A Theory of Dystopian Liberalism

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Abstract

This dissertation aspires to revive the dystopian liberalism which identifies the avoidance of the worst as the fundamental aim of politics. The theory I present consists of three elements overall: The first element is what I call the Priority Claim, stating that the most important aim of social institutions should, morally speaking, be to avoid cruelty *qua* worst evil (Part I). The second element is the identification of the informal structure, the set of social norms within a population, as an important site to realize this ideal (Part II). The third element is the application of the principle that cruelty be avoided to the informal structure (Part III). This leads to an account of desirable social norms and in turn to a concrete answer to the question how individuals can in their everyday lives do their part to create a world that is overall less cruel and more humane.

To my parents,

masterly architects of freedom

Acknowledgments

This project started with my master's thesis entitled *The Informal Structure and the Demands of Justice*. Many thanks go to my supervisor back then, to Laura Valentini, who greatly stimulated my research at that time and helped composing the research proposal for this dissertation.

Turning the proposal into a full-blown dissertation required a strenuous effort and I am grateful first and foremost to my supervisor Simon Caney for his contenuous encouragement. The first time I came across Simon's work, I remember this precisely because it motivated me to apply for the D.Phil at Oxford, was when he, as his critic, elicited a generous compliment from Brian Barry who I knew had made a name for being a fierce opponent. Barry writes in his rejoinder that no author could ask for a more careful and judicious reader than Simon Caney, and he should very much be right about that.

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Introduction

"Humanly speaking, no more is required, and no more can reasonably be asked, for this planet to remain a place fit for human habitation."

Hannah Arendt (1963)

1. A theory of dystopian liberalism[1]

The characteristic feature of dystopian liberalism is that it puts the avoidance of the worst as the fundamental aim of politics and that it eschews (for the most part) more comprehensive and loftier political goals. This liberalism can be traced back to Montesquieu and it was first rehabilitated by the so-called cold war liberals such as Berlin and Popper.[2] One major statement of the dystopian position can be found in Shklar's *Liberalism of Fear* where she argues that the basic norm of political life should be the avoidance of cruelty and she contrasts this kind of liberalism with the liberalism of natural rights and the liberalism

[1] The term dystopian liberalism goes back to Benhabib's (1996) description of Shklar's theory as a *dystopic* liberalism. I modify the term to avoid confusion in spoken language with the word "despotic".

[2] As Levy (2000: 19) puts it: "Montesquieu's political vision was centrally concerned with diminishing cruelty and violence in social life." Berlin (2014), for instance, who had lived through almost the entire century when he wrote his *Message to the 21st Century*, states that "the most important lesson to future generations is that the worst of all times, when the tyrants of the twentieth century trampled on the life [...] of millions, is never to happen again." See Müller (2008) for an admirable historical account of cold war liberalism and their political ideals. Forst (2007) adds Arendt to the same camp as Berlin and Shklar in his essay *Republicanism of Fear*.

of personal development.[3] More recently, her theory has been endorsed by Jacob Levy, Richard Rorty and Bernhard Williams, but very little has been said as to why we should accept such an approach.[4]

The task set in this dissertation is to invigorate the dystopian liberalism as handed down by this tradition and in particular the liberalism of fear as defended by Shklar. It is a liberalism "that has its origins in post-Reformation Europe", in "the religious wars that had the effect of turning many Christians away from the public policies of the churches": it is the view that "the individual, whether the bearer of a sacred conscience or the potential victim of cruelty, is to be protected against the incursions of public oppression."[5] It is in this sense a "liberalism from below",[6] as Honneth calls it, for avoiding the worst is tantamount to relieving the plight of the weak and vulnerable.

The theory I present consists of three elements: The first is what I call the Priority Claim stating that the most important aim of social institutions should, morally speaking, be to avoid cruelty (Part I). The second element is the identification of the informal structure, the set of social norms within a population, as an important site to realize this ideal (Part II). The third element is the application of the principle that cruelty be avoided to the informal structure (Part III). This leads to a theory of social norms and in turn to a concrete

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[3] Shklar (1989).
[4] See Rorty (1989), Levy (2000) and Williams (2005).
[5] Shklar (1989: 23)
[6] Honneth (2013: 16).

answer to the question how individuals can in their everyday lives do their part to create a less cruel and more humane world.

Part I and Part II thus join together in Part III and this is in a sense also a move from abstraction to a concrete political theory. In the first two parts, I will address a number of abstract conceptual problems and normative questions on a high level of generality. But Part III that brings them together will outline some practical implications of my view.

As I move on and elaborate on each of these elements I hope to contribute to three problems that remain unresolved in the literature.[7] First, what is cruelty? What are necessary conditions for an act to count as cruel? The concept is surprisingly unexamined; not a single in-depth analysis is available. Annette Baier for instance takes cruelty to be an important concept but "leave[s] aside the very tricky question of just what should count as cruelty."[8] The only contemporary account is presented by Kekes – one that, I will argue, is misleading on various points.[9] Neither do historical studies help. Baraz' intellectual history of the concept, looking at Seneca, Augustine and Montaigne (among others), reveals serious disagreement between philosophers, yet he does not attempt to resolve it.[10]

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[7] The same three problems I point out are also identified as gaps in Shklar's theory by Bajohr & Liebsch (2014/a) in their introduction to the special issue on Shklar in the *Deutsche Zeitschrift für Philosophie.*

[8] Baier (1993: 437).

[9] Kekes (1996).

[10] Baraz (2003).

Second, why is avoiding cruelty the most important political principle? Shklar writes that the prohibition of cruelty has "an immediate appeal and can gain recognition without much argument."[11] But she is also aware that an argument is needed nonetheless, that "one cannot rest on this or any other naturalistic fallacy."[12] In view of that, she indicates two possible routes. The first is Kantian and based on the premise that the "prohibition of cruelty can be recognised as a necessary condition of the dignity of persons." The second is Utilitarian and rests on the point that avoiding cruelty would "benefit the vast majority of human beings in meeting their known needs and wants."[13] Shklar is convinced that both routes lead to the same conclusion, i.e. the priority of avoiding cruelty, but she nowhere shows how.

This gap becomes even wider in view of two criticisms that have not yet been subjected to evaluation. John Kekes argues that "it takes no more than a little thought to realize that the slogan – that a liberal is one who believes that cruelty is the worst thing we do – is mere verbiage that cannot withstand the most elementary questioning."[14] And Quentin Skinner maintains that Shklar fails to make good her claim that avoiding cruelty is primary because it undermines liberty.[15]

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[11] Shklar (1989: 30).
[12] ibid.
[13] ibid.
[14] Kekes (1996: 835).
[15] Skinner (1996).

Third, what does follow from the Cruelty Principle regarding institutional design, in particular the design of the informal structure of society? What social norms are required? What demands does this place on individuals? These vital questions have not been posed yet,[16] hence it remains unresolved how individuals can create a civic society that is less cruel.

Overall, this dissertation is an attempt to build a systematic theory of dystopian liberalism with its own internal logic: two elements that come together in a third element that yields concrete directives for individual action. At the same time, I will address three problems that taken together are so serious that it is not difficult to see why the dystopian liberalism and Shklar's variant have not gained a foothold in contemporary debates as a compelling account of liberalism, especially in comparison to what she calls the liberalism of natural rights and the liberalism of personal development.

2. A new ideal theory

I said that the third element of the theory of dystopian liberalism is an account of desirable social norms. More precisely, it is an *ideal* theory of social norms, the question is what social norms would ideally be in place. It should be seen

[16] Shklar's book *Ordinary Vices* (1984) does raise the question what "character" the Liberalism of Fear calls for. Yet, this is different from asking what informal structure is desirable and what distinct demands the formation of social norms places on individuals. I will elaborate on this distinction in Chapter 7.

as a vision of what is the best that can be hoped for based on the assumption that individuals do their part in establishing these social norms.[17]

The specific ideal theory I put forward is different though from what is common in political theory: it is an account of an ideal informal structure. One might ask why I focus on the informal structure and not on the legal one. The easy answer is that this is where the research gap is, given that many philosophers have already addressed the question what legal framework would be required to avoid cruel acts, not least Montesquieu. But the more pertinent answer is that the informal structure is where the action is: this structure can deter cruelty to an extent that the legal structure is unable to achieve, as I will demonstrate in Chapter 6.[18]

To be clear: I do not mean to talk down the relevance of the rule of law to avoid cruelty. All I argue for is that social norms are effective barriers and a necessary part of the solution to deter cruel acts. They are required in addition to, not in place of the rule of law in order to bring forth the desired state of affairs.

This amounts to the first attempt in the literature to develop a systematic account of an ideal informal structure. Some authors have made a first step

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[17] This is to say, as Rawls (2001: 13) would put it, that the theory assumes strict compliance, i.e. that "(nearly) everyone strictly complies." Also see Stemplowska & Swift (2012) for a discussion of how this criterion distinguishes ideal from nonideal theory.
[18] It is well-known, as McTernan (2014) shows, that social norms are effective deterrents, but not so much what the advantages are in relation to the legal structure.

towards this direction. The most thorough discussion can be found in I. M. Young's most recent book, but she limits her attention to a few norms within the economic sphere and especially the housing market.[19] Furthermore, A. J. Julius and G. A. Cohen point out that certain social norms need to be in place to counteract unjust inequalities between men and women.[20] But a systematic account is not being offered in either case.

Philip Pettit also emphasizes the import of social norms in his seminal work on republicanism. He argues that republican laws "must be embedded in a network of norms that reign effectively, independently of state coercion, in the realm of civil society."[21] And he sets out to identify some different grounds on which norms are required to support a republic and he even mentions in what realms these norms need to be established.[22] But ultimately he does not state *which* social norms should be in place, leaving it to the rather vague proposition that the norms should support republican laws.

Apart from this, Axel Honneth's recent book *Freedom's Right* does offer a systematic account of social norms. Yet, it is not an ideal theory but rather

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[19] Young (2012), see especially Chapter 2.
[20] Julius (2003: 348); Cohen (2008: 142).
[21] Pettit (1999: 241).
[22] Pettit distinguishes between society-wide norms and those specific to certain groups and roles. Regarding the latter, he writes (1999: 248) "that it is important to recognize that the civility required is needed across a much broader range than these examples may suggest. Think of the politics that has been waged in many societies, to a lesser or greater effect, on behalf of consumers or prisoners or war-widows, on behalf of those with various handicaps, those in deprived geographical areas, or those who identify themselves as homosexuals."

a historical reconstruction of social norms. Indeed, he explicitly disassociates himself from the tradition of ideal theory as pursued by John Rawls and Jürgen Habermas. Honneth's aim is not to delineate a vision of what is the best that can be hoped for but, following Hegel, to derive political principles from "the internal meaning of previously established practices."[23]

In contrast, the theory of dystopian liberalism expounded in this thesis involves an ideal theory and to be more precise: an ideal theory of the informal structure. I hope to demonstrate that such an account is feasible as well as important to arrive at a more complete normative theory, one that does not limit its focus on the legal structure alone.

3. With Rawls, against Rawls

As I outline above, the dystopian liberalism I present in this dissertation comprises three elements. This structure is strictly Rawlsian in the following way: the first two stages of Rawls' Four-Stage Sequence involve (i) establishing moral principles intended to guide social institutions, and (ii) applying the principles to what he calls the *subject* of principles, i.e. tailoring the institutional reality of citizens to the general principles.[24] An intermediate stage is (iii) the identification of what the subject of the principles is. The threefold structure of this dissertation reflects these stages.

[23] Honneth (2014: 5).
[24] Rawls (1971).

Yet, even though I follow the Rawlsian paradigm, I depart from Rawls on all of these levels: On the one hand, I argue that the Cruelty Principle and not the liberty principle should be taken as the fundamental principle governing human social life. On the other one, I do not take what Rawls calls the basic structure as the subject of the principle but what Cohen terms the informal structure.[25] In conjunction, when the two points come together in the third element, they lead to a different political theory than Rawls's: not an account of the legal structure, but of social norms and of specific demands on individuals to generate these norms.

Accordingly, the dissertation will also involve contributions to debates in Rawlsian political theory. Part I deals with the debate on what the first virtue of social institutions is. Robert Goodin, for example, argues in his response to Barry's *Why Social Justice Matters* that it is not justice:

> The upshot of the foregoing discussion is that we have been misled by Rawls and the many philosophers following him (intermittently including Barry) into thinking of 'justice' as 'the first virtue of social institutions.' Anyway, we have been misled if 'justice' is taken to mean – as Rawls originally stipulated, and most join Barry in continuing to assume – principles pertaining narrowly to the distribution of rights and duties, benefits and burdens. Undeniably important though it is, the just distribution of rights and duties and benefits and burdens does not exhaust the subject matter of political philosophy. There is more to it than that.[26]

[25] Cohen (2008).
[26] Goodin (2007: 425).

I hope to contribute to the debate in the following way: I take side with Goodin and look at another value – the avoidance of cruelty – and argue that it can be seen as the first virtue of social institutions.

Part II deals with the question of what the subject of political principles is. In his theory of justice, Rawls distinguishes between the basic structure of society on the one hand and "rules of practices of private associations or for those of less comprehensive social groups" on the other.[27] His view is that principles of justice apply to the basic structure but "may not work" for the other set of rules. Cohen's response can be read as an attempt to set the distinction right as well as making a claim about the subject of justice. According to him, the social world falls into three constitutive elements: the coercive structure, the informal structure, and the social ethos.[28] And his position is that principles of justice apply to each of these items.

Despite the debate Cohen's text has sparked off,[29] a number of questions remain unresolved which I hope to contribute to. (a) A first question is how exactly the distinctions run. Cohen himself admits that the distinction between the coercive and the informal structure "may be more blurred than I have been

[27] Rawls (1971: 7).
[28] See Cohen (2008: 141).
[29] On the one hand, Pogge (2000), Murphy (1998) and Williams (1998) argue that the subject of justice should be limited to the legal structure. On the other hand, Young (2011) and Julius (2003) join Cohen in defending that it be extended.

disposed to allow."[30] And I think that the distinction between the social ethos and the informal structure is no less blurred.

(b) What is the empirical reality of the informal structure? Rawls gives a definition of the basic structure in conceptual terms, but he also points out what it corresponds to in the empirical world, namely the "political constitution, the legally recognised forms of property, the organisation of the economy, and the nature of the family."[31] In contrast, the literature does not reveal what the institutional reality of the informal structure is.

(c) Why is the informal structure a site of political principles? Cohen argues that it is because the structure has pervasive impact on the lives of individuals. But it is widely contested whether *pervasive impact* is the relevant criterion to determine the site of principles.[32]

As can be seen, I will address a number of questions within Rawlsian political theory. But it is imperative to stress that the arguments I present in each case serve the primary purpose of this dissertation, that is, to develop a theory of dystopian liberalism.

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[30] Cohen (2008: 146).

[31] Rawls (2001: 258).

[32] Even in Rawls' theory, as Abizadeh (2007) shows, there are at least three distinct ways to understand what the criterion is, none of which is obviously to be favoured.

4. Real-world movements

A further objective of this dissertation is to offer resources for social movements to advance their causes. I am particularly thinking of two types of social movements: those that fight for the prevention of extreme forms of violence, be it physical or psychological, and those that speak up for the change of social norms. To give an example, *Futures without violence* is an NGO that pursues both goals. According to their mission statement, the NGO wants to "provid[e] groundbreaking programs, policies, and campaigns that empower individuals and organizations working to end violence against women and children around the world. [...] Striving to reach new audiences and transform social norms, we train professionals [...] on improving responses to violence and abuse."

The resources this dissertation offers extend over arguments to motivate and mobilise people and over concrete strategies to transform social norms: On the one hand, I will provide an argument for why the prevention of cruelty is of first importance and hence also why the prevention of various forms of severe violence is of first priority (Chapter 3). On the other hand, I will indicate what one must ask individuals to do so that social norms change (Chapter 7). Transforming social norms has become a mantra in debates on social change and this thesis has the goal to endow it with more substance.

Furthermore, this dissertation can offer resources for yet another concern that people share. To see this, consider what President Obama wrote recently in *Glamour*: "we need to break through these limitations. We need to

keep changing the attitude that raises our girls to be demure and our boys to be assertive [...]. We need to keep changing the attitude that punishes women for their sexuality and rewards men for theirs. We need to keep changing the attitude that teaches men to feel threatened by the presence and success of women." What is decisive here is that Obama calls for a change in *attitudes* to bring forth a desirable state of affairs, not so much what attitudes he proposes.

However, it is not yet fully understood what the nature of the attitudes is. In Chapter 7, I hope to clarify this issue so that one knows what exactly is required when asking to "keep changing the attitude".

5. The structure of the dissertation – A summary

So far I have outlined three objectives of this dissertation. To recap: The main task set is to rehabilitate the dystopian liberalism as an attractive account of liberalism. As I pursue this goal, I also hope to achieve two further objectives, namely to present a new type of ideal theory and to correct certain points within Rawls' work. I now give a chapter-by-chapter overview of what is to follow. The theory I propose consists of three main elements and thus the thesis falls into three parts.

