, it is necessary to recall the discussion of deriving private property rights from the abstract right to agency in chapter 4:10. I argued there that it is extremely difficult to weaken private property rights and still show how they can be derived from the abstract right to agency: either there are full liberal rights of ownership or no derivative private property rights at all. Fortunately, private property rights can be sufficiently weakened without denying this earlier conclusion. Property rights, like liberty rights, can be understood to forbid interference with private property for certain reasons, not interference *per se*. In this sense, they can be said to provide second-order exclusionary reasons for action. Although sometimes those second-order reasons have been construed as Fully exclusionary, this seems to be deeply counter-intuitive. Even Nozick is hesitant to say that interference with private property is never justified. He mentions the prevention of a moral catastrophe as one possibly legitimate reason for interference.[52] Thus, rights to

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52 Nozick, *Anarchy, State, and Utopia*, p. 33n.

private property provide, it seems, only Partial exclusionary reasons for action. The key issue is what reasons for interference with private property are not excluded. I suggest that at least one reason not excluded is the taxation of private property for the purpose of financing the state's rights-based responsibility to meet needs.

The second objection to the state meeting needs is more formidable. I have argued above that the agency conception of liberty rights reflects a commitment to the belief that it is of value that an individual be the kind of person who can make higher-order choices and have his or her actions flow from those choices. An apparent consequence of coercive collective provision is that it takes away from the individual a sphere in which he or she can undertake voluntary actions that can flow from certain higher-order choices. The modern welfare state, for example, has been accused of disempowering people in this way.[53] Does this not undermine the commitment to the kind of person the agency conception presupposes? On

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53 M. Sandel, 'The Procedural Republic and the Unencumbered Self', *Political Theory 12* (1984), p. 92.

balance, I think not. Two consideration are pertinent. It must not be forgotten that it is not being claimed that the state meet all needs; only in some cases does it have a role. (Also relevant here is the unrestricted scope for supererogatory acts of giving.) Furthermore, one of the primary arguments for the state having any role at all is that it would relieve people of the excessive moral demands of meeting some of the needs of others themselves. One of the attractive features of the state meeting the needs of others on our behalf is that it allows us as individuals to concentrate on getting our actions to flow from the important choices we make about our own lives.

Conclusion

14. A normative defence of either the abstract right to agency or the abstract right to integrity necessarily commits one to holding as valuable being a certain kind of person. This chapter has been concerned with explicating and defending a particular view about the implications of that commitment. The development model of rights and deprivation reaches two important conclusions. The first is that derivative moral rights against others to have

one's needs met flow from and are a natural extension of both the abstract right to agency and the abstract right to integrity. The second conclusion is that the state is required to promote and protect certain forms of culture as well as to meet certain sorts of personal needs including special needs, collective needs, and the unmet personal needs that arise when the prevailing methods of meeting those needs breaks down.

It is difficult to say whether or not the role for the state that the development model of rights and deprivation defends is identical to or even very similar to that ordinarily associated with the modern welfare state. It is my belief that the development model can justify many of the redistributive social policies of the modern welfare state. The fact, however, that the development model presupposes a rather narrow theory of needs - the Aristotelian theory - which construes needs as only those conditions necessary to mature into a valuable kind of person may lead some to doubt this belief. For showing that justice requires the state to meet needs so understood may not warrant the extensive redistribution sometimes attributed to the welfare state. In defence of the belief that the development model can justify many of the redistributive social policies of the modern welfare

state, I should emphasize that it is important not to exaggerate the actual redistributive consequences of the welfare state. The welfare state has achieved moderate but not extensive redistribution in the many industrial countries where it has operated.[54] My point is that the development model of rights and deprivation has only to justify moderate redistribution, not extensive redistribution. This, I think, it successfully does.

Someone could say that my concession that the development model of rights and deprivation might only justify moderate redistributive transfers makes it an unattractive basis for redistribution. But it is important to keep in mind that this rights-based justification for redistribution can be regarded as only a partial theory of distributive justice. There is no reason why it cannot be complemented by an equality-based justification for redistribution such as Dworkin's theory of equality of resources. The discussion in chapter five suggests how two such theories might compliment each other. The development model of rights and deprivation

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54 For an excellent comprehensive discussion, see Stein Ringen, *The Possibility of Politics* (Oxford, Clarendon Press, 1987), pp. 178-90 & 196-200.

justifies *in-kind* redistributive transfers that are designed to meet needs and, thus, remedy deprivation. Equality-based redistribution, unlike rights-based redistribution, is not designed to meet needs. Instead, through *cash* transfers it aims to make people equal with regard to the resources they have to pursue their own individual life-plans.