Part I: In the first part, I defend the Priority Claim stating that the most important aim of social institutions should, morally speaking, be to avoid cruelty. The first chapter tackles the question of what cruelty is. I discuss various conceptions and argue that the concept has a fourfold structure. It consists of

an account of (a) the mental states of the perpetrator; (b) the interests of the victim; (c) the relationship between the perpetrator and the victim; and (d) the behaviour that is involved. I will argue that an act is cruel in the relevant sense if it exerts a drastic force on another person.

In Chapter 2, I present the Cruelty Principle stating that the avoidance of cruelty be a norm of political practices and prescriptions. My aim is to describe what this ideal contains. The first two features I highlight are distinguishing features of this ideal: (a) that it aims at avoiding certain emotional states and (b) that it eschews more comprehensive and loftier goals. The third feature I indicate is that the Cruelty Principle delineates a "relational" and an "administrative" ideal, to use a pair of concepts that Scheffler has introduced: It guides how the sovereign should treat its citizens but also how people should treat each other.[33] These three features are descriptions of what the Cruelty Principle calls for. The fourth and last one I bring out is a conceptual point concerning the question of whether or not the principle can be seen as a principle of justice.

On the basis of the these two chapters, I come to defend the Priority Claim in Chapter 3. I first discuss several arguments that are handed down by the tradition of dystopian liberalism and show why they fail to establish the claim. Hereafter, I present my own argument that rests on the observation that

[33] Scheffler (2003/a).

the absence of cruelty is a precondition for a wide range of fundamental human interests. Last but not least, I examine and reject the criticisms laid down by Skinner and Kekes.

Part II: In this part I argue that the informal structure should be taken as an important site of the Cruelty Principle. To begin with, I present the conceptual background in Chapter 4 and elaborate on the notions of the informal structure, the social ethos and the coercive structure. To define these terms, I draw on three concepts put forward by Brennan et al: formal, moral and social norms.[34] I aim to show that the informal structure is best understood as the set of social norms, the social ethos as the set of moral norms and the coercive structure as the set of legal formal norms.

This definition of the informal structure is still abstract in the sense that it is removed from the empirical world. In chapter 5, I thus set out to offer a much more concrete account of this structure, i.e. the institutional reality of the structure. I suggest that the best account of an empirical informal structure can be found in Part III of Honneth's book *Freedom's right* where he presents the view that Western societies consist of seven spheres: (1) friendship, (2) intimate relationship, (3) family, (4) consumption, (5) workplace, (6) democratic public sphere and (7) constitutional state. The central claim is that the informal structure shows itself in these spheres.

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[34] Brennan et al. (2013).

On the basis of these two chapters, I come to argue in Chapter 6 that the informal structure, the set of social norms within a population, is an important subject of the Cruelty Principle. First, I examine and reject various arguments that aspire to limit the subject of political principles to the legal structure.[35] Next, I suggest that the informal structure can deter people from being cruel to an extent that the legal structure is unable, and that it is thus indispensable to bring about the social conditions under which the principle can be said to be satisfied.

Part III (Chapter 7): This part is where Part I and Part II come together when I apply the Cruelty Principle (Chapter 2) to the informal structure (Chapter 5). Given the constraints of space, I will focus on only three of the seven sub-spheres. In particular, I will apply the principle the sphere of production and services, the sphere of the family and the democratic public sphere to explore what some social norms need to be in place in these spheres. As social norms are constituted by normative attitudes individuals hold, the theory of desirable social norms will involve a theory of what normative attitudes people should accept within the different spheres. Hereafter, I will come to an end by showing in what respects this account of how to bring forth a less cruel world is superior to the theories laid down by Rorty and Shklar.

[35] For example, I will examine the arguments laid down by Pogge (2000), Murphy (1998) and Williams (1998).

6. Method

I said right at the beginning that the task set in this dissertation is to invigorate the liberalism of fear as defended by Shklar. Let me just say what this does *not* involve. The theory I put forward is not what Rorty calls an *historical* reconstruction, an "account of the dead thinker in [her] own terms", what she "would have said to [her] contemporaries."[36] It is also not quite what Rorty calls a *rational* reconstruction,[37] though I do look at Shklar's work "in the light of the best work now being done on the problems [she] discussed" in order to arrive at a theory "in our terms, ignoring the fact that the dead thinker, in [her] linguistic habits as [she] lived, would have repudiated these terms as foreign to [her] interests and intentions."[38] Nonetheless, I do *not* call it a rational reconstruction in view of the differences that will come to the fore over the course of the dissertation.

Rather, what I present may best be called a restatement, by which I mean that it is a position which is inspired and deeply indebted to hers. To be more precise, it is a restatement as the main pillars of Shklar's account will be preserved: (1) the avoidance of the worst is taken as the fundamental aim of politics, (2) the avoidance of worst is understood as the protection of people

[36] ibid: 54 & 53.
[37] Rorty (1986).
[38] ibid: 62 & 54.

against severe physical or emotional harm (centrally, that is),[39] (3) the theory adds up to a "liberalism from below" in that the emphasis is placed on relieving the plight of the weak and vulnerable. So although she might not agree with the details of my account, my approach is deeply indebted to hers and bears the imprint of her thought.

Further, I will draw on a number of methods that have gained currency in Rawlsian political philosophy. First, as I state above, the triadic structure of the dissertation is Rawlsian, i.e. the idea to work out principles first, to explicate what the subject of the principles is and then to apply principles to the subject.[40]

Second, the aspiration to formulate an ideal theory takes Rawls' procedure of delineating a *realistic* utopia as the methodological guideline. This procedure states that political philosophers should aim at (a) extending "what are ordinarily thought to be the limits of practical political possibility" and (b) "reconciling us to our social and political condition."[41] As I understand it, this means to stretch the limits of political possibilities while keeping in mind as well as responding to the fact that certain aspects of our condition cannot be changed.[42]

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[39] This is because cruelty is defined as "the deliberate infliction of physical, and secondarily emotional pain [...]." See Shklar (1989: 29).
[40] Rawls (1971).
[41] Rawls (1999: 11).
[42] See Miller (2008).

This dissertation stretches those limits in as much as it suggests that individuals ought to accept certain attitudes in order to create an adequate informal structure. So in this sense I take the informal structure as it might be. But I also take people as they are, accepting that two aspects of our condition cannot be changed. First: the human need for social approval and acceptance is an important motor for action.[43] If this was not the case, there would be no need for a particular informal structure to govern human interaction. Second: that in the absence of effective measures cruelty is a persistent feature of social life. For example, a survey by the *Office for National Statistics* shows that 1.6 million people in England and Wales suffered domestic assaults in the year ending March 2015, 1.1 million of them women.[44] Even on the assumption that most of the assaults do not qualify as cruel, the number of those that can be regarded as cruel will still be staggering.

I admit that there is a tension between taking people as they are and the informal structure as it might be. After all, how realistic is it that people accept certain attitudes if I assume that they are cruel? But the assumption is

[43] This is a well-known phenomenon in social psychology. Cialdini and Goldstein (2004: 598) for example write in their review article on empirical compliance and conformity research that "humans are fundamentally motivated to create and maintain meaningful social relationships with others", that (610) "individuals often engage in [...] conscious and deliberate attempts to gain the social approval of others, to build rewarding relationships with them, and in the process, to enhance their self-esteem. Conformity [i.e. the act of changing one's behavior to match the responses of others] offers such an opportunity, although the extent to which the phenomenon is not only socially prescribed, but also normatively embraced, differs across cultures."

[44] Travis (2015).

not that everybody is a cruel person, that "man is a wolf to man." Rather, it is that cruelty is a stubborn feature of social life. This still leaves enough room for the possibility that a *significant* proportion of the population accepts certain attitudes – more is not needed.

Third, the normative parts of this dissertation (Chapter 3 & Chapter 7) draw on the method of reflective equilibrium.[45] The method of reflective equilibrium consists in working back and forth among our intuitions about particular cases and the principles or rules that we believe govern them. More precisely, the idea is to develop moral principles (Chapter 3) and see if we can find cases in which guidance about how to act contradict our intuitions (Chapter 7). If there are such cases, we need to revise our principles. If not, the method succeeds and we achieve reflective equilibrium.

Fourth, the Priority Claim in Chapter 3 is fact-dependent in an important respect revealing that the dystopian liberalism I present is what Miller calls a "political philosophy for earthlings".[46] The principle is fact-dependent in that the normative weight of the Cruelty Principle is dependent on the fact about humans that they have a fundamental interests in forming mental contents and in certain rational ways of deliberation.

Fifth, the conceptual parts, particularly Chapter 1 on cruelty and Chapter 4 on the informal structure, use the method of conceptual analysis. The idea is

[45] See Rawls (1971) and Daniels (1996).
[46] Miller (2008).

to bring out necessary and sufficient features of concepts that are to be tested against counterexamples via thought experiments.

Having set out the objectives, the structure and methods of this dissertation, I now turn in Chapter 1 to the analysis of the concept of cruelty which will be crucial to understand the central claim of the dystopian liberalism, namely that avoiding cruelty be the fundamental norm of political practices.

Chapter 1

The concept of cruelty

Introduction

The notion of cruelty is the single most important concept in Shklar's political theory, given that avoiding cruelty is seen as the supreme principle. Despite the fact that it is so important, she offers only a thumbnail definition, which, as I hope to show, is problematic for several reasons.[1] Not only that: the conception she presents in the *Liberalism of Fear* conflicts with the definition in her earlier work,[2] which gives rise to questions she does not address.

Surprisingly, the lack of conceptual rigour recurs; neither Williams nor Rorty discuss the concept, though both endorse Shklar's principle.[3] And it is striking how little attention their contemporaries give to the notion. As Allen writes: "[M]ost moral philosophers and political theorists of this century have not given explicit attention to the analysis of negative moral concepts such as injustice, evil, vice, cruelty [...]. Interest in the significance of negative moral concepts and experiences remains very much the exception that proves the

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[1] Also see the editorial (2014: 627) in the special issue on Shklar in the *Deutsche Zeitschrift für Philosophie* where the authors point out that the lack of a clear concept of cruelty is one of the major gaps in Shklar's *Liberalism of Fear*.
[2] I refer here to *Ordinary Vices* (1984).
[3] Rorty (1989), Williams (2005).

rule."[4] And even when the concept is of central concern, as it is for Annette Baier, she "leave[s] aside the very tricky question of just what should count as cruel."[5]

In light of this, my aim in this chapter is to present an extended study of the concept. I shall address several questions: Is cruelty to be predicated of persons or actions (in §2)? What is the structure of the concept (in §5)? What are necessary features (in §12-14)? Above this, I will also provide a definition. However, it won't be a definition of cruelty as such, but of *one kind* of cruelty that is of particular normative significance.

The chapter is structured as follows: To begin with, I shall ask in §2 whether cruelty should be predicated of persons or actions. In a next step, I will give an overview of controversies that have arisen in intellectual history (§3 – §4) and then arrive at a description of the structure of concept as consisting of four elements (§5). The remainder of this chapter will cover the four components.

§1 A word on method

I just wrote that I will address a number of issues related to the concept of cruelty and also that I will offer a definition. The aim of the definition is to single out of a subclass of cruelty that is of particular normative importance.

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[4] Allen (2001: 339).
[5] Baier (1993: 437).

To this end, I will point to three conditions that are individually necessary for the application of the concept of cruelty in everyday language (§12 – §14). In addition to that, I will specify a fourth feature as a demarcation criterion to discern a class of cruel acts that is of special moral importance (§8).

In response to this, one may now ask why I call the concept cruelty despite the fact that it covers only a subset and why I do not give it another name. My reply is that cruelty is a natural term to refer to the phenomena within the subclass in the sense that all phenomena would readily be recognised as such in ordinary language. The reason for this is that the actions meet the conditions under which an act would be considered cruel in an everyday setting. To be more precise, the actions meet four conditions that are *jointly sufficient* for the application of the term.

The interlocutor might now point out that the phenomena within the subclass also meet the conditions that are jointly sufficient for the application of other terms such as "particularly severe evils" or "injustice" or "inhumane treatment". I have two replies to that. First, assuming that this is true, those names would face the same issue as the term cruelty, i.e. that the class of all phenomena that fall under the concept in everyday life is wider than the class of actions that fall under the definition. So if I chose injustice, I would again have to speak of a subclass on injustice. Hence, other terms do not have an advantage in this regard.

Second, the aim of this dissertation is to advance a theory to protect people against the exertion of severe physical and emotional harm. And there is a theory tradition that speaks of the avoidance of cruelty to state this goal, while the terms inhumane treatment or injustice are less prevalent. Hence, the advantage of using the term cruelty is that it designates a congruence with regards to this goal and marks an affiliation with a group of thinkers.

§2 Acts, not persons

To begin with, an important question about cruelty is whether it is predicated of persons or of actions.[6] Is it more pertinent to speak of cruel acts or of cruel persons? Shklar is not clear on this point. On the one hand, she wrote a book entitled *Ordinary Vices* in which cruelty is regarded as the most serious vice. In turn, virtues and vices are understood as features of a person's character, so there is strong textual evidence that cruelty is predicated of persons and one might reasonably argue that Shklar's focus is specifically on cruelty as a *vice* (rather than on *cruel act*s). However, on the other hand, Shklar also defines cruelty as the "wilful inflicting of physical pain on a weaker being in order to cause anguish and fear."[7] Note that she does not write that cruelty is the

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[6] I speak here of "actions" because this is the terminology used in the literature, but it should be understood broadly as *things people do* and thus to cover behaviour, speech, expressing attitudes, etc. But it may be that cruelty can also be predicated of other things such as omissions, but I leave that question aside.
[7] Shklar (1984: 8)

disposition to inflict physical pain, or an inclination or the character trait to do so. Hence, here her definition makes cruelty a property of actions rather than of persons.

Her position on this question is even less clear in the *Liberalism of Fear.* If the text is read against the background of her earlier work, then there is good reason to understand cruelty as a *vice* and thus as a characteristic of persons. Yet, the text itself does not provide much evidence for this interpretation, given that there is no explicit reference to cruelty as a vice. Also, her updated definition makes cruelty again a property of actions rather than persons, stating that cruelty is "the deliberate infliction of physical, and secondarily emotional pain [...]."[8] Even more to the point, she writes that what is to be prevented is the "fear created by arbitrary [...] *acts* of force and by habitual and pervasive *acts* of cruelty and torture."[9]

This ambivalence also comes to the fore in the literature on Shklar. MacKinnon observes that Shklar "ranks cruelty as the worst of what she calls [...] our ordinary vices."[10] And she leaves no doubt that the concept is to be predicated of persons, noting that "cruelty is a *disposition* manifested by those who are terribly mistaken about the end of man, about what desires are

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[8] Shklar (1989: 29).
[9] ibid, emphasis mine.
[10] MacKinnon (1989: 328).

worthy […]."[11] In contrast, Levy offers a different interpretation of Shklar's work: In his book *The Multiculturalism of Fear*, he presents a theory that aims to mitigate certain dangers arising from cultural pluralism: "forcible inclusion of an ethnic minority which wishes to retain its own identity; forcible exclusion from citizenship and the protection of the state of small and stigmatized minorities; internal cruelty, arising from attempts by communal leaders to prevent members from assimilating to or hybridizing with a neighbouring culture […]."[12] It seems that mitigating "inclusion", "exclusion" and "internal cruelty" amounts to mitigating certain classes of *actions*.

So much on Shklar's position. Kekes addresses the same question with less ambivalence. He claims that an "essential feature of cruelty is that it is a disposition of human agents. To be a cruel person, an agent must habitually be in the appropriate state of mind and perform the appropriate action."[13] Also, he thinks that "cruelty may also be predicated of actions, but only in a derivative sense […]. [I]t is the kind of action that would be performed by a cruel agent."[14] This view seems problematic though. I think that someone

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[11] MacKinnon (1989: 334), emphasis mine.
[12] Levy (2000: 16).
[13] Kekes (1996: 837). Mayes (2009: 28) follows Kekes on this point that cruelty is to be predicated of persons.
[14] ibid. It is clear here that for Kekes cruelty is predicated of persons. Yet, it should be noted that his definition is circular: On the one hand, he defines a cruel person as one who is habitually in the appropriate state of mind and performs the appropriate action; so he defines a cruel person in terms of particular actions. On the other hand, he conceptualises a cruel action as a kind of action that would be performed by a cruel

might perform a cruel act even if she is not a cruel person – a case where the action is ‘out of character’: A good Samaritan for instance, though all his life a compassionate person, may yield once in his life to political pressures and torture a prisoner. On the other hand, I think it is correct that cruelty can also be predicated of persons: a blood-thirsty person, who is kept in a cellar all his life, and who thus never comes to act upon his violent desires, can be seen as cruel. So ordinary language allows for both, that cruelty is predicated of persons *and* actions.