CHAPTER EIGHT

CONCLUSION

Introduction

1. Although my defence of the development model of rights and deprivation is for the most part complete, I shall in this final chapter elaborate briefly on certain specific policy implications of that model. In particular, I shall address two issues. First, I try to substantiate the claim that, when it comes to grounding the belief that the state is required to promote and protect culture, the development model of rights and deprivation offers much more promise than distributional equality. The second issue concerns an argument that can be interpreted as saying that workfare is a better way

than redistributive transfers, whether in-kind or cash, for the state to fulfill any responsibility it has to meet personal needs. This second issue is important because I said in the previous chapter that the development model of rights and deprivation requires the state to meet personal needs through in-kind redistributive transfers.

State Support For Culture and Equality of Resources

2. The idea that certain principles of distributive justice can justify the promotion and protection of culture by the state is an attractive one, for it is widely believed that the state should support, to some degree, forms of culture.[1] This is evident if one considers the ongoing condemnation of the present government for its lack of support for cultural institutions in Britain. An important issue is what sort of distributive principle holds the most promise with

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1 Here I mean by culture not simply "high culture", i.e. opera, art museums, etc., but the social environment in which one lives a way of life. Included in this broader idea of culture is "high culture". See Raymond Williams, *Keywords* (London, Fontana, 1976), pp. 79-81.

regard to justifying the promotion and protection of culture by the state. Is there any promise in an egalitarian argument which says that treating people as equals justifies state support for culture? I have already shown how the development model of rights and deprivation justifies a role for the state in the promotion and protection of culture. I propose to argue here that this rights-based approach to the problem of justifying state support for culture holds more promise than an egalitarian approach. I shall restrict my comments about the egalitarian approach to Dworkin's interpretation of what treating people as equals requires.

Now, Dworkin himself does not claim that equality of resources can ground a requirement for the state to promote and protect culture. This is evident if we consider the justification for supporting culture that he does defend. He says,

> We should try to define a rich cultural structure, one that multiplies distinct possibilities or opportunities of value, and count ourselves trustees for protecting the richness of our culture for those who will live their lives in it after us.[2]

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2 Ronald Dworkin, 'Can a Liberal State Support Art? in *A Matter of Principle* (Cambridge, Mass., Harvard University Press, 1985), p. 229.

The relevant issue for our discussion is why Dworkin thinks we have this role of trustee. His reason is intuitive and basic: 'We inherited a cultural structure, and we have some duty, *out of simple justice*, to leave that structure at least as rich as we found it.'[3] How primary is this duty from *simple justice*? Dworkin's response to this question is revealing. What he emphasizes is that it not necessarily our most pressing duty but must be understood to compete with other duties including what he calls our duty from *social justice*.[4] I take it that our principal duty from social justice is to treat everyone as equals. For Dworkin, then, the duty to promote and protect culture competes with what distributional equality demands, it does not follow from those demands

Dworkin is, I think, quite right not to attempt to

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3 Dworkin, 'Can a Liberal State Support Art?', p. 233. Emphasis added.

4 Dworkin, 'Can a Liberal State Support Art?', p. 232.

find egalitarian grounds for why the state should promote and protect culture. This is because any such attempt will be defeated by the two problems I shall outline below. The first problem can be described as a *practical* problem because it says that state support for culture will have consequences that undermine the egalitarian justification for that support. The second problem can, in contrast, be described as a *conceptual* problem because it challenges the very idea that treating people as equals might require the state to support culture.