In light of that, I now want to suggest that the analysis in this chapter should focus on actions rather than persons. Before I turn to the argument, I just want to stress that this focus means a departure from Kekes, but it might also mark a departure from Shklar’s account if cruelty is interpreted as a characteristic of persons. However, if it is plausible that she is ambivalent on this question – and I attempted to provide some textual evidence for this interpretation – then it can be argued that the focus I suggest is continuous with Shklar’s account.

Here are now two possible arguments. First, one might argue that it is necessary to understand what a cruel action is prior to examining what a cruel person is. When Kekes writes that a cruel person is one who is habitually in

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agent. It turns out that whichever concept he looks at, he defines it in terms of the other. Another mistake is that, contrary to what Kekes writes in the first quote, the performance of particular actions is not even necessary for a person to count as a cruel person, as the example of the bloodthirsty person kept in the cellar shows.

the appropriate state of mind and performs the appropriate action, it is necessary to first understand what counts as an appropriate action to arrive at a definition of a cruel person. But this argument is vulnerable to objections.[15] One point is that a cruel person might also be defined as someone who lacks benevolence or mercy. It seems that in such a case it is not essential to understand what a cruel action is prior to examining what a cruel person is.

A second and better argument runs as follows: the concept of cruelty will later be plugged in to the Cruelty Principle as the main principle of the "liberalism from below" which aims to protect the potential victims of cruelty against the exertion of violence. In view of that, it seems more sensible to understand the goal of politics to avoid cruel acts than cruel persons. The actions and their impacts are what we care about. They are our primary concern. This is because avoiding cruel persons does not guarantee a good protection of the victims:[16] even if we get rid of most cruel persons and live in a world populated by non-cruel people alone, we may still face massive violence. This point goes back to Hannah Arendt's analysis of evil in *Eichmann in Jerusalem,* where she argues that extreme forms of violence are often carried out by "terrifying-

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[15] David Oven brought this point to my attention against my earlier view that this is a good argument.

[16] Note that I do not claim that avoiding cruel persons is entirely ineffective to protect people. Hence, I would admit that discouraging the vice of cruelty as a matter of practical politics is somewhat important. However, to repeat, avoiding cruel persons does not guarantee a good protection of the victims. Hence, it seems misguided to focus on avoiding cruel persons as our primary concern.

ly normal human beings" whose motives and character are "banal" rather than monstrous.[17] Milgram's findings support this view, his experiments show "that ordinary human beings were capable and willing to inflict a great deal of pain on other human beings (on total strangers) for no other reason than being ordered to do so by an authority figure."[18]

It should be noted that Arendt's argument implies a critical view on virtue theory. Indeed, it anticipates a recent development in normative ethics and in particular the criticism that "cultivating virtue [understood as dispositions towards a certain stable pattern of behaviour] is the best way to make citizens behave, on the grounds that it is an ineffective method by which to secure desired patterns of behaviour from citizens."[19] The focus on cruel actions rather than on cruel persons can appeal to this critical position on the effectiveness of dispositions.

In sum: it may be that for Shklar the concept refers first and foremost to persons. Yet, irrespective of what the correct interpretation is, I think that cruelty as a predicate of actions is the more relevant notion given the overriding goal to develop a liberalism from below. This does not mean that it is

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[17] Arendt (1963: 276).

[18] See Hollander (2016: 57). Milgram (1974) writes: "after witnessing hundreds of ordinary people submit to the authority in our experiments, I must conclude that Arendt's conception of the banality of evil comes closer to the truth than one might dare imagine."

[19] McTernan (2014: 85). In normative ethics, the most important texts are Doris' *Persons, situations, and virtue ethics* (1998) and Harman's *The nonexistence of character traits* (2000).

not an interesting question what a cruel person is.[20] Rather, it means that it is less important for the purposes of this dissertation.

§3 Intellectual history (1)

I now turn to conceptions of cruelty throughout intellectual history, in particular to Seneca, Augustine, Aquinas and Montaigne in this section, and to more recent contributions to the topic in the next one. My aim is to offer an overview of the main controversies regarding the concept, not only to show that it is not just evident what cruelty is, as one might argue, but also because this will provide insights into the structure of the concept.

Seneca was the first philosopher to study the concept as a subject – and indeed a very influential one. In his essay *De Clementia*, addressed to the young emperor Nero who was his student, he defines cruelty as the "grimness of mind in exacting punishment."[21] Seneca also gives a definition of grimness as the absence of mercy where mercy is understood as "moderation that remits something of a deserved and due punishment."[22] Yet, he denies that enjoying

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[20] It seems to me that the best theory to date can be found in Luke Russell's discussion on how evil actions and evil persons relate to each other (2014, Chapters 7 and 8), assuming that what is true of evil is also true of cruelty. According to his account, an "evil person is someone who is markedly likely to do evil when he is allowed to do what he wants to do, and whom we cannot easily change into a good person by using everyday techniques such as moral reasoning."

[21] Seneca (1995: 160).

[22] ibid.

the suffering of others is a necessary element of cruelty.[23] This grimness manifests itself in an excess of punishment, more precisely of "punishment that goes beyond the limits established by natural law."[24]

This conceptualization specifies a dyadic structure of the concept. What is necessary for an account of cruelty is (i) a description of the mental states of the perpetrator and (ii) a description of the behaviour that is involved. Regarding (i), the experience (such as delight or gratification) is not relevant for an act to count as cruel, but the absence of mercy is. Regarding (ii), only punishment is seen as the domain of cruel actions; and punishment is in fact cruel only if it is excessive, for instance when it goes beyond the legitimate purposes of punishment.[25]

Aquinas and Montaigne do away with the dyadic structure. Aquinas' work on the concept in the text *De Crudelitate* is presented as a direct response to Seneca whom he is quoting extensively throughout.[26] He agrees that cruelty applies to punishment only; but he denies that the behaviour should be considered at all in determining whether an action is cruel. Instead, the brutality of mind is all that counts. As Baraz notes, "Aquinas deals exclusively

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[23] ibid: 161.
[24] Barrozo (2008: 71).
[25] See Barrozo (2008: 79) for an expanded study of what else in Seneca's view amounts to a transgression of the limits of natural law.
[26] To be found in his *Summa Theologiae* (2006), see the treatise on the theological virtues, question 159.

with intentions [...]. [The definition] refers solely to the psychology of the perpetrator."[27]

Montaigne makes the opposite move to the one by Aquinas: For an act to count as cruel, what matters is what a person does to another. It is not that intentions are irrelevant for the moral evaluation of cruel acts, for example in the case of "murder for sheer fun, [...] not from hatred or for gain, but for the sole purpose of enjoying the pleasant spectacle of pitiful gestures and twitchings of a man in agony."[28] This is the "farthest point that cruelty can reach."[29] But it is not necessary to know what goes on in the mind of the perpetrator to determine if an act is cruel. He thus writes: "Even in the case of justice itself, anything beyond the straightforward death penalty seems pure cruelty."[30]

This debate between Seneca, Aquinas and Montaigne gives rise to a vital question regarding the structure of the concept: Is both (i) a description of mental states of the perpetrator (such as intentions) and (ii) a description of the behaviour involved necessary to count an action as cruel? Or is either of the two sufficient?

Despite the disagreement on this question, it should be noted that all three agree that cruelty is an interpersonal concept, i.e. that it describes how

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[27] Baraz (2003: 22).
[28] Montaigne (2001: 484).
[29] ibid.
[30] ibid: 482.

one person treats another. But according to Augustine, it refers first and foremost to self-inflicted harm and is in this sense not an interpersonal concept.[31] Centuries later, Nietzsche will affirm this self-regarding view on cruelty in his criticism of religion and Kantian ethics. He declares that living up to the ethical doctrine is to treat oneself in a way that is "intrinsically cruel, indeed sadomasochistic."[32]

Moreover, Augustine also has a different view than Seneca on what behaviour needs to be involved in cruel actions. Seneca is mainly concerned with extreme physical violence in punishment. In contrast to this, Augustine maintains that cruel acts amount to "actions that harm the soul and impair its prospects for salvation."[33] And Montaigne presents an account that goes even further, arguing that "more mundane *everyday* activities, such as hunting" can be cruel, too.[34]

Overall, this brief survey of intellectual history from late antiquity to the early modern period reveals three main questions that an analysis of the concept of cruelty should address: What is the structure of the concept? Is

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[31] Augustine (1972). See Baraz (2003: 16).

[32] Baier (1993: 448). Nietzsche speaks in *On the Genealogy of Morality* (1994: 88) for instance of "cruelty towards themselves, imaginative forms of self-mortification." Also see Baraz (2003: 193) who argues that there is a continuity between Nietzsche's and Christian conceptions.

[33] Baraz (2003: 16).

[34] Baraz (2003: 31). Emphasis mine.

cruelty an interpersonal concept? And if the infliction of harm is a necessary feature, what does harm involve?

§4 Intellectual history (2)

Baraz maintains that modern and contemporary approaches "make use, sometimes inadvertently, of the ancient, medieval, and Renaissance conceptions of cruelty" and more specifically that "general philosophical discussions are extensions of Montaigne's treatment of the issue."[35] If this was correct, it would follow that there had been a convergence and that the concept has become less contested over time. So it is worth to briefly examine this claim.

Baraz presents Shklar's view on cruelty as well as MacKinnon's elaboration of Shklar's view as evidence for this point. But I find this misleading. In the early text to which MacKinnon refers, Shklar defines cruelty as the "wilful inflicting of physical pain on a weaker being in order to cause anguish and fear."[36] As can be seen, not just the infliction of pain is relevant but also that the action is wilful. MacKinnon notes: "the action must have been desired and deliberate."[37] Thus Shklar's view is in this important respect closer to Seneca's than to Montaigne's, given that she regards both as essential: a description of the state of mind and of the behaviour that is involved.

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[35] Baraz (2003: 193).
[36] Shklar (1984: 8).
[37] MacKinnon (1989: 328).

The two important contributions to the topic by Philip Hallie and John Kekes, which Baraz does not discuss,[38] also undermine his claim. On the one hand, Kekes writes that cruelty is "the disposition of human agents to take delight in or be indifferent to the serious and unjustified suffering their actions cause to their victims."[39] This shows that dispositions are of primary importance for Kekes, not the specific behaviour that emanates from them. This brings Kekes' view closer to Aquinas than to Montaigne.

On the other hand, Hallie's book, first published in 1969, defends as the main hypothesis that cruelty involves a particular relationship between the perpetuator and the victim. The clearest expression of the hypothesis is this: "cruelty involves a power-relationship between two parties (where we take power to mean the speedy overcoming of resistance, in analogy with its definition in physics); one party is active, comparatively powerful, and the other is passive, comparatively powerless."[40] I will discuss this suggestion in §14; for the moment I just want to bring out that this is an original idea that is not obtainable in intellectual history. What Hallie presents here is a third structural element of the concept alongside the description of (i) the mental states of the perpetrator and (ii) her behaviour.

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[38] Though Baraz (2003: 188) does mention Hallie in a footnote.
[39] Kekes (1996: 838).
[40] Hallie (1982: 34).

In sum, contemporary analyses of cruelty are more diverse than Baraz thinks. There is disagreement regarding fundamental questions which shows that there is need for further examination.

§5 The structure of the concept

I suggest that the concept of cruelty has a quadruple structure. Two of the components are brought out by Seneca: First, what I call the core of the concept is the description of the behaviour of one person towards another. I call it the core because, as I set out to show in Chapter 3, it is morally the most salient feature of cruel acts. Second, a satisfactory definition must also attend to the state of mind of the perpetrator. This may involve for instance an account of mental states such as emotions, beliefs, intentions, dispositions, desires and others.

This conception so far overlaps roughly with Kathleen Taylor's recent analysis of the concept. Her definition centres on two axes: "the perpetrator's motifs and behaviour, and the victim's status and experience."[41] Although the labels here seem to suggest a different understanding than the two components I just highlighted, a closer look indicates that there is a convergence. On the first axis, her question is whether the act is gratuitous, voluntary, intentional, which I take to amount to a description of the state of mind of the

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[41] Taylor (2009: 22).

perpetrator. On the second axis, the important feature is that the behaviour brings forth suffering. In the terminology I suggest, this counts as a description of the behaviour of the perpetrator, where the behaviour is examined in terms of the effects on the victim.

Taylor also adds a third axis to this, namely an observer who makes a moral judgement about the scene. She writes: "cruel behaviour often, though not always, affects observers, evoking disgust directed at the perpetrators and empathy [...] for the victims."[42] But this point seems problematic to me, and one reason for this is that Taylor does not put the judgment of the observer as a necessary feature of cruelty, acknowledging that cruel behaviour does not *always* evoke an emotional reaction. I think that this is correct: Behaviour can be cruel even if there is no person who in fact observes the act and can thus judge, or if the person present is a bystander and even rejoices at the act committed.

Taylor might respond to this as follows: even if, as a matter of fact, it is not always the case that it affects observers, it would always be the case if we imagine an observer with a particular mind-set looking at the scene. But this counterfactual would lead to a circular reasoning: it would assume a suitably sensitive person to show that the scene evokes certain emotions. In other

[42] ibid.

words, this response would assume what it wants to show. Hence I leave aside what Taylor suggests as the third component.

Instead, I suggest that the third component of the concept is an account of the interests of the victim, and the fourth one is, following Hallie, a description of the relationship between the perpetrator and the victim. So unless we have certain information about the victim, and this goes against the view handed down by Seneca and Montaigne, it does not seem to be possible to ascertain whether an act is cruel.

§6 First Criterion (1) – other theories

The core of the concept of cruelty is an account of the behaviour involved, and more precisely: of the impact the behaviour has on the victim. I now examine three different accounts that can be found in the literature, first turning to Shklar's theory. In *Ordinary Vices*, she defines cruelty as the "wilful inflicting of physical pain on a weaker being in order to cause anguish and fear."[43] And on the ready-cooked account she offers in *The Liberalism of Fear*, cruelty "is the deliberate infliction of physical, and secondarily emotional, pain upon a weaker person or group by stronger ones in order to achieve some end, tangi-

[43] Shklar (1984: 8)

ble or intangible, of the latter."[44] For Shklar the behaviour involved in cruel acts is thus the infliction of pain.

A similar theory is presented by Taylor, who argues that "cruelty is behaviour that causes suffering."[45] And she explains that suffering is a form of harm comprising both physical pain and psychological distress, which may for example be caused by the infliction of fear, grief or depression.

Shklar and Taylor observe correctly that the infliction of suffering and pain can be cruel: enforced nudity can be harsh just as whipping, denailing or the drilling of body joints. But it does not seem that either the infliction of pain or of suffering is a necessary feature of cruelty. For example, an instant killing may well be cruel even if it does not involve any pain or suffering at the side of the victim. In view of that, these theories are flawed on a rather fundamental level.

It is thus worth looking at Hallie's account according to which "cruelty involves maiming of a person's dignity, crushing the person's self-respect."[46] He reiterates this point in his article for the *Encyclopaedia of Ethics*: "The depths of an understanding of cruelty often lie in the depths of an understand-

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[44] Shklar (1989: 29). Note how imprecise Shklar's definition is, since a teacher who causes some emotional distress to her students by way of exams would count as cruel, just as a wrestler who has his opponent in a headlock. Obviously, both do not commit what Shklar means by the worst of all evils.
[45] Taylor (2009: 23).
[46] Hallie (1982: xvi).

ing of human dignity."[47] Dignity is conceptualised as self-respect, as also his example of excremental assaults shows,[48] where the loss of dignity implies the loss of the sense of being human.

The maiming of dignity may as well be understood in a different way. Sussman for instance holds that torture "fails to respect the dignity of its victim", the central point being that the pain induces a particular form of self-betrayal, the turning of the victim against herself.[49] To be fair, Sussman does not intend this in any way as an insight into cruel acts. Yet I mention it here to investigate how Hallie's theory would fare if the maiming of dignity was conceptualized in different terms.

The issue with Hallie's view is that the maiming of dignity, be it understood as the violation of self-respect or the infliction of self-betrayal, is not a required feature of cruel acts. Again, the worry is that self-betrayal requires a self that "finds herself actively, if reluctantly, participating"[50] in the infliction of pain, which is not in place in the case of instant death. Likewise, self-respect is a moral relation of persons to themselves, a form of valuing that presupposes a self that is capable of evaluating, which a corpse is not. So Hallie faces the same objection as Shklar and Taylor.

This brings me to the third position presented by Kekes who claims that

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[47] Hallie (2001: 361).
[48] Hallie (1982: xvii).
[49] Sussman (2005: 19).
[50] Sussman (2005: 20).

cruel actions involve the violation of some kind of deliberative and reflexive agency. He proposes that "cruelty is the disposition of human agents to take delight in or be indifferent to the serious and unjustified suffering their actions cause to their victims"[51] and he goes on to explain, this being the decisive point, that the act must "harm the victim in a way that endangers the victim's functioning as a full-fledged agent."[52]

In contrast to Hallie's and Shklar's theories, this view does allow to regard an instant killing as cruel. For it seems intelligible to state that death pulverises deliberative and reflexive agency, that it is defeated in a most radical manner. However, although Kekes takes care of this problem, he faces another one: brutal acts against non-human animals, such as tearing a kitten's head off,[53] are forthright cruel (on an intuitive level) but do not violate deliberative and reflexive agency, assuming that this characteristic cannot be attributed to most non-human animals in the first place. His definition is thus implausible, too.

In conclusion, the three theories of cruelty presented by Shklar, Hallie

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[51] Kekes (1996: 838).
[52] ibid: 837. A graphic description of this effect can be found in Murphy's (1979: 233) account of torture: "Sending painful voltage through a man's testicles to which electrodes have been attached, or boiling him in oil, or eviscerating him, or gouging out his eyes – these are not human ways of relating to another per son. [The victim] could not be expected to understand this while it goes on, have a view about it, enter into discourse about it, or conduct any other characteristically human activities during the process [...]."
[53] In fact, it is very common to speak of animal cruelty. See, for example, Regan (1980).

and Kekes do not bring out a necessary feature of cruel acts. It thus remains an open question what kind of behaviour cruel acts involve and what the core feature amounts to.

§7 First Criterion (2) – A narrow focus

As the previous discussion shows, defining cruelty is not a simple task and I must admit that I do *not* know what exactly it is that someone must do to another person to trigger the judgement. Hence, I shall not attempt to present a criterion that is a feature of all cruel actions. Rather, I will select a *narrow* focus in the sense that I will pinpoint a criterion that is a feature of a particular subclass of cruel actions.

To explain: Cruelty is often regarded as a so-called thick concept which means that it has "both evaluative conceptual content, for [it] seem[s] to be essentially keyed in to approval (and disapproval), and descriptive conceptual content, for [it] help[s] to give us a specific idea of the character of the person or action so characterised."[54] This means that the judgment that X is cruel always involves a moral judgment. It is presumptively bad. This seems to be true to me and I shall take it as granted throughout this chapter.

Yet, the evaluative content is not always the same. There are cases of severe or extreme cruelty, in which case the concept has strong evaluative

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[54] Kirchin (2013: 1). Väyrynen (2013) for example lists 'cruel' as a thick concept. The idea of a thick concept originally comes from Bernard Williams (2011).

content: it involves strong moral condemnation. But there are also cases of more minor cruelty, in which case it has a weaker evaluative content. This is not to say that the concept falls into two strictly separable classes. Rather, the observation is that the evaluative content can vary on a continuum between strong and weak.

For instance, Shklar writes that cruelty is the "deliberate infliction of physical, and secondarily emotional, pain upon a weaker person [...]" and that it is an evil "which all of us know and would avoid if only we could."[55] The concept is ascribed strong evaluative content for it is keyed in to strong (moral) disapproval. However, the concept can also cover petty slights, snubs and other less severe harms. In such cases it is keyed in to less harsh moral disapproval and has weaker evaluative content.

In providing an account of the behaviour involved in cruel acts, I won't propose a criterion that is present in all acts that would be judged as cruel in everyday language. Instead, the aspiration is to suggest a feature in order to pick out a subclass of cruelty with strong evaluative content.

The reason for this narrow focus is the following: The concept will later be plugged in to the Priority Claim which stipulates that the protection of the potential victims against the exertion of violence is of first political priority.

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[55] Shklar (1989: 29).

For this claim to be plausible, the concept has to have a certain moral gravity. If it did not, the claim would be a non-starter.

§8 First Criterion (3) – The proposition

The criterion I propose states that an act must exert a drastic force on another person. In turn, I take this to mean that an act must involve the invasion of the other person's mental life; and to be even more precise, the substantial obstruction of one's capacity to form mental states.

Three notions are central as part of this criterion. First, what I mean by obstruction is that the behaviour gets in the way of a certain capacity, i.e. that it exerts a disabling force. Suppose for example that A inflicts severe pain on B. Scarry describes it as a process in which the pain "overflows into the spaces before his eyes and in his ears and his mouth."[56] So the pain gets in the way of the aptitude to see, hear and speak. Likewise, it has a disabling force on the capacity to form mental states.

Second, the behaviour has a *substantial* effect. Kramer's description of the experience of severe pain helps explain what this entails. He writes that the victim "might be aware of some other matters and might be able to deal with them to some degree, but the shrieking intensity of the pain inexorably

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[56] Scarry (1985: 36).

draws her attention primarily to the pain itself."[57] Likewise, the person subject to a cruel act might be able to form some mental states, so the behaviour need not be disabling to the full extent, but it must impair the capacity to a drastic extent.

Third, the term 'mental states' refers to states such as: belief, desire, hope, fear, love, hate, aversion, liking, disliking, doubting, elation, sorrow, grief, guilt, joy, irritation, anger, affection, wanting and admiration. Moreover, it refers to states such as contempt, respect, intention, wishing, forgiveness, imagining, fantasising, aspiring, disappointment, lust, pleasure, abhorrence and amusement.[58] Hence, the capacity to form mental states boils down to the ability to form e.g. a belief of X, the desire for Y or an intention to do Z.

The criterion then states that an act must involve a drastic impact on someone else where drastic is understood as a particular effect on the other's inner life. I just want to emphasise again that this not presented as a necessary feature of all cruel acts but rather as a demarcation criterion to pick out a certain set of cruel actions. I should also add the argument in support of the moral significance of this criterion has to wait until Chapter 3. Meanwhile, I shall assume that this is the case.

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[57] Kramer (2014: 169).
[58] I take the list of mental states from Searle (1983: 4).

§9 First Criterion (4) – Two examples

Having presented the criterion, I now would like to indicate what phenomena it subsumes under the category of cruelty with strong evaluative content. In this short section, I highlight two kinds of action: torture and murder.

I start with torture. Consider the following two conceptions: Sussman writes that "it is almost impossible to reflect, deliberate, or even think straight when one is in agony. When sufficiently intense, pain becomes a person's entire universe and his entire self, crowding out every other aspect of his mental life."[59] And Kramer observes that "one's excruciating pain thrusts aside one's other concerns as it clamorously absorbs attention to itself [and] crowds out everything else in someone's psyche as its own horrible pulsing stymies her awareness of anything else."[60] These two accounts bring out the absorbing nature of pain and with it comes the obstruction of the capacity to form mental content. Torture thus meets the criterion and falls under the subclass of cruel acts.

The second case is murder: The invasion of one's mental life is visible as a feature just as it is in torture, though the capacity to form mental content is not only curtailed to a substantial degree but to an irreversible and absolute extent. The parallel between death and extreme pain is also pointed out by Scarry: "The pain so frequently used as a symbolic substitute for death in

[59] Sussman (2005: 14).

[60] Kramer (2014: 162).

the initiation rites of many tribes is surely attributable to an intuitive human recognition that [excruciating] pain is the equivalent in felt-experience of what is unfeelable in death."[61] In light of that, murder meets the criterion and falls under the subclass of cruel acts, too.

§10 First Criterion (5) – More examples

An advantage of the criterion I suggested is that it demarcates a class of actions that involve not only severe physical harm but also severe psychological harm. By physical harm I refer to the injury of another person's body or of his organs, and by psychological harm I refer to the manipulation of emotions and feelings (without injury, that is), causing psychological phenomena such as grief, shame and fear, but also such as a yearning for sleep and nutrition. In this section, I highlight four kinds of psychological harm.

I start with the shattering of self-respect. The playwright Gustav Strindberg presents an interesting and arresting scenario in his essay entitled *Soul Murder*:

In the city of X a great actor was recently murdered in the following way. He and a theatre director had been rivals over a girl, and he had been preferred. Subsequently, the actor was enticed by the director into signing an extremely attractive ten-year contract. The first year he was given no roles. The public believed he was losing his talent. The second year he got one that did not suit him, and he failed. After which he was given no more roles. He was beaten. Then the director introduced a younger man, whom he immediately dubbed a great star through advertising, accustoming the public to him while the other

[61] Scarry (1985: 31).

was being buried. The latter then broke his contract; was brought to court; lost his reputation as a man who did not keep an agreement; and received not further engagements. He was murdered![62]

What is interesting for the purposes of this section is Strindberg's interpretation of the narrative:

From purely physical (imprisonment, torture, death), the struggle for power has gradually developed into something more psychological, but no less cruel for that [...]; nowadays one creates a majority against [an adversary], prevails upon him, exposes his intentions, ascribes to him intentions he does not have, deprives him of his livelihood, denies him social standing, makes him look ridiculous – in short, tortures him *to death* by lies or drives him insane instead of killing him.[63]

Note that Strindberg describes the actions of the theatre director as murder; the expression "torturing to death" is particularly revealing, for it captures how his behaviour transfixes the mental life of the actor and thus curtails his capacity to form mental content.

The infliction of extreme fear is no less drastic: Consider the situation of the protagonist in Sartre's *The Wall* when he learns that he is to be shot the next morning. Scarry notes that his fear of death manifests itself in a state of mind in which "the objects of consciousness from the most expansive to the most intimate, from the realm of personal memories to the most abiding objects of love and belief – all in one patient rush are annihilated."[64] The point

[62] ibid: 67.
[63] ibid: 66. Emphasis mine.
[64] Scarry (1985: 32). Interestingly, Shklar (1986) was very critical of her work and wrote in the *London Review of Books* that the "account is so wholly devoid of historical evidence and political information as to be worse than useless. It is all speculation." In

here is that the fear of death is so absorbing that his aptitude to form mental states is drastically curtailed.

What is true of fear is also true of intense yearning and alienation. Scarry gives a vivid description again, writing that a "state of consciousness other than pain – such as desire – will, if deprived of its object, begin to approach the neighbourhood of pain, as in [...] prolonged, objectless longing."[65] In a later passage, she draws the same parallel between alienation and pain. Looking at the working class during the 19th century British factory world and at slavery in the American South, she finds that the working conditions involve a "degree of aversiveness in which [the horror] indeed begins to be identical with physical pain."[66] This is to say that is has a similarly paralysing impact on the mind.

Now imagine the following scenario: Jill is deeply traumatised because her own mother left her recklessly when she was young. Michael knows this and also that she breaks down mentally when Pink Floyd's *Mother* is played to her. Suppose that Michael is angry with her and puts the song on to hurt her.

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her view, "Scarry's 'reading' of torture suffers from Lit Crit unintelligibility," and that treating the subject "as irresponsibly as Scarry does is so offensive." Despite the flaws her book might have, I think that specifically her account of the effects of extreme pain is ingenious and helps arrive at an adequate conception of cruelty. Swenson (2012: 13) develops an account similar to Scarry's, though he does not reference her, in which he speaks of the power of pain as "invading" one's inner life.

[65] ibid: 166.

[66] ibid: 170.

Such cases of mental breakdown can too be seen to meet the criterion and hence fall under the subclass of cruel acts.

The examples given in this section showcase what kind of phenomena fall under the subclass of cruel actions. The vital point is that there is a *range* of actions that fall under the subclass that can involve the infliction of physical and psychological harm.

§11 First Criterion (6) – Difficult cases

I now look at three further classes of phenomena where drastic impact is less visible as a feature. I argue that the first two meet the criterion nonetheless and qualify as cruel in the relevant sense, whereas the last one does not.

First, there are cases in which the individual who is subject to harmful behaviour is not *aware* of it (because she is unconscious, ignorant, immature, intoxicated, deceived, etc.). One example is unconscious rape, another one is degrading humiliation when the victim is not able to grasp the meaning but others in her social environment are. Imagine a person who has the delusion that she is a terrific singer even though she is terrible. Suppose others are aware of this and invite the delusional person to sing in front of a crowd, to the great mirth of those who witness it.[67]

This does not seem to involve a drastic impact as conceptualized above.

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[67] Thanks go to Gideon Elford and Stuart White for suggesting this case.

And yet, it is also true that the singer *would* perceive the situation as degrading (with severe impact on her self-respect) if she was to "wake up" and realize that others are bringing her into derision. So even if the action does not cause the *actual* invasion of one's mental life, it is evident that the behaviour *would* have had a certain effect on the victim had she not been unconscious, ignorant, immature, intoxicated, deceived, etc. In turn, this implies that the behaviour exercises a drastic force. To put it differently: If we think that such behaviour *would* have had a certain effect, it must be the case that we ascribe a certain force to such behaviour.

Second, there are cases in which the person who is subject to harmful behaviour is particularly resilient. Consider the following two: (1) a spouse leaves a note for her partner and children letting them know that she will never return home; (2) a parent hosting her child's birthday party gives party bags to all children except one, and publicly declares to everyone that this one child will not get a party bag.[68] Suppose that the affected people are somewhat sad but nothing more.

It seems that the actual invasion of one's mental life is not part of the description. But note that in such cases the behaviour *is likely to have* a certain impact (i.e. shattering, especially on children who are particularly vulnerable) on the persons affected. It would normally do so. Again, this implies that

[68] Again, many thanks to Gideon Elford and Stuart White for suggesting these cases to me.

the behaviour exercises a drastic force. In other words: If we think that such behaviour is likely to have a certain effect, it must be the case that we ascribe a certain force to such behaviour.

Third, there are cases in which the behaviour is simply less violent or harmful. Suppose that A saves up money for a new jacket and then B, knowing this, makes fun of it. It seems that this may be seen as cruel in ordinary language. However, the behaviour neither has a drastic impact on the other, nor is it likely to have such an effect. Accordingly, such cases, though they might be considered cruel, do not meet the criterion and hence do not count as cruel in the *narrow* sense.

§12 Second Criterion: Moral Responsibility

So far I have looked at one component of cruel acts, and even if this gives us an important building block, it obviously does not cover all there is. For example, euthanasia or an emergency amputation in the field without anaesthesia count as cruel under the current definition because such acts involve the invasion of one's mental life. This means that the definition is too capacious as it stands. In view of that, the first criterion needs to be complemented with a description of the conditions under which the behaviour occurs.

In this section I start with the first of three conditions, an account of the state of mind of the perpetrator. Various theories have been suggested,

which I discuss and reject one by one. I argue that what is necessary is that moral responsibility can be attributed to the person.

First, Mayes argues that the perpetrator must be "rewarded by the perception of injury" and that cruelty should thus "be defined in terms of psychological dispositions (e.g. pleasure)."[69] Nell has a more capacious conception than Mayes; he writes that the perpetrator's inner world can range "from instrumental cruelty, marked by [...] emotional coldness and distance from the victim, to expressive or affective cruelty, marked by the perpetrator's escalating arousal."[70] What these two authors share here is that they regard a certain *emotional* state as essential for cruel acts.

Yet, this does not seem plausible. Imagine that a mother sacrifices her daughter during a religious ritual, but that she is horrified and weeps bitter tears over the body of her daughter. This is palpably cruel and yet it is not the case that the behaviour is pleasurable in any sense or exhibits emotional coldness. More to the point: the perception of injury here is neither marked by gratification nor by indifference. Therefore, a particular uninvolved emotional reaction is in fact not necessary for an act to be cruel.

A second theory can be found in Kekes' discussion of the view defended by Hallie that people can be cruel to each other without explicitly intending to hurt. He rejects this position and argues that the intention to hurt is

[69] Mayes (2009: 31).
[70] Nell (2006: 213).

necessary to distinguish between "cruelty and justified punishment, painful therapy [etc.]."[71]

Now consider a further example presented by Kramer: A doctor akin to Josef Mengele abducts some people and carries out hideous medical experiments on them without any anaesthetics or other palliatives. [72] Yet, he is not deliberately seeking to make his victims suffer. Instead, he is simply opting to save considerable funding and time. This is clearly a cruel act but one that does not involve the intention to hurt, which shows that this intention is not necessary for an act to be cruel.[73]

A third view is presented by Hallie who argues that the perpetrator's state of mind is not relevant at all to determine whether and act is cruel or not. It is worth quoting the passage:

> A man can be cruel without having cruelty as his main or even his subsidiary aim. He can be cruel by omission and by commission – all at once. He can disregard the victim in a sincere desire to do something good at (at least for himself), something whose goodness is more important to him than is the maiming his bringing about [...]. The main thing is that the maiming is done.[74]

In response to this: suppose a patient goes to a routine check-up at her local clinic. While the doctor examines his left arm, twisting his underarm

[71] Kekes (1996: 840). A clear expression of this position can also be found in MacKinnon (1989: 328): "The agent must wish to cause harm, and he must act in a manner which he calculates will cause such harm."
[72] Kramer (2014: 75).
[73] This claim is also defended by Hallie (1982: 13).
[74] ibid.

slowly, he suddenly screams in pain and faints. The infliction of pain is an accident and the doctor does not have the intention to cause it. Is this cruel? My intuition is that it is not. And if this is true, it follows that "maiming" the person is not sufficient for an act to be cruel.