The practical problem concerns the difficulty of the state maintaining neutrality whilst promoting and protecting culture. For Dworkin, the commitment to neutrality - 'the idea that government should not seek to impose any way of life on individuals' - is a derivative commitment, not a foundational one.[5] Treating people as equals requires neutrality. His liberalism, 'supposes that the liberal's emphasis on neutrality in personal morality is not the source but rather one consequence of a prior and more general commitment to equality, a commitment

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5 Ronald Dworkin, 'What Liberalism Isn't',*New York Review of Books*, 20 January, 1983, p. 47.

that already includes the ideal of economic equality.'[6] The practical problem asks how the state could support culture without imposing, in some sense, a way of life on some individuals. It seems inevitable, given limited resources, that the state is going to favour some ways of life over others in the course of supporting culture. Thus, Dworkin could be charged with incoherence were he to claim that treating people as equals requires both state neutrality and that the state support culture. The state cannot successfully meet both of these requirements.

Now, someone might reply that the state can support culture without violating the requirement of neutrality by promoting the structure of a culture but not any particular content.[7] The underlying idea is that only the promotion of a particular cultural content will result in the violation of neutrality. The problem with this response is that it seems hard to separate in practice the promotion of the structure of a culture from the promotion

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6 Dworkin, 'What Liberalism Isn't', p. 47. Dworkin emphasizes on p. 48n2 of that article that in his earlier article, 'Liberalism', he mistakenly suggests that economic equality is derived from neutrality. See *A Matter of Principle*, pp. 192-93.

7 Dworkin makes a suggestion to this effect on p. 233 of 'Can a Liberal State Support Culture?'.

of particular forms of culture. How can you promote cultural structure except through the promotion of particular forms of culture? Consider an example from Will Kymlicka's recent book *Liberalism, Community, and Culture* intended to show how this could be possible.[8] Kymlicka believes that the cultural structure of Canadian Indians is promoted by laws that make Indian reservation property inalienable; it cannot be bought or sold. Supposedly, these property laws do not promote any particular forms of culture. Yet, those laws do violate neutrality in that they place restrictions on the kinds of risks Indians can take in their lives, risks that other property owners in Canada can readily take. So this example fails to show how the state can successfully support culture without violating the requirement of neutrality.

The conceptual problem with saying that treating people as equals requires the state to support culture is quite different. It makes a point to which Dworkin is very sensitive. We have seen in chapter five that, according

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8 Will Kymlicka, *Liberalism, Community, and Culture* (Oxford, Clarendon Press, 1989), pp. 190-94.

to Dworkin, any distributive mechanism which purports to treat people as equals must be "personality-sensitive" in its distribution of resources, that is to say, it must take into consideration only the recipient's own relative ordering of the resources he or she values and the opportunity costs to others of him or her enjoying those resources. The auction achieves perfect distributional equality with regard to transferable resources because the bundle of resources each individual receives is determined by his or her own preference ordering at a price determined by the opportunity costs to others. The hypothetical insurance market for non-transferable resources such as skills and talents is also "personality-sensitive", albeit imperfectly. I also argued in chapter five that the logic of Dworkin's insistence on distributive mechanisms being "personality-sensitive" commits him to cash transfers because they allow people to buy what they would most prefer at a price determined by the opportunity costs to others. I propose here to suggest another consequence of the claim that any distributive mechanism which purports to treat people as equals must take into consideration only the recipient's own relative ordering of the resources he or she values and the opportunity costs to

others.

Suppose that treating people as equals does require the state to promote and protect culture. How can the level of state support of culture be determined in a way that treats everyone as equals? (This question is intended to raise an issue that is more fundamental than the practical problem of how the state can actually support culture without violating its neutrality.) The answer to this question has to be that the level of state support for culture must reflect the value each individual involved places on culture in comparis on to other desiderata. Imagine that the state asks the following two questions of each of its citizens: Do you value this form of culture over that form of culture? Do you value this form of culture over some other resource or circumstance that might be devoted to your life? The point and purpose of these questions is to *discover* the value each individual places on a particular form of culture in comparision both to other forms of culture and to other resources. If the state did not ask these questions but instead determined the level of its support for culture "objectively", then it would not be treating everyone as

equals.[9] Yet, there is something odd about asking these questions. As Dworkin has pointed out, 'culture is too fundamental, too basic to our schemes of value, to make questions of that kind intelligible. Our problem is not one of discovery but of sense.'[10] He makes the same point even more strongly with specific reference to language.