One might now be inclined to think that the knowledge of the harmful effect is in fact necessary. The doctor in this case does not know that he is inflicting the pain, and it might be thought that it is this fact that sets the case apart from the other cases where the mother sacrifices her child and the doctor carries out hideous medical experiments. But I think that this criterion would have counterintuitive implications: it would not allow us to call a sadistic person cruel if that person lacks the aptitude to understand and share the feelings of another. Neither would it allow us to call a father cruel who forgets his toddler in a car at the height of summer and the child suffocates as a consequence.

In view of the problems these theories face, I now propose a different theory, namely that we need to know the information about the perpetrator that allows us to attribute to her moral responsibility for the effect on the victim. This raises the difficult question when exactly a person can be attributed moral responsibility, which is a matter of fierce dispute in moral philosophy. A widely held view is that some sort of control over the consequence is suffi-

cient for the attribution of moral responsibility.[75] However, it also thought that control is not necessary. Sher for instance points out that moral responsibility can be ascribed when "a person acts wrongly or foolishly because he has forgotten or lost track of some crucial element of his situation, cases in which he does so because he exercises poor judgment, and cases in which the problem lies in his lack of moral insight or imagination."[76]

To be more concise: What I suggest here is that we need to know the information about the perpetrator that allows to attribute to her moral responsibility for the effect on the victim.[77] Depending on the account of moral responsibility, this then implies that an act is cruel only if the perpetrator has control over the effect on the victim or he acts foolishly or wrongly, for instance because of a lack of moral insight.

The advantage of the view is that it explains the difference in judgment about the cases I present above. On the one hand, the mother who sacrifices her child for example can be attributed moral responsibility for the impact on the victim, given that she has control over it. The same is true for the father who forgets his toddler in the car, but for another reason: he has lost track

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[75] For example, see Fischer & Ravizza (1998), especially Chapter 4.

[76] Sher (2006: 286).

[77] In fact, it occurs that the perpetrator need not necessarily be a single agent but can also be a group agent. In this case, we need to know the information about the group agent that allows us to attribute to it moral responsibility for the effect on the victim. What qualifies as a group agent is deeply contested. The perhaps best account on the question when group agents can be held responsible can be found in List & Pettit (2011).

of some crucial element of his situation. On the other hand, the doctor who causes excruciating pain to his patient but where that is an accident cannot be held responsible. This difference seems to explain the intuition that the former cases are cruel while the latter is not.

One might now respond to this that there are cases in which a person is responsible for the infliction of severe pain but where the act is not cruel. Suppose for example that the doctor who twists his patient's arm could have anticipated the infliction of extreme pain had he not thought mistakenly that he was treating another patient. I agree that the doctor is morally responsible for the pain, but it is not clear to me that the act is not cruel. The intuition that it is not seems to be driven by the intuition that the practice of slowly twisting an arm is not cruel. But the case has the same relevant features as the case where a father forgets his toddler in the car,[78] and if that is seen as cruel, then the behaviour of the doctor is cruel, too.

Overall, the position I advocate here is a middle position in the debate between Hallie and Kekes. On the one hand, an account of the state of mind is needed in order to ascertain moral responsibility, which goes against Hallie. On the other hand, I argued in response to Kekes that the explicit intention to hurt is not necessary. The pain will be intentional most of the time – whenever

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[78] The severe effect is due to losing track of some crucial element of the situation. Here is another parallel case: a doctor mistakenly administers a very painful chemotherapy though he should have known that the patient does not have cancer. The act is clearly cruel.

it is a means (as in the case of interrogational torture).[79] Yet it is not necessary that it be.

§13 Third Criterion: Against the interest of the victim

Having so far elaborated on two components of the concept, the invasion of one's inner life and moral responsibility, the definition is still overly capacious. A doctor can be held responsible for the pain during an emergency amputation in the field without anaesthesia, yet the act is not necessarily cruel. Neither is BDSM.

To exclude such cases, I want to suggest a second condition: the behaviour must be against the interest of the person who is affected in order to be cruel.[80] I need to be more precise at this point. Suppose that a doctor does not take reasonable steps to minimize the pain during an operation and that some of the extreme pain is in fact avoidable.[81] This act does not qualify as cruel on the basis of the criterion just suggested, given that the behaviour (all things considered) is still in the interest of the person. So what must be the case for an act to be cruel is that at least part of the mental impairment is against the

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[79] See Marcel Henaff's (2015: 13.) study of the concept of cruelty for an informative account of different intentions that bring forth cruel acts.
[80] A similar point is *en passant* mentioned by Taylor (2009: 23). In her argument for suffering as a necessary condition of cruelty, she argues that cruelty involves aversion: "A victim must experience harm as unpleasant." The problem with this view is that a medical operation that is unpleasant and yet in her interest would be counted as cruel.
[81] Thanks to Simon Caney for raising this point.

interest of the person affected. Vice versa, it is not cruel if all of it is in the interest of the person.

The best way to determine the interests of the victim is to examine if consent has been given. But actual consent is not sufficient; it is required that it is given under particular circumstances that Kramer summarizes succinctly: actual consent counts if and only if "the voluntariness of the agreement is not vitiated by factors such as coercion or deception or ignorance or immaturity or intoxication or senility or mental retardation."[82] And a second best option to determine the interests of the victim, in situations in which the person cannot speak for herself, be it because of manipulation or unconsciousness or intoxication, is to examine whether consent would have been given had she not been unconscious or intoxicated, etc.

§14 Fourth Criterion: Not for the prevention of a fatal threat

As I mention in §4, Hallie thinks that cruelty involves "a power-relationship between two parties (where we take power to mean the speedy overcoming of resistance, in analogy with its definition in physics); one party is active, comparatively powerful, and the other is passive, comparatively powerless."[83] Such an inequality-of-power-condition is also built into both of Shklar's definitions of the concept. In the *Liberalism of Fear* she states for example that

[82] Kramer (2014: 112).
[83] Hallie (1982: 34).

cruelty is the infliction of "pain upon a *weaker* person or group by *stronger* ones in order to achieve some end [...]."[84]

To motivate his position, Hallie argues that "the main difference between combat and cruelty is that combatants are relatively equal in power, but people involved in cruelty are not. An armed soldier's seizing a child from its mother's arms and smashing the child against a brick wall is an instance of cruelty, not of combat, mainly because of the immense difference in power."[85] Hallie's argument in support of the inequality-of-power-condition is thus that it allows to distinguish between combat and cruel acts.

To examine Hallie's position, it is helpful to distinguish between the problem he discerns and the solution he offers. According to him, the problem is that we need to distinguish between cruel acts and combat. But this is misleading because combat between two soldiers in a war may well be cruel, for instance when it involves mutilation. I think the problem is something else: A soldier might kill or hurt her enemy in combat without the act being cruel. The challenge is thus to find a criterion to distinguish between cruel combat and non-cruel combat.

I now turn to the solution he offers and ask whether the inequality-of-power-condition is a plausible criterion. To see this, suppose a robber breaks into a jewelry store with the intention to torture the owner and to extract the

[84] Shklar (1989: 29), emphasis mine.
[85] Hallie (2001: 362).

combination of the safe from her. He wants to employ a pain-inducing device, but the owner is on guard: she fights back for many hours and defends herself vigorously, though in the end she falls victim to the robber. This example refutes Hallie's criterion, for the torture can be seen as cruel albeit a quick overcoming of resistance did not precede.

Hence, the problem how to distinguish between non-cruel and cruel combat remains. At this point it is instructive to turn to the debate on whether helplessness at the side of the victim is a necessary condition for torture. As Kamm notes, two terms are often confused in the literature: helplessness and unthreateningness.[86] Likewise, I think that Hallie confuses inequality-of-power with unthreateningness. The point is not that the other person must be weak in whatever sense, but rather that he does not pose a fatal threat to one's own life or the life of others. Vice versa, if a person does pose such a threat, the action *necessary* to eliminate the threat is not seen as cruel.

What I mean by necessary in this context is that the force must not go beyond fulfilling the purpose of eliminating the threat. Where it goes beyond that purpose, the act can be cruel despite the fact that prevents a threat. Think for example of a soldier who frenetically stabs his opponent in self-defense but also for the exhilaration of listening to his anguished cries.

[86] Kamm (2011).

This view has the advantage that it fits intuitions about various cases, for example the intuition that severe violence is not cruel if as an ultima ratio it protects one's own life in a war situation or it safeguards the life of others during a police raid. The updated definition of the criterion thus helps distinguish cruel and non-cruel combat.

Conclusion

Taking everything into account, the analysis leads me to the following definition of cruelty as a *thick concept with strong evaluative content*: an act is cruel if and only if

(1) X exerts a drastic force on another person (i.e. substantially obstructs the capacity to form mental content),

(2) this goes against the interest of the other person,

(3) moral responsibility can be attributed to X and

(4) the act is not necessary to prevent a fatal threat.

In cases where the other person is unconscious, ignorant, immature, intoxicated or deceived, we need to ask whether (1) and (2) would have been true had that not been the case.

Chapter 2

The Cruelty Principle: main features

Introduction

According to Shklar, liberalism requires that avoiding cruelty be a "norm of political practices and prescriptions."[1] Call this the Cruelty Principle. In this chapter I explore what the ideal entails.

Overall, I will bring out four features. The first two components I highlight are distinguishing features of this ideal: The Cruelty Principle (a) aims at avoiding certain emotional states and (b) eschews more comprehensive and loftier goals. Highlighting these two features serves the following purpose: One might be worried that the dystopian liberalism with the Cruelty Principle at its heart is not different from other theories of liberalism, given that other theories stipulate the absence of cruelty on some understanding of the term. This would be a problem because to be interesting the principle needs to be somewhat distinct and cannot simply reiterate other principles under a different banner. I want to allay this suspicion by indicating these two features in §15-§17.

[1] Shklar (1989: 30).

The third feature I indicate is that the Cruelty Principle delineates a relational ideal and an administrative ideal as opposed to an administrative one only, to use a pair of concepts Scheffler has introduced.[2] The point is that the principle does not only guide how the sovereign treats its citizens but also how individuals should treat each other: It characterises the structure of the relationship between people (§18-§21). This observation will have far-reaching implications, as I am going to show in the later parts of this dissertation, especially for the question what demands the principle places on individuals (which I address in Chapter 7).

These three features describe what the Cruelty Principle calls for. The fourth and final one I will bring out is a conceptual point on whether it is a principle of justice (§22-§23). This question is relevant because it has consequences for the argument to follow in the next chapter and in particular on how the Priority Claim is to be phrased. Moreover, I will argue in Chapter 6 that the principle applies to the informal structure and if the Cruelty Principle is in fact a principle of justice, this will force me to consider a string of counter-arguments in order to defend this proposition.

[2] Scheffler (2003/a).

§15 Similar principles

As Shklar puts it, liberalism requires that prohibiting the evil of cruelty be the "basic norm of political practices and prescriptions."[3] In the following three sections, I will bring out two features that distinguish her view from similar ones on the fundamental ends of politics. In this section now, I present the different views. I limit the focus to theories that according to Shklar contrast with her liberalism of fear, but also to theories that Rainer Forst identifies as similar to Shklar's liberalism, placing her in one camp with Hannah Arendt, Isaiah Berlin and Theodor Adorno.[4]

Let me begin with theories that according to Shklar contrast with her liberalism of fear: the liberalism of natural rights and the liberalism of personal development.[5] The liberalism of natural rights has its spokesman in John Locke and it looks to "the constant fulfilment of an ideal pre-established order, be it nature's or God's, whose principles have to be realised in the lives of individual citizens [...]."[6] Accordingly, "if the agencies of government have a single primary function, it is to see to it that the rights of individuals be rea-

[3] Shklar (1989: 30).
[4] Forst (2007).
[5] This contrast has proved influential. Both Dunn (1996) and Benhabib (1996) follow Shklar in this exercise to pinpoint the distinct element of Shklar's liberalism.
[6] Shklar (1989: 26).

lised, because our integrity as God's or nature's creations requires it."[7] Robert Nozick's political theory is perhaps the most influential contemporary iteration of such a liberalism.[8]

The liberalism of personal development, as advanced by Mill, does not see the securing of rights as the primary political goal, but rather the flourishing of individual freedom, that people can make the best of their potentialities. This is seen as essential for the development of both knowledge and morality. On Mill's view, "morality is impossible unless we have an opportunity to choose our courses of action. Nor can we benefit from education unless our minds are free to accept and reject what we are told and to read and hear the greatest variety of opposing opinions."[9]

Shklar compares the liberalism of fear with these two traditions, but it seems worthwhile to at least mention a third variant, namely the liberalism of autonomy. What characterises this tradition is the Kantian ideal of a free person as one whose actions are in some sense her own. Rawls' theory of justice, with the ideal of individuals who pursue their own conceptions of the good, can be seen as an exemplary contemporary version of this liberalism.[10]

All three of the above theories, and this is the crucial point, condemn

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[7] ibid.
[8] Nozick (1974).
[9] Shklar (1989: 27).
[10] See especially Rawls's *Kantian Constructivism in moral theory* (1980).

cruelty on some understanding of the term – just as the liberalism of fear does. To this end, Locke for example defends the natural right to life, Mill the harm principle and Rawls (among other basic liberties) the right to bodily integrity.[11] What the three traditions share is the absence of cruelty (again, on some understanding of the term), as an integral element of an ideal world. This is the crucial point since it asserts pressure on the liberalism of fear to show how the Cruelty Principle is distinct.

Shklar juxtaposes her theory with what she regards as other variants of liberalism, but she does not compare her view with theories that are closer to hers in the following sense: they also see the avoidance of the worst as the most important goal of politics. In his text tellingly entitled *The Republicanism of Fear,* Forst for instance emphasizes that Arendt's thinking is "in all of its facets is directed to the avoidance of the *Summum malum*."[12] Especially in *The Human Condition* one of Arendt's main aims is to design a bulwark against the

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[11] See especially *2nd Treatise* in Locke (1988); Rawls (1971) and *On Liberty* in Mill (1991).

[12] Forst (2007: 239), my own translation. Forst regards *The Origins of Totalitarianism*, in particular Part Three entitled *Totalitarianism*, as the key for the interpretation of her work. He argues convincingly that the bulk of her normative theory should be read as a vision to avoid various elements of totalitarianism she identifies in this part of the book. Honneth (2013: 14) also compares Arendt and Shklar in his recent preface to the German translation of the *Liberalism of Fear,* but unlike Forst he claims that on a substantial level Shklar and Arendt defend a liberalism "that could not be more different" (my own translation). It seems to me that Honneth overlooks that Arendt's normative ideal of a public sphere is, at least in part, geared to the more fundamental ideal that Arendt (1963: 233) puts as follows: "Humanly speaking, no more is required, and no more can reasonably be asked, for this planet to remain a place fit for human habitation."

worst, the relapse into social terror, and to this end she insists for example on the vital importance of what she calls action and on the preservation of a public space that allows for action.

Furthermore, Forst maintains that Arendt's and Shklar's views on the fundamental ends of politics are close to those of Berlin and Adorno. He does not elaborate on this observation,[13] but it is worth registering the principles he might have in mind. Berlin, who had lived through almost the entire century when he wrote his *Message to the 21st Century*, thus states that "the most important lesson to future generations is that the worst of all times, when the tyrants of the twentieth century trampled on the life [...] of millions, is never to happen again."[14] And Adorno, not least in his *Negative Dialectics,* writes that the barbarism of the Nazis imposes a "new categorical imperative" on individuals to arrange their thought and action that "Auschwitz would not repeat itself, [that] nothing similar would happen."[15]

This brief overview of theories reveals that there is a group of principles that are similar to the Cruelty Principle in the sense that the absence of cruel acts (on some understanding of the term) is seen as an integral element of an

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[13] He writes (2007: 230) that he *cannot* elaborate on this, presumably because of more pressing objectives he pursues in his paper.
[14] Berlin (2014).
[15] Adorno (1973: 365).

ideal world. The objective in the next two sections is to demonstrate that the principle is distinct nonetheless.

§16 First distinguishing feature: The relevance of emotions

The first distinct feature of the principle can be brought out with recourse to the conception of cruel acts I presented in Chapter 1, in particular with recourse to the point that putting people in particular emotional state can be just as cruel as the exertion of physical force (see §10). In line with this understanding, the principle stipulates the avoidance of a certain set of emotional states, e.g. the absence of wilfully inflicted extreme grief and shame, and of course: fear.[16] To quote Katrina Forrester: the Cruelty Principle extends "the scope of politics. For Shklar, feelings were not insignificant in the face of ideals and principles."[17]

This ideal sets the Cruelty Principle apart from the principle that Lockean natural rights be secured. Here are two examples: First, Walzer writes that the libertarian version of liberal politics with its focus on "individual autonomy, unlimited in its scope, gives rise to a pattern of domination: the strong over

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[16] It thus seems sensible to call her theory the liberalism of fear, given that it is particularly the avoidance of fear that distinguishes her theory from both the liberalism of personal development and of natural rights. It should be noted that Shklar herself does not specify the absence of other emotions as part of her ideal, but this follows from the understanding of cruelty expounded in Chapter 1.
[17] Forrester (2012: 6).

the weak, the rich over the poor."[18] And second, as Marx famously argues, labour in its various guises can alienate individuals.[19] The principle that natural rights be secured typically remains silent on these issues since they do not violate natural rights such as the right to life and the right to property. In contrast, the Cruelty Principle gives reason to confront domination where it produces severe existential fear for example, and alienation that, as Scarry puts it, begins to be identical with physical pain (see §10).