> The center of a community's cultural structure is its shared language. A language is neither a private nor a public good as these are technically defined; it is inherently social, as these are not, and as a whole it generates our ways of valuing and so is not itself an object of valuation.[11]

Now, Dworkin undoubtedly overstates his claim in this second quotation. Forms of culture can generate our ways of valuing but still be objects of valuation. This is

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9 For the idea of an "objective" standard for distribution, see chapter 5:8.

10 Dworkin, 'Can a Liberal State Support Art?', p. 228

11 Dworkin, 'Can a Liberal State Support Art?', p. 230.

evident if we think about the everyday sales of pop music. For many of us, although pop music has generated our standards for judging what we value in music and indeed in life, it has also been an object of valuation. None the less, although Dworkin does overstate his claim, the observation that culture generates our way of valuing is insightful.

How does culture compare to ordinary resources that might be devoted to one's life? Notice, first of all, that culture is not a simple transferable resource. I cannot, for example, transfer my cultural membership to someone else in exchange for some other resource. It seems, then, that what is at issue is a non-transferable resource. Thus, in this respect, it is akin to skills and handicaps. Kymlicka has argued that egalitarians should regard cultural membership in the same way that they regard natural endowments. He says, 'No one chooses which class or race they are born into, or which natural talents they are born with, and no one deserves to be disadvantaged by these facts.'[12] Now, it seems perfectly

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12 Kymlicka, *Liberalism, Community, and Culture*, p. 186.

intelligible to ask questions about how much value we place on a skill or handicap in comparis on to other goods: How much do you value being able to play ice hockey like Wayne Gretzky? How much do you disvalue the prospect of being blind? Dworkin's hypothetical insurance market presupposes that there are unambiguous answers to these questions and that they will determine how high of a premium people are willing to pay to insure against suffering from certain handicaps and under-endowments. Can we say that natural endowments generate our ways of valuing? Certainly, our natural endowments influence what sorts of projects we set for ourselves; it seems doubtful, however, that they actually generate our standards for judging what is valuable. I believe that we can arrive at an accurate idea of how much people value natural endowments by asking questions like those posed above precisely because natural endowments do not, in any fundamental sense, generate our ways of valuing.

The fact that culture generates, in a very fundamental sense, our ways of valuing casts doubt on the proposition that we can arrive at an accurate idea of how much people value culture by asking them questions similar to the ones posed above about the value of natural endowments. The reason is that any answer one might give

to questions about the value of culture is itself culture-laden. One cannot step back from one's culture and offer an unequivocal judgement about its value. The general point is that the state cannot determine the level of support it should give to culture simply by asking people how much they value culture.

I am now emphasizing a problem with determining the level of state support for culture which is very different from the technical problem that arises because culture is the sort of good which is collectively produced and consumed but from its benefits it is impossible to exclude those who do not contribute to its production. This is the free-rider problem. Some people are not willing to make contributions that reflect how much they value culture because they cannot be excluded from its benefits. In the case of ordinary public goods, this technical problem is resolved by determining how much an individual would be willing to contribute if he or she could be excluded from the benefits of those goods and then imposing on him or her a tax equal to that contribution. Notice, however, that if what I have said above is correct, this solution is not available in the case of culture because we cannot accurately determine how much he or she actually values culture.[13]

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13 See Dworkin, 'Can a Liberal State Support Art?', pp.

The upshot of this discussion is that the state cannot determine its level of support for culture solely by asking each individual how much he or she values particular forms of culture or the cultural structure as a whole. That level of support must be partially determined by "objective" considerations. This means that state support for culture cannot treat everyone as equals. This is not the practical problem of how the state can go about supporting cultural structure without violating its neutrality. It is an irreconcilable conceptual problem with saying that treating people as equals requires state support for culture. Egalitarians like Dworkin face the following dilemma: they must deny either that treating people as equals requires the state to support culture or that a distributive mechnanism which purports to treat people as equals must be "personality-sensitive". As I have already indicated, Dworkin opts for the second alternative and implicitly denies that there are egalitarian grounds for state support of culture.

225-228.

Workfare or Redistributive Transfers?