Calling for a certain set of emotional states also sets the Cruelty Principle apart from liberty principles (as the key component of the liberalism of autonomy) as well as from Mill's harm principle. To see this, suppose that a cartoon in a local magazine has a deeply agonizing effect on the members of a religious group. Now, Rawls' liberty principle stipulates that a great weight is put on the protection of freedom of expression.[20] The same is true of Mill's

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[18] Walzer (1996: 24) compares here the libertarian version with Shklar's variant of liberalism. I think he is correct that Shklar would reject certain patterns of domination, but I also think that the reason he gives is misleading. He writes that patterns of domination "open the way for cruelty", which might mean here that it makes it possible that people can be cruel to each other. Rather, I think that patterns of domination can themselves be cruel where they evoke certain emotional states such as existential fear.

[19] To my knowledge, the best conceptual account of alienation (including an investigation of Marx's view) can be found in Jaeggi (2014).

[20] One might argue, as Rae Langton (1990) does, that the value of freedom of expression can in certain cases be outbalanced by other liberal values such as equal concern and respect. This would imply that some version of the liberty principle recommends the same course of action in this case as the Cruelty Principle, which seems to undermine the distinctness of the Cruelty Principle. Yet, to undermine the distinctness of the Cruelty Principle, one would have to argue that the principle of equal concern and respect sets the same limits to the freedom of speech as the Cruelty Principle does. I do not

harm principle: Daniel Jacobson for example points out that the harm principle will not set limits to free speech just because a person is harmed by the statements of another.[21] In contrast, where the harm inflicted can be seen as cruel, the Cruelty Principle will recommend that such cartoons be banned at the cost of freedom of speech.

One might now object that this overstates the difference between Rawls' principle and the Cruelty Principle, given that his principle is supposed to protect self-respect, which is "perhaps the most important primary good."[22] So one might argue that Rawls' principle also recommends that such cartoons be banned. Even if this response was accepted, a crucial difference would still remain, i.e. that his principle does not protect people against certain emotional states such as grief and fear, though it might protect individuals against shame. This is because fear and grief do not inevitably lead up to violations of self-respect.

Finally, the emphasis on avoiding excruciating psychological force also renders the Cruelty Principle distinct from the principle to avoid the worst that can be found in the other theories of dystopian liberalism.[23] Benhabib writes:

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think that this is plausible, given that it is deeply contested what equal concern and respect means and it seems implausible that the most convincing interpretation is that on which it is coextensive with the Cruelty Principle.

[21] Jacobson (2000).

[22] Rawls (1971: 386).

[23] Shklar (1989: 27) herself writes that her theory "should not be mistaken for the obsessive ideologies which concentrate solely on the notion of totalitarianism."

"What is distinctive about Shklar's voice as an émigré political theorist, and what sets her so far apart from thinkers like Strauss and Arendt," and one may also think of Berlin and Adorno here, "is the lack of pathos with which she registered" the atrocities of the 20th century, her "restrained temperament".[24] I think that this difference in temperament explains that Shklar has a more capacious understanding of what the *summum malum* consists of. Her account goes beyond what would be considered crimes against humanity and factors in subtler psychological forces. This difference in temperament also explains what is meant by avoiding the worst and thus what is seen as the most fundamental end in politics.

§17 Second distinguishing feature: A nonutopian vision

Shklar writes that "intellectual modesty does not imply that the liberalism of fear has no content, only that it is entirely nonutopian" and I take this to be the second distinguishing feature of the Cruelty Principle.[25] It is nonutopian in the following way: the set of *inviolable* goals is a narrow one. Avoiding cruel acts is seen as such a costly and difficult task that does not leave much room for more comprehensive and loftier political ideals.

This contrasts with Locke's view according to which the right to life and

[24] Benhabib (1996: 58). Honneth (2013: 13) also emphasizes the difference in temperament between Shklar and Arendt.
[25] Shklar (1989: 26).

for example the right to property can coexist. Mill's harm principle protects people also from harm that is not necessarily cruel, and Rawls' first principle defines liberties such as the freedom of speech and assembly as inviolable. Forrester is thus correct in observing that the liberalism of fear calls for a significant narrowing of the normative possibilities of liberalism.[26]

This nonutopian character also puts Shklar far apart from Adorno's more comprehensive vision of the *right life* presented in his *Minima Moralia*, as Rahel Jaeggi maintains.[27] Adorno, who was a keen observer of his times, criticizes for instance that "one no longer learns to close a door softly, discreetly and yet firmly"[28] and that "humans are forgetting how to give presents",[29] which he counts as violations of the right life. Furthermore, his ideal also entails that people can show themselves as weak in intimate relationships without provoking indignation. According to Jaeggi, Adorno thus "calls for much more than the mere absence of hunger and cruelty."[30]

One might argue in response that Shklar's vision is not as nonutopian as she advertises it. In support of this one may point out, as Honneth does, that she defends citizenship rights, as well as equality of opportunity and even a

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[26] Forrester (2012: 6).
[27] Jaeggi (2005).
[28] Adorno (1974: 40).
[29] ibid: (1974: 42).
[30] Jaeggi (2005: 129), my own translation.

right to work.[31] Moreover, Benhabib observes about her view: "The vision of an activist and redistributionist government, the call for a citizenship of vigilance, and the insistence on the moral integrity of public officialdom go far beyond the dystopic liberalism of fear [...]. Her vision of liberalism is one of active politics, public rectitude, and social compassion."[32] This all seems to undermine the point that the Cruelty Principle stipulates a nonutopian vision and hence is distinct in this respect from the other principles.

It is possible to counter this criticism by distinguishing two types of principles. On the one hand, the rights and the principle of equality that Honneth refers to are measures to avoid cruel acts, as he emphasizes it. As such, the rights and the principle can be seen as the application of the Cruelty Principle on the institutional level. In turn, this implies that they are not inviolable but rather contingent upon historical circumstances, on whether the measures further the protection against cruel acts or not.

On the other hand, I do think that Shklar also defends principles that are self-standing – such as the vision of active politics – where the value does not derive from the fact that it is a measure against cruelty. But it seems that these principles have a particular status and are not inviolable. In *Ordinary Vices*, she writes for example that avoiding cruelty comes with a "vast intellectual and

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[31] Honneth (2013).
[32] Benhabib (1996).

moral cost."[33] And the cost is that other desirable goals will often have to be sacrificed. This nonutopian feature is gloriously expressed in the verses Shklar prepends to the last chapter of the book:

> It is the logic of our times
> No subject to for immortal verse –
> That those who live by honest dreams
> Defend the bad against the worst

In sum: The two features that set the Cruelty Principle apart from similar principles are that the ideal (a) focusses on avoiding certain psychological states and (b) is nonutopian in that the goal stated is a rather narrow one. My main aim in bringing out these two features was to allay the worry that this variant of dystopian liberalism with the Cruelty Principle at its heart reiterates other principles under a different name and therefore is not interesting in its own right.

§18 Relational and administrative conceptions

In §21 I will highlight the third feature of the Cruelty Principle: that it is a relational and an administrative principle as opposed to an administrative one only. This means that it governs the way individuals relate to each other and how the state treats its citizens, not just how the state treats its citizens. In the

[33] Shklar (1984: 22).

three sections that lead to §21, I want to elucidate some important aspects of the two concepts. In this section now, I present the basic distinction.

In his paper *What is Egalitarianism?*, and later in his reply to Dworkin's criticism of that paper, Samuel Scheffler distinguishes between two conceptions of equality.[34] According to him, the administrative conception of equality comes to the fore in Dworkin's *Sovereign Virtue*. Dworkin writes:

> I have been studying the idea of equality beginning in a principle – the abstract egalitarian principle – that states the idea in its most abstract form. This principle stipulates that governments must act to make the lives of citizens better, and must act with equal concern for the life of each member. We reach a useful, practical theory about what equality requires by constructing and testing concrete interpretations – conceptions – of that principle, to decide which conception is, all things considered, the best.[35]

On the administrative conception, principles thus govern and regulate how the state should treat its citizens.

Scheffler juxtaposes this conception with what he calls the social or relational ideal of equality. On this view, equality is not seen as a virtue of sovereigns at the most abstract level, but of the relations between people. Accordingly, principles that for example stipulate the absence of social hierarchies do not characterize how the state should treat its citizens but first and foremost how individuals should stand in relation to each other. Such a principle might give directions to governments as well, but only in a derivative

[34] Scheffler (2003/a) and (2003/b).
[35] Dworkin (2000: 184).

sense in order to bring forth certain relations between people. For instance, the principle might call for a certain redistribution of resources in a given population to impair the manifestation of social hierarchies.

Three points are worth noting about this distinction in order to avoid misunderstanding. First, it is not exhaustive: not all egalitarian principles are either relational or administrative. It seems for example that the Luck Egalitarian claim that no individual should be disadvantaged through no fault of their own need not fall under either rubric.[36] The principle might turn out to be an administrative one when, as in Dworkin's case, the principle is presented as an interpretation of the norm to treat others as equals *and* the state is specified as the agent. But the Luck Egalitarian principle may also stipulate certain duties of individuals towards future generations. In this case it is not administrative and it seems far-fetched to speak of a relational principle given that it is not about how one should treat someone with whom one shares an existing relationship.

Second, the distinction is not exclusive: an egalitarian principle can be both administrative and relational. For example, the principle that hierarchies

[36] (i) For examples of Luck Egalitarian views, see Anderson (1999) who has coined the term. (ii) Many thanks to Simon Caney for bringing this point to my attention. (iii) The distinction between equality as a virtue of how the state treats its citizens and of how people treat each other suggest that there are two further logical possibilities, namely equality as a virtue of (a) how citizens treat the state (this might pertain to principles of civil disobedience) and how states treat each other (this might pertain to principles of international justice). This also shows that Scheffler's distinction is not exhaustive.

should be avoided may demand that citizens treat each other in certain ways but also that police officers do not sneer at citizens or look down on them in their day-to-day business. However, it may of course well be that a principle is not both administrative and relational. Nagel thus argues that the impersonal standpoint places a powerful demand on governments to treat citizens impartially but not on people towards each other.[37]

And third, it may be that relational and administrative principles conflict. Suppose for example that Dworkin's equality of resources is a plausible principle of justice that should give directions for government action. It may be that the relational ideal recommends a different pattern for the distribution of resources in order to bring forth the ideal. The challenge in such a case is to balance the principles without privileging one over the other per default. Likewise, Kolodny suggests: "Why not say that [we] should seek, on the one hand, to provide means fairly distributed *and*, on the other hand, to prevent subordinating relations from taking root."[38]

§19 Administrative, not distributive

So much for the basic distinction. Before I move on and show in what sense the Cruelty Principle is a relational and an administrative principle, I need to

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[37] Nagel (1991).
[38] Kolodny (2014: 294, fn. 5), emphasis mine.

address a question that might be raised at this point, i.e. why I resort to this distinction rather than to the one between relational and distributive principles that is more common in the literature.[39]

It do not intend to argue that the distinction between distributive and relational principles is not tenable at all. Rather, I want to offer two reasons for why I do not use it in this context. First, a relational ideal can also be seen as a desirable distribution of some X, say of dispositions or attitudes towards others, or as a distribution of status, privilege and advantage. For instance, instead of demanding that social hierarchies be eliminated, it seems possible to call for a certain distribution of egalitarian attitudes and of social status. If this is correct, then the distinction between relational and distributive principles seems misleading.

Scheffler objects to this: "such a definition [of relational ideals in terms of distribution] would be artificial [...], does not show that there is any natural or interesting sense in which [this can be done]."[40] I agree with Scheffler that it seems unnatural to speak of social equality in terms of distribution. But I

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[39] This distinction was introduced to contemporary debates by I. M. Young (1990) as an opposition between relational views and what she calls the distributive paradigm and it has been very influential. It can be found in recent publications such the collection of essays on social equality by Fourie et al. (2015). But it goes back all the way to Marx (2001), who argued that the Gotha Programme of the German Social Democratic Party from 1875 wrongly concentrated on the fair distribution of material benefits, rather than on qualitative transformations of social relations.
[40] Scheffler (2015: 32).

also think, unlike Scheffler, that the intelligibility of such a proposition reveals that it is not clearly cut.

The second reason is that relational ideals have implications for the distribution of resources in that the ideal itself recommends what a desirable distribution is. Such an account of a distribution is provided by Christian Schemmel who starts off with a relational ideal of non-domination and then asks how material goods should be distributed in order to arrive at this goal; how abuses of power can be prevented by limiting material inequalities.[41] He arrives at the conclusion that "an unconditional basic income seems a good policy instrument that merits further research."[42]

This line of argument in which the pattern of distribution is evaluated on the basis of whether it is compatible with a relational ideal is sometimes also attributed to Rawls. O'Neill writes:

John Rawls also identifies some of the ways in which inequality can be bad, using some of the same categories as those identified by Scanlon [...]. Like Scanlon, Rawls also stresses the ways in which [economic] inequality can (b) lead to inequalities in social status "that encourage those of lower status to be viewed both by themselves and by others as inferior." Rawls further holds, like Scanlon, that inequality can be bad insofar as (c) it leads to the domination of one part of society by the rest.[43]

[41] Schemmel (2011).
[42] Schemmel (2009: 28).
[43] O'Neill (2008: 122).

In light of the fact that relational ideals also entail a position on the distribution of resources it seems misleading to draw a strong contrast between relational and distributive principles.

These are then the two reasons why I juxtapose relational with administrative principles, not with distributive ones.

§20 Relational ideals: Two refinements

I now want to elaborate on the concept of relational ideals and suggest two refinements to Scheffler's account. These refinements will be helpful to grasp what kind of relational principle the Cruelty Principle is.

First, I suggest that the main distinction should be between relational and administrative political principles, not between different conceptions of equality (as Scheffler presents it). Where a principle regulates how the state should treat its citizens, we can speak of an administrative principle. And where a principle governs how people should relate to each other, we can speak of a relational principle. This does not invalidate Scheffler's distinction. It implies though that the conceptions of equality he identifies should be seen as specific versions of administrative and relational principles.

I suggest this refinement because it has the following advantage: it allows us to distinguish between different kinds of relational principles. I want

to highlight four of them: First, egalitarian relational principles prescribe an opposition to social hierarchies, which Fourie identifies as a common theme:

> A common thread among discussions of social equality (and related notions) is that it is fundamentally opposed to what Scheffler refers to as 'hierarchies of social status'. Miller describes a society of equals as one 'that is not marked by status divisions such that one can place different people in hierarchically ranked categories, in different classes for instance'. Anderson describes inegalitarianism as a commitment to 'basing a social order on a hierarchy of human beings ranked according to intrinsic worth'. An opposition to ranking people according to hierarchies of social status appears to be the central tenet of social equality.[44]

Second, and in contrast to the former, liberal relational principles stipulate an opposition to freedom-constraining relations between individuals. In positive terms, such principles can be seen to prescribe that people should respect each other's freedom in how they relate to each other. This ideal comes to the fore for example in Scheffler's opposition to "patterns of deference" on the basis that such patterns "exert a stifling effect on human freedom."[45] I think that it also comes forward in Anderson's defence of a democratic community, where democratic is understood as collective self-determination.[46] The point here is

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[44] Fourie (2012: 110).

[45] Scheffler (2005: 19).

[46] Anderson (1999). It might strike as odd that I ascribe a liberal position to Scheffler and Anderson. But I think that what they defend is not a just an egalitarianism, as the titles of their papers suggest. Rather, it is a hybrid of a liberal and egalitarian relational position depicting a society in which people respect each other's freedom and relate to each other as equals. This is also pointed out by Kolodny (2014, fn. 8). In his response to Anderson he writes: "I worry that many elements of Anderson's analysis confuse social inequality with distinct concerns. Some of these elements are not necessary for social inequality, such as 'exploitation,' 'marginalization,' unjustified

that these ideals are driven, at least in part, by a commitment to freedom, though the two authors do not operate with the same conception.

Moreover, this ideal is also expressed in John Stuart Mill's account. In a marvellous analysis of his work, Alexander Herzen, Mill's contemporary and a captivating intellectual figure of 19th century Russia, pinpoints Mill's ingenuity in defending liberty. He writes: "Milton defended freedom of speech against the attacks of authority, against violence [...]. Mill's enemy is quite different: he is standing up for liberty not against an educated government, but against society, against custom, against the deadening force of indifference, against petty intolerance, against mediocrity."[47] What Mill calls for is that people respect each other's freedom in how they relate to each other and he can therefore be seen as a champion of a liberal relational ideal.

Third, neo-republican relational principles can be seen to demand that individuals do not dominate each other in everyday interaction,[48] for example at the workplace or in the family. And fourth, communitarian relational principles are those that seek to establish, as Nagel puts it, "a condition of the right

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'violence' [...]." I think that Kolodny is right, but he does not pinpoint what the confusion is. What the analysis confuses is social inequality with what one might call social unfreedom and other objectionable social relations.

[47] Herzen (1982: 459).

[48] See for example Pettit (1997). Note that Schuppert (2015: 440) argues that "republican accounts of equality share a significant normative overlap with the idea of 'social equality'", but for him the overlap is that the ideal of freedom of non-domination is "structurally egalitarian" (442). The overlap I pinpoint is different: both amount to relational ideals, but to different ones.

kind relations among [the members of society] and of the formation of healthy fraternal attitudes, desires and sympathies."[49]

As can be seen, the first refinement allows to distinguish between different kinds of relational principles. In turn, this will allow me in the next section to depict the Cruelty Principle as a relational principle without at the same having to describe it as an egalitarian one.

So much on the first refinement I suggest to Scheffler's distinction. The second one is to further differentiate between forms of relations that are seen as relevant on the relational view, on a spectrum between direct and indirect. It is also possible to say that these are different views on the *scope* of the principle.[50] On the one hand, some authors argue that people should regard and treat each other in certain ways in direct interaction: in face-to-face interaction but also in one-to-one communicative interaction, for example via Facebook or Twitter. Anderson for instance argues that "egalitarians seek to abolish oppression – that is, forms of social relationships by which some people [...] exploit, demean, and inflict violence upon others."[51]

On the other hand, most authors also insist that people should stand in

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[49] Nagel (1979: 108).
[50] Nath (2014) for example uses this terminology.
[51] Anderson (1999: 313). In a recent paper, Scheffler (2015: 30) also specifies what the relational ideal involves on an interactional level, namely that individuals have particular "attitudes, motives, and dispositions to one another", what he calls deliberative constraints.

certain relations towards each other where this does not involve direct interaction.[52] Such relationships where no face-to-face interaction takes place, nor one-to-one communicative interaction, I shall call indirect relationships. Wolff and de-Shalit for example champion a society in which people have a certain "connection with others".[53] This does not only mean that people should behave in respectful ways towards each other when met in person. It goes beyond that and implies, among other things, that people should take action so that no one in society is left behind.

In sum, the two refinements I suggest in this section can be seen as two distinctions to characterise relational principles: between liberal and relational ones, and between those that prescribe certain forms of direct interaction and those that also prescribe indirect ways to relate to others.

§21 A relational and administrative principle

With these distinctions at hand, I can now introduce the third feature of the Cruelty Principle, that it is both a relational and an administrative principle. It (a) characterises the structure of the relationship between people, stating that one must not be cruel to each other, and (b) prescribes that state officials must

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[52] Nath (2014) addresses specifically this question which individuals should be seen to relate to each other and presents the very capacious view that relational facts that can obtain beyond state borders.

[53] Wolff & de-Shalit (2007: 6).

not be cruel to citizens in their day-to-day businesses. This includes but is not limited to: refraining from severe humiliation, from evoking extreme fear as well as from various forms of physical violence.

It seems that this take on the Cruelty Principle overlaps with Shklar's understanding of it. In the beginning of *Liberalism of Fear*, she describes the principle as an administrative ideal, writing that this version of liberalism "regards abuses of public power in all regimes with equal trepidation. It worries about the excesses of official agents at every level of government."[54] But later in her essay she also extends the worry to civic actors: "the separation of the public from the private is evidently far from stable here, especially if one does not ignore the power of corporate business enterprises. [...] It is the task of a liberal citizenry to see that no one official or unofficial can intimidate anyone."[55] Her ideal is thus also a relational one, given that the principles stipulates how people (or civic actors) ought to treat each other.[56]

The Cruelty Principle *qua* relational principle is yet different from the

[54] Shklar (1989: 28).
[55] ibid: 31.
[56] It seems to me that Shklar shares this penchant for relational ideals with Arendt. The last paragraph of *Eichmann in Jerusalem* (1963) reads as follows: "For the lesson of such stories is simple and within everybody's grasp. Politically speaking, it is that under conditions of terror most people will comply but some people will not [...]. Humanly speaking, no more is required, and no more can reasonably be asked, for this planet to remain a place fit for human habitation."[56] I think that "a planet fit for human habitation" is meant as a relational ideal in this context, for it depicts a state of affairs in which ordinary people do not terrorise and kill their fellow citizens.

norms defended by Scheffler and Anderson in that the *main* driving force behind it is a fervent commitment to freedom. Shklar thus writes that the ultimate goal is that every adult should be able "to make as many effective decisions without fear or favour about as many aspects of her or his life as is compatible with the like freedom of every other adult."[57] I will discuss the connection between avoiding cruelty and enabling freedom at length in the next Chapter. For the moment I am assuming that it is correct to indicate that the principle delineates first and foremost a liberal relational ideal.

Yet the Cruelty Principle is also an egalitarian principle in the following sense: In §14 I discuss and reject Hallie's suggestion that cruel acts *always* involve certain unequal power-relationship between the perpetrator and the victim. But this is not to deny that cruel acts *regularly* involve unequal power-relationships, which I think is plausible. Accordingly, avoiding cruelty will also involve (in some cases at least) preventing unequal power-relationships, which can be understood as an egalitarian relational ideal. Nonetheless, I want to stress that this is not a conceptual necessity.

Moreover, the Cruelty Principle *qua* relational principle has a relatively wide scope. It characterizes how the direct interactions between people should be, but indirect relationships are relevant, too. This follows from the conception

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[57] Shklar (1989: 21).

of cruelty I present in Chapter 1. On the one hand, the definition extends over severe domestic violence between couples, brutal ill-treatment of children by their parents or deep humiliation at the workplace. Accordingly, to avoid cruel acts means to give shape to direct face-to-face and one-to-one communicative interactions.

On the other hand, I also argue in §12 that a necessary feature of the concept cruelty is that moral responsibility can be attributed to an agent. And to ascribe moral responsibility does not require face-to-face interaction. The doctor who abducts some people and lets others carry out hideous medical experiments on them is complicit in the act even if he himself does not carry out the experiments. Likewise, a certain group of people can be held responsible for the plight of people where it is the foreseeable and avoidable cumulative effect of their actions. The Cruelty Principle demands that such a course of action does not take place and it therefore also shapes indirect interactions, not just direct ones.

In conclusion, the Cruelty Principle is an administrative principle and a liberal relational one with a relatively wide scope.

§22 Relational ideals and justice: two views

In this chapter I have so far pointed to three main features of the Cruelty Principle: (a) that the ideal involves certain emotional states, (b) its non-utopian

character and (c) that it amounts to a relational and an administrative principle. The fourth and final feature I want to bring out is that the Cruelty Principle *qua* relational principle is at least in part a principle of justice. Whereas the former three points are substantive in that they describe a possible state of affairs, the fourth feature is a conceptual point.

In this section now, I will present the distinction Schemmel draws between two competing views on the connection between egalitarian relational principles and principles of justice. An important assumption is that the same distinction can be drawn between principles of justice and liberal relational principles.[58] I will turn to this assumption at the end of this section and state why it is justified.

The distinction Schemmel suggests is between what he calls a "pluralist social egalitarianism" (in short: PSE) and a "justice-based relational egalitarianism" (in short: JRE).[59] These two views "agree with each other that egalitarian concern should have a broader focus: that the question of how a properly egalitarian society should look like necessitates sustained inquiry into the kind of social and political relations that characterise such a society."[60] Yet the two

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[58] Otherwise the exposition would require slight changes to the terminology which I will omit in order to present Schemmel's analysis without distortions.
[59] Schemmel (2015).
[60] Schemmel (2015: 148).

positions differ with respect to the question whether relational ideals fall under the heading of justice:

What they disagree on is the question of whether concern for egalitarian relations makes it necessary to conceive of social equality as a value which is distinct from justice – and which might sometimes be in conflict with it. This is what [PSE] affirms, and what makes it "pluralist" [...]. Liberal justice-based relational egalitarianism, on the other hand, as the name makes clear, retains an exclusive focus on questions of social justice: it seeks to subsume considerations of social equality entirely under social justice.

According to Schemmel, the paradigmatic example of PSE is David Miller's account of social equality, which is expressed in the following passage:

[T]here are two different kinds of valuable equality, one connected with justice, and the other standing independently of it. Equality of the first kind is distributive in nature. It specifies that benefits of a certain kind – rights, for instance – should be distributed equally, because justice requires this. The second kind of equality is not in this sense distributive. It does not specify directly any distribution of rights or resources. Instead it signifies a social ideal, the ideal of a society in which people regard and treat one another as equals, in other words a society that is not marked by status divisions such that one can place different people in hierarchically ranked categories, in different classes for instance. We can call this second kind of equality equality of status, or simply social equality.[61]

Miller's view is that social equality and justice are distinct goods that need to be balanced with each other. The distinctness-claim is based on two premises: The first premise is (a) that justice is essentially distributive. According to him, three values need to be balanced with each other – equality, need and desert –

[61] Miller (1998). Further examples Schemmel highlights are Cohen's (2009) distinction between principles of community and principles of justice, Wolff's (1998) distinction between a concern for fairness and a concern for respect, and O'Neill's (2008) account of nonintrinsic egalitarianism.

when determining how to distribute rights and resources. The second premise is that (b) social equality is not distributive in the same sense justice is. If this is true, then it is necessary to conceive of social equality as a value which is distinct from justice.

In opposition to Miller, Schemmel endorses the justice-based view. He argues that the "concern about – yet to be specified – egalitarian relations ought to be regarded as the primary concern of social justice." To support his claim, Schemmel criticizes premise (a) above and maintains that "the primary focus of the "equality of what"-debate on distributions is misguided." Justice does not only concern the distribution of rights and resources but more broadly governing "individuals' relations to each other as free and equal within society understood as a cooperative enterprise."[62] According to Schemmel, relational principles meet this criterion and are thus to be seen as principles of justice.

To reiterate: Schemmel draws here a distinction between two competing views on the connection between justice and *egalitarian* relational principles. I said at the outset of this section that I take these as two competing views on the link between relational principles in general and principles of justice. The reason for this is the following: What sets egalitarian relational principles apart

[62] With reference to Rawls, Schemmel (2015) continues: "the task of social justice [is] that of identifying the societal constraints within which equal opportunity for all individuals to pursue and revise their own conception of the good can be secured [...]."

from principles of justice, at least according to Miller, is that they are not distributive in a specific sense. If this is true of egalitarian relational principles, it will also be true of liberal relational principles. In contrast, the reason why Schemmel thinks that egalitarian relational principles should be seen as principles of justice is that they govern individuals' relations with each other. The same can be said about liberal relational principles. Nothing depends on the fact that the relational principles are taken as egalitarian in character in order to draw the distinction.

§23 The Cruelty Principle and justice

Whether the Cruelty Principle *qua* relational principle is a principle of justice or not depends on whether PSE or JRE is more plausible. If JRE is correct, this will mean that the Cruelty Principle is a principle of justice. But if PSE is true, then the picture will be different. In this section I first want to show that Schemmel's argument against PSE fails. In the next step, I want to explore what this implies for the status of the Cruelty Principle.

I start with Schemmel's case against PSE. It rests on two points: The first one is, as I indicate above, that the conception of justice underlying PSE is seen as misguided, i.e. the view that justice is just about the distribution of resources and rights. Though Schemmel does not stress this point, it is the central point of disagreement between Miller and him and it explains why the

two authors arrive at dissimilar views on the relation between justice and relational ideals.

Second, Schemmel maintains that PSE leads to a perfectionist position. He thinks that goods such as the absence of hierarchies are valued (a) intrinsically, not instrumentally and (b) as impersonal goods. What he means by intrinsic is that such goods are seen as desirable in themselves, i.e. "in their own right, independent of their negative effects."[63] The example Schemmel provides is Cohen's ideal of civic friendship. He argues that friendship is attributed impersonal value and is seen as not "reducible to [the] impact on the welfare of those engaged" in the interaction.[64] On the basis of this observation, he contends that PSE makes "perfectionist claims about the social good", the claim here being that "individuals should [...] strive for them [...] even if it is not personally good for them in any way."[65]

Schemmel opposes such perfectionist claims, emphasizing the importance of respect for individual autonomy and of equal opportunity to pursue a wide array of conceptions of the good. The point is that "requiring people to support [...] arrangements that are not even aimed at sustaining and enhancing their personal good [...], but require them to perhaps sacrifice part of it for

[63] ibid: 151.
[64] ibid: 163.
[65] ibid.

some impersonal value is a case of oppression."[66] The bottom line then is that PSE entails demands that are oppressive and illiberal.

In response to Schemmel's case against PSE, I want to note that both arguments are radically incomplete and therefore fail to convince. The first argument is incomplete because Schemmel simply juxtaposes his preferred conception of justice with Miller's and does not present a reason as to why the former is to be preferred over the latter. Neither does Schemmel take issue with Cohen's nor with Wolff's conception of justice, whom he regards as champions of PSE. This is a crucial claim he does not make good.

The second argument is incomplete, too. The problematic premise here is that advocates of relational views *must* see an intrinsic value in the relationships they regard as desirable. Schemmel stresses this point earlier in his paper, writing that the "social egalitarian concern must be regarded as ultimate. It must not be reducible to concerns about aggregate welfare or even the welfare of the disadvantaged."[67] However, he does not offer evidence for this premise and states that it is "fairly obvious".[68]

The issue here is not only that Schemmel delivers no argument, but also that the premise is not obvious at all. And the simple reason for this is that

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[66] ibid: 164.
[67] ibid: 151.
[68] ibid.

prominent advocates of PSE do *not* walk right into this trap. Wolff and de-Shalit are explicit about this and write: "social equality is not – or at least not only – some mysterious good in itself. Unless it can be shown that social equality – such as relations of community and solidarity between people – is good for the people who live in that society, it is very hard to see its point."[69] O'Neill, too, brings out the instrumental value of certain egalitarian relationships, e.g. the protection of a "secure sense of standing and of agency."[70]

In light of that, it is not obvious that authors whom Schemmel associates with PSE must require people to support arrangements that are not aimed at sustaining and enhancing their personal good. Hence it does not follow that PSE must make demands that are oppressive and illiberal. Both arguments he presents against PSE thus fail to convince.

This has implications for the Cruelty Principle. Schemmel's case against PSE does not settle that the Cruelty Principle as delineating a relational ideal is a principle of justice. This leaves us with the following picture: if we draw on the same conception of justice as Schemmel, then clearly the Cruelty Principle *qua* relational principle will count as a principle of justice. This is because principles of justice, according to Schemmel, govern individuals' relations to each

[69] Wolff & de-Shalit (2007: 6).
[70] O'Neill (2008 :128).

other as free and equal within society understood as a cooperative enterprise, and this is, as I demonstrate in §21, precisely what the Cruelty Principle does.

However, if we draw on Miller's conception of justice, the picture is more complicated. It seems that some demands that follow from the Cruelty Principle give directions to the distribution of rights and resources, and hence would count as requirements of justice, but not all. For example, consider the norm that one must not starve another person: it is both a demand of justice, given that it concerns the distribution of resources, as well as of the Cruelty Principle. Now consider the norm that one must not psychologically abuse another person, say through the infliction of existential fear. I do not think that it is as clear that it directly specifies a distribution of rights or resources, while a demand of the Cruelty Principle it is. On Miller's account of justice, it therefore seems that at least some stipulations of the Cruelty Principle can be seen as requirements of justice, but possibly not all of them.

To sum up: independent of which of the two conceptions of justice one draws on, it follows that at least some demands of the Cruelty Principle can be seen as demands of justice, though possibly not all if Miller's conception of justice turned out to be the more plausible one.

Conclusion

In this chapter, I explored what the absence of cruel acts entails and whether the demands of the principle should be understood as demands of justice. Overall, I highlighted the following four features:

(1) that the absence of cruelty implies the absence of certain emotions such as extreme fear and grief;

(2) that it is non-utopian in that the goal stated is a rather narrow one: it does not comprise for example the absence of non-cruel harm;

(3) that it represents a relational and administrative ideal and hence also gives directions to how people treat each other;

(4) that at least some demands of the Cruelty Principle can be seen as demands of justice.

Chapter 3

The Priority Claim: normative justification

Introduction

In the previous two chapters I first analysed the concept of cruelty (Chapter 1) and then examined in some detail what avoiding cruelty entails (Chapter 2). In short, the principle stipulates the prevention of bodily injuries and psychological forces that involve the substantial invasion of one's mental life. In this chapter now I defend the claim that avoiding cruel acts should be taken as the most important political principle. Call this the Priority Claim.