3. A redistributive transfer was defined in chapter five as, 'a payment to an individual or institution that does not arise out of current productive activity.' In the previous chapter, it was assumed that the state should meet personal needs through redistributive transfers. The fact that the social programmes of the modern welfare state also characteristically involve redistributive transfers gives a great deal of plausibility to the proposition that the development model of rights and deprivation is capable of justifying at least some of those programmes. Consider, however, the following objection to meeting needs by redistributive transfers.[14]

I. Redistributive transfers are designed to meet an individual's needs.

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14 The argument here, although my own construction, is informed by Lawrence M. Mead, *Beyond Entitlement: The Social Obligations of Citizenship* (New York, Free Press, 1986), esp. pp. 1-3, 12-13, 41-45, & 218-240; and J. Donald Moon, 'The Moral Basis of the Democratic Welfare State' in *Democracy and the Welfare State*, ed. Amy Gutmann (Princeton, Princeton University Press, 1988), pp. 27-52.

II. Among any individual's needs is having self-respect where self-respect is understood as 'one's belief that one lives up to certain [socially determined] standards that define what it is to be a person of worth, a person entitled to respect.'[15]

III. In our society, the most important socially determined standard for measuring one's self-respect is the idea that one works for what one receives.

IV. Redistributive transfers involve payments that have not arisen out of current productive activity.

V. Therefore, redistributive transfers have a self-defeating aspect in that they frustrate some of the needs of the recipient in the course of meeting other needs he or she has.

Now, in my view this is a formidable objection to the state using redistributive transfers to meet needs and it deserves to be taken very seriously.

Distinct from it is the claim that this argument establishes the case for the doctrine of what is commonly called workfare. The doctrine of workfare says that rather than providing the needy with in-kind or cash benefits, they should be provided with jobs that will allow them to meet their own needs and thus preserve their

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15 See Moon, 'The Moral Basis of the Democratic Welfare State', p. 32.

self-respect.[16] Workfare thus ascribes to the needy a right to a job, not a right to in-kind or cash benefits.[17] The point is that using workfare to meet needs is superior to the use of redistributive transfers because it supposedly does not have the self-defeating aspect of frustrating some of the needs of the recipient in the course of satisfying other needs he or she has.

It is, however, a mistake to claim that the use of workfare to meet needs is not self-defeating in the way that the use of redistributive transfers is. The idea central to workfare is that the needy have a right to a job which they can exercise. Having a right to a job gives the needy the opportunity to meet their own needs by working for what they receive. It might then be inferred

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16 The doctrine of workfare should not be confused with the view that redistributive transfer payments are bad because they act as a disincentive to work and that, therefore, people should have to work for the state benefits they receive. Relevant here is Judith M. Geuron's recent paper *Reforming Welfare With Work* (New York, Ford Foundation Project on Social Welfare and the American Future Occasional Paper 2, 1987), esp. pp. 30-32 & 37-38, which shows that in various pilot programmes where benefits received are work-related, this has had only a marginal influence on the incentive to work.

17 Robert Lane, 'Government and Self-Esteem', *Political Theory 10* (1982), p. 13. Note that the contrast here between a right to a job and a right to in-kind or cash benefits is overstated because a job could be regarded as an in-kind benefit.

from this that the use of workfare does not threaten the self-respect of the needy. There is an elementary problem with this inference. Suppose that a person is given a job because he or she has a right to a job and not because he or she "deserves" it. What I question is that that person's self-respect will not be threatened. It is hard for me to see how exercising one's right to a job would not have the effect of undermining one's self-respect and thus introduce a self-defeating aspect into the use of workfare as a way to meet needs.[18] Thus, saying that individuals in need have a right to a job is no more successful at avoiding the objection under consideration than saying that they have rights to redistributive transfers.[19]

Now, someone might respond that, although it is true that the use of workfare does have a self-defeating

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18 Jon Elster, 'Is There (or Should There Be) a Right to Work?' in *Democracy and the Welfare State*, ed. Amy Gutmann (Princeton, Princeton University Press, 1988), pp. 74-75.

19 The fact that exercising one's right to a job might threaten one's self respect should not be construed as a denial that there are good reasons for supporting a statutory right to a job, independent of considerations about meeting needs. See Michael Rustin, 'A Statutory Right to Work', *New Left Review 137* (1983), esp. p. 53, and Tom Campbell, *The Left and Rights* (London, Routledge and Kegan Paul, 1983), chapter 9.

aspect, it is still preferable to the use of redistributive transfers because it undermines the self-respect of the recipient less than does the use of transfers. The validity of this response depends, I think, on just how much redistributive tranfers do in fact undermine the self-respect of the recipient. I shall make three remarks which combined are intended to show that rights-based redistributive transfers will not have the negative effects on self-respect critics often assume.