Defending this claim serves two goals. My primary purpose is to bridge a central gap within the dystopian liberalism and in particular Shklar's liberalism of fear, and thus to strengthen this type of liberalism. An auxiliary goal is to criticize a central tenet of Rawlsian liberalism, i.e. that the adequate distribution of basic liberties is the first principle of justice, which in turn is seen as the first virtue of social institutions. These two goals are interlinked: To support the Priority Claim, I argue that avoiding cruelty is prior to Rawls' first principle of justice. The move is thus to accomplish the first goal through the second one.

The chapter falls into three parts: In the first part (§23-§29) I look at various arguments that have been given in support of the Priority Claim. The prevalent method in the literature that is used to justify this claim and similar contentions is the so-called methodological negativism. I want to demonstrate that arguments on this method fail to warrant the claim.

In the second part of this chapter (§30-§32) I offer a remedy to this problem and present my own argument. It is based on the observation that the absence of cruelty is a precondition for a wide range of fundamental human interests. In particular, it is a precondition for rationality as protected by Rawls' liberty principle.

In the third part, (§33-§34), I address the criticisms against the Priority Claim put forward by Kekes and Skinner. Kekes states that "it takes no more than a little thought to realize that [the view] is mere verbiage that cannot withstand the most elementary questioning."[1] And Skinner maintains that Shklar fails to make good her claim that avoiding cruelty is primary because it undermines negative freedom.[2]

[1] Kekes (1996: 835).
[2] Skinner (1996).

§24 The Priority Claim

I have said many time throughout this thesis that avoiding cruelty should be taken as the most important or supreme political principle. What is meant, and I do not mean to imply more, is that it is lexically prior to other principles.[3] Shklar writes: "What liberalism requires is the possibility of making the evil of cruelty and fear the basic norm of its political practices and prescriptions. The only exception to the rule of avoidance is the prevention of greater cruelties."[4] The lexical priority is expressed in stating that the principle must under no circumstance be sacrificed for other goods.[5]

I think that the way Shklar understands "priority" is too strong. The reason for this is that it blocks negligible violations of the Cruelty Principle, say two seconds of excruciating pain, that might bring forth a significant increase of another good. Cruelty can be so unimportant that it is not worth bothering for the victim. This is why I want to commit myself only to what Van Parijs calls *soft* lexical priority: "if and when there is a genuine trade-off, the priority claim

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[3] This is not to say that the principle is more important than other principles in *all* relevant respects. So it might be that another principle is more important than the Cruelty Principle in another respect.

[4] Shklar (1989: 30).

[5] The idea of lexical priority implicit in this proposition is clearly taken from Rawls' discussion of the priority of liberty, when he writes (1971: 266) that "liberty can be restricted only for the sake of liberty." What it means to claim lexical priority for a good is to prohibit its sacrifice for other goods such as efficiency.

means that [a departure from the principle is permissible] only when major gains in terms of other properties can be bought with negligible departures."[6]

The move to soft lexical priority has its own problems, one of which is the definition of "negligible departures". I must admit that I do not yet have a good solution to this problem, which forces me to reformulate Van Parijs' claim as follows: if and when there is a genuine trade-off, the priority claim means that a departure from the Cruelty Principle is not permissible if the cruel acts are without doubt *not* negligible. I am thinking, for example, of severe child and partner abuse. Once this claim is established, we can still return, at another point, to the further question of what is to count as negligible.

§25 Methodological negativism

In the next five sections I will examine a widely used method within dystopian liberalism to justify that avoiding the *summum malum* is of first priority. This method has recently been called methodological negativism, but it goes back to Jonathan Allen's distinction between negative and positive political theory.[7] To see what the negative variant amounts to, consider the these three premises:

(1) The goal of politics is the avoidance of X

(2) X is an evil

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[6] Van Parijs (1995: 27).

[7] Allen (2001). The term methodological negativism I take from Bajohr & Liebsch (2014/b) who use it to characterize Shklar's line of reasoning.

(3) G is an important good

Roughly speaking, methodological negativism takes premise (2) as the ultimate and irreducible premise to justify premise (1). In contrast to that, positive political theorist offer premise (3) as the ultimate justification for premise (1). So the difference in method here is a difference in the type of argument invoked.

It should be noted that on both views premise (1) is also negative in another sense, as Walzer points out.[8] For him, the liberalism of fear is negative in that it calls for the absence of something and not for the presence, in this case the absence of cruelty and fear. If it was positive, it would prescribe the presence of a particular good. But this distinction is different from the one Allen draws: Walzer's terms describe premise (1) and Allen's terms the type of argument invoked to support a political ideal.

It may be helpful to look at the examples Allen provides to illustrate the distinction. Margalit for instance starts with the meaning of the experience of humiliation, and "from the basis of this analysis, he proposes a social ideal of decency."[9] In this case the ideal is described in positive terms, given that it calls for the *presence* of something. But the method, as Allen insists, is nega-

[8] Walzer (1996: 62).
[9] ibid.

tive, and the reason for this is that Margalit attempts to "build normative reflection on [an] anatomy of vices and experiences of vulnerability."[10] What gives the ideal its normative force is the badness of humiliation.

Allen does not give a definition of positive political theory, but for him it is visible in Honneth's criticism of Bloch's negative approach regarding the justification of natural law. For Bloch, natural law is justified because it eliminates human degradation and injury and it thus derives its normative force from the badness of such practices. But Honneth emphasises that on a fundamental level, the ideal is rather based on a concern for recognition and the victim's positive sense of self. In turn, the "positive sense of self constitutes the notion of integrity – which, for Honneth, seems to include basic self-trust connected to a sense of physical wholeness, self-respect, and self-esteem."[11] Honneth's point, at least according to Allen, is that positive moral notions underlie natural law and that in general political theory is parasitic on robust positive moral concepts.[12]

These two examples demonstrate how justifications for principles can come apart: In the former case, the reasoning is based on the badness while in the latter case it is based on the goodness of a value.

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[10] Allen (2001: 342).
[11] ibid.
[12] Liberal-egalitarian theories of justice are in the same sense positive in that they take freedom and equality as the fundamental values to justify principles of justice.

§26 Dystopian liberalism & methodological negativism

I now turn to three main figures of the dystopian liberalism: Montesquieu, Berlin and Bernhard Williams. In each case I look at how the fundamental end of politics is justified and show that the methodological negativism is employed.

Shklar herself traces her account back to the early modern period, in particular to Montaigne and Montesquieu. According to her, they are the only philosophers who regard cruelty unconditionally as the summum malum. Montaigne thus terms it "the ultimate vice (l'extreme de tous les vices)" and writes that the "horror of cruelty impels me more to clemency than any model of clemency could draw me on."[13] But this had drastic consequences for Montaigne, leading to a radical spirit of denial including the view that public action and political theory are futile endeavours.

Montesquieu is different in this regard, as Shklar points out: like Montaigne he thinks that cruelty is the ultimate vice, but he also develops a theory of the state that "had no other end than to protect the security of the innocent."[14] As Levy puts it: "Montesquieu's political vision was centrally concerned with diminishing cruelty and violence in social life."[15] He can in this sense be

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[13] See Shklar (1984: 9).
[14] Shklar (1984: 24).
[15] Levy (2000: 19). He writes further: "A central normative ideal of [Montesquieu's] work was moderation, closely linked with the prevention of cruelty. Despotic governments, which ruled by cruelty and fear, were contrasted with moderate governments of whatever form [...]."

regarded as the founding father of dystopian liberalism. And since his theory is based on the moral conviction that cruelty is the ultimate vice, the dystopian liberalism presented here can be seen to pursue a methodological negativism.

This liberalism made its comeback only in the aftermath of World War II with the rise of what is known as *cold war liberalism*. It was recently observed that Isaiah Berlin, Raymond Aron and, to a lesser extent, Karl Popper share their distinct strand of political thought with Judith Shklar. In particular, what they share is, as Mueller writes, a concern "primarily with avoiding the worst, rather than achieving the best."[16] Berlin, for instance, who had lived through almost the entire century when he wrote his *Message to the 21st Century*, states in this message that the most important lesson to future generations is that the "worst of all times, when the tyrants of the twentieth century trampled on the life [...] of millions, is never to happen again."[17]

Again, the principle is not grounded in a positive value. As Mueller notes, cold war liberalism "sought to advance a conception of political action that was informed by the limits of political knowledge."[18] Identifying positive universal values that are to guide political action was seen as beyond these limits. Yet, the theorists share a pre-theoretical aversion to cruelty and the view

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[16] Müller (2008: 48).
[17] Berlin (2014).
[18] Müller (2008: 48).

that it can produce directives for political action. Hence, the dystopian liberalism presented here can, too, be seen to invoke the methodological negativism.

The liberalism of fear is also defended by contemporary thinkers, most notably by Bernard Williams.[19] His realist political theory calls for institutions that pass what he calls the *basic legitimation demand*, which can be equated with there being an "acceptable" solution to the first political question "as the securing of order, protection, safety, trust, and the conditions of cooperation."[20] For Williams, it is the liberalism of fear that best meets this demand as it takes "the life without terror as its first requirement."[21]

On the question what his justification for "the life without terror" is, Hall notes that "what matters is indeed that we can endorse the liberalism of fear without invoking a set of contestable moral claims."[22] What justifies it is something more profane: "[i]t is clear what the most basic violations of human rights are. In the traditional words of Catholic Church, the most basic truth on this matter is *quod semper, quod ubique, quod ab omnibus creditum est* [that which

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[19] A second thinker who endorses the liberalism of fear is Jacob Levy. His dystopian theory of multiculturalism (2000: 12) explicitly aims to prevent cruelty. It is "centrally concerned neither with preserving and celebrating ethnic identities nor with overcoming them, but which instead focuses on mitigating the recurrent dangers such as state violence toward cultural minorities, inter-ethnic warfare, and intra-communal attacks on those who try to alter or leave their cultural communities."
[20] Williams (2005: 3).
[21] ibid: 61.
[22] Hall (2013: 217).

has been believed everywhere, always, by all]."[23] The justification here is based on an intuitive knowledge of the *badness* of basic violations of human rights.

Moreover, Williams also dismisses the identification of positive values in support of the ideal. Hall summarizes his view as follows:

> [Williams] would consider it implausible to think that the aversion to cruelty on which the liberalism of fear is grounded is amenable to philosophical justification [...]. To wit, just as he insists that anyone who tried to theoretically justify the statement 'You can't kill that child' would fail to understand the injunction at hand, because the felt need here is simply 'more convincing as a reason than any reason which might be advanced for it being a reason, he would find peculiar the idea that as liberals we could adequately justify our aversion to cruelty. For this reason, the demand that the liberalism of fear must be at each moment a justificatory doctrine demands one thought too many.[24]

In sum, this short historical sketch reveals that the theories of dystopian liberalism use a methodological negativism that can be reconstructed with the following two premises:

(1) The most important end of politics is to avoid X

(2) X is the greatest evil / a great evil

The second Premise is taken as self-evident and to imply premise (1). And the hidden assumption is that there is continuity between moral and political theory, stating that the badness of an evil determines its relevance on the political level.

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[23] Williams (2005: 214).
[24] Hall (2013: 236).

§27 Shklar & methodological negativism

Overall, four different lines of reasoning can be found in Shklar's *Liberalism of Fear* to justify the Priority Claim, all of which are underdeveloped. The first is Kantian and based on the premise that the "prohibition of cruelty can be recognized as a necessary condition of the dignity of persons."[25] The second one is Utilitarian and rests on the point that avoiding cruelty would "benefit the vast majority of human beings in meeting their known needs and wants."[26] Shklar is convinced that both routes lead to the same conclusion, i.e. the lexical priority of avoiding cruelty, but she nowhere shows us how. The third one is that the prohibition of cruel acts is a precondition for liberty. She thus suggests that "systematic fear is the condition that makes freedom impossible."[27] I will discuss this argument later in the chapter, esp. in §34.

At this point now I am only interested in the fourth argument stating that cruelty is the greatest evil and therefore avoiding cruelty should be the basic norm of political practices. Liebsch & Bajohr call Shklar's specific negativism the "phenomenology of the vulnerability of the Other".[28] The authors speak of methodological negativism because the political principle is based on

[25] Shklar (1989: 30). McKinnon (1989: 332) follows this third route.
[26] Shklar (1989: 30).
[27] ibid: 29.
[28] Liebsch & Bajohr (2014/b: 633).

the premise that cruelty is the greatest evil, but it is specific in that this premise is in turn based on how cruelty is experienced, how it appears to the victims. The authors write: "only when it is explored in what forms (excessive), how pervasive (radical) and extensive (lasting) other people are violently harmed in their sensitivity, is it possible to determine what political claims follow."[29]

For Shklar then, the experience of cruelty is at the heart of the justification for the Priority Claim, and thus an empirical premise. Liebsch & Bajohr point out that Shklar refers the reader to the historical record to support this premise and that her view is therefore "driven by history".[30] Indeed, she writes that historical memory is "the faculty of the human mind that the liberalism of fear draws most heavily" on, in particular the history since World War I and the memory of "torture on a colossal scale" and the "horror of modern warfare".[31]

In light of that, Judith Shklar's fourth line of reasoning can be reconstructed with the following premises:

(1) The most important end of politics is to avoid cruelty

(2) Cruelty is the greatest evil

(3) Cruelty shows itself as the greatest evil to the victims

[29] ibid: 649, my own translation.
[30] ibid: 642.
[31] Shklar (1989: 27).

Shklar is aware that this is a problematic argument to support premise (1). She admits that "one cannot rest on this or any other naturalistic fallacy",[32] and it seems that this refers to the step from premise (3) to premise (2), the move from how people experience cruelty as a matter of fact to the proposition that cruelty is morally speaking the *summum malum*. Though she admits this problem, she does not dismiss claim (1) as a consequence. For her, the prohibition of cruelty has "an immediate appeal and can gain recognition without much argument."[33]

§28 Two advantages

Before I criticize this approach in the next section I now want to highlight two advantages. First, it has what Allen calls an educational value: "it directs our attention to a range of experiences (and to the details of these experiences) that would otherwise be missed."[34] In particular, "by concentrating on evils, these social evils emerge clearly into view from the perspective of the victim." This is especially visible in Shklar's line of reasoning: the claim that cruelty shows itself as the greatest evil to the victims draws attention to the experience of cruel acts; it teaches us what such acts do to the victims. In contrast, if we

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[32] ibid: 30.
[33] ibid.
[34] Allen (2001: 352).

say: it is because of autonomy or human dignity that we should avoid cruelty, then the experience of the victims fades into the background.

Second, the methodological negativism also has a pragmatic advantage vis-à-vis approaches that justify the priority of the Cruelty Principle on the basis of positive values. As Shklar notes: cruelty is the worst evil "which all of us know and would avoid if only we could."[35] The premise is very tangible to a wide audience. In contrast, the other approach is more roundabout. What Williams says about Rawls's theory of justice can also be said about this approach, i.e. that the arguments address "a very patient listener with a great appetite for argument and very few political restrictions on what [they should do]." But "no audience in the world is in that position, not even the Supreme Court."[36]

§29 Why methodological negativism is insufficient

I now want to indicate four problems of the methodological negativism. First, this approach seems incomplete when it does not specify positive values to warrant its central principle. As Allen writes, political theory should also identify, clarify, and systematize the range of moral commitments behind political principles.[37] It might be that the evil of cruelty is in fact the main justificatory

[35] Shklar (1989: 29).
[36] Williams (2005: 57).
[37] Allen (2001).

element within the dystopian liberalism. Yet, not to mention the positive values that may as well infer normative force to the principle, if of course there are any, leaves the theory half-finished.

Second, the negative approach underdetermines what institutional set-up is to follow from the Cruelty Principle. Bajohr thus argues that the methodological negativism warrants a liberal state as well as a conservative one that prescribes an intrusive government in order to protect its citizens.[38] In contrast to that, when we also discern certain positive values that, too, support the Cruelty Principle, this shows what values are to be protected, which then gives additional guidance for the set-up of institutions. Suppose for example that a concern for autonomy drove the commitment to the principle. This would secure that the certain freedom constraining institutions are not compatible with the principle.

To bring out the third point, I want to assume, somewhat charitably, that (a) cruelty is indeed the worst evil and that (b) there is a continuity between moral and political theory in the sense that the badness of cruel acts implies that avoiding cruelty is an important political goal. Even if we assume both (a) and (b), it does not follow that we need to put avoiding cruel acts first. The reason is that it is simply not enough that cruelty is the worst evil. In addition,

[38] Bajohr (2013: 146). Similarly, Allen (2001: 345) asks: "After all, if our concern is primarily or exclusively for physical security, then why not settle for Leviathan and a quiet life?"

it must be the case that the goodness of the absence of the worst evil outweighs the goodness of the presence of the most desirable good. Only then it would follow, on the basis of the continuity thesis, that avoiding cruel acts is more important than securing the most desirable good and therefore is of first importance.

The burden of proof leads naturally to a positive approach. The reason for this is the following: to show that avoiding cruelty is more desirable than securing the most desirable good, it seems apt to claim that the interests violated by cruelty are more pressing than those that come with the absence of the most important good. If this is correct, the argument must refer to certain fundamental