First of all, notice that the argument I sketched out above does not actually establish that all redistributive transfers designed to meet needs pose a threat to self-respect. There are two possible ways in which a transfer to someone in need might be redistributive. It might be either redistributive between different persons or redistributive across one person's life. A social programme providing everyone with the same benefits is an example of a programme redistributive between persons if it is funded through a progressive income tax with the effect that high earners are subsidizing the benefits received by low earners. A mandatory contribution scheme for old age pensions is an example of a programme that is primarily intended to be redistributive across one person's life. The idea is that you contribute when you

are young and working so that you have an income when you are older and no longer working. (This is still an example of a redistributive transfer because the payment of the pension does not arise out of *current* productive activity.) Redistribution in this second sense - across one person's life - was the primary objective in the setting up of the British welfare state after the Second World War.[20] It is hard to see how meeting needs by transfer payments which are redistributive across one person's life would threaten the recipient's self-respect.

My second remark concerns the sorts of needs I have identified as relevant to the development model of rights and deprivation. A general feature of those needs is that the help of others is required to meet them. It is inconceivable that one could meet them on one's own; we can never be "self-sufficient" in this respect.[21] What I wonder is whether your self-respect is really threatened when someone else helps you meet needs that you could not

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20 David Marquand, *The Unprincipled Society* (London, Fontana, 1988), p. 29.

21 This theme is emphasized by Charles Taylor in 'Atomism' in *Philosophy and the Human Sciences, Philosophical Papers 2* (Cambridge, Cambridge University Press, 1985), pp. 190-91.

have conceivably met without that help. Do we say that a child's self-respect is threatened when someone helps to meet his or her needs? I am inclined to think that when others help you to meet needs that you could not conceivably have met on your own, your self-respect is not undermined to the degree that it might have been if those needs had been of the sort that you could have met them on your own.

The validity of my third and most important remark depends on the truth of the empirical claim that how much a redistributive transfer threatens a recipient's self-respect depends on whether society regards that transfer as an act of charity or a requirement of justice. The received view is that a redistributive transfer regarded as a requirement of justice will threaten the recipient's self-respect less than a transfer regarded as charity.[22] I shall assume that this received view is correct. It follows from it that it is of the utmost importance that redistributive transfers designed to meet needs be regarded as requirements of justice. The

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22 R. Plant, H. Lesser, and P. Taylor-Gooby, *Political Philosophy and Social Welfare* (London, Routledge & Kegan Paul, 1980), pp. 22-25.

development model of rights and deprivation is important because it shows why redistributive transfers should be so regarded. I would hope that in a just society redistributive transfers would be regarded as requirements of justice and that, therefore, their use to meet needs would not have the negative effects on the self-respect of the recipients that they are often said to have today.

Conclusion

4. To conclude, then, I have in this final chapter discussed two issues relating to the development model of rights and deprivation. I have argued that, in comparison to an egalitarian approach, the development model of rights and deprivation holds much more promise as a justificatory account of why distributive justice requires the state to pursue a policy of giving support to forms of culture. It is perhaps an uneasy feature of that justificatory account that it defends the role of the state in the promotion and protection of particular forms of culture, for it is hard to see how the state could fulfill that role without violating some principle of neutrality.

I have also defended the use of redistributive

transfers in social programmes designed to meet personal needs grounded on the development model of rights and deprivation. I have not directly challenged the argument that there may be a self-defeating aspect to the use of redistributive transfers to meet personal needs but have sought only to cast doubt on the claim that workfare is a superior method of meeting needs. My critique of the argument in favour of workfare has been double-edged. I have shown, on the one hand, that workfare also has a self-defeating aspect and, on the other hand, that the use of redistributive transfers to meet needs is unlikely to frustrate needs to the extent often projected. These two considerations validate the claim I made in chapter seven that the development model of rights and deprivation requires the state to meet personal needs through in-kind redistributive transfers.

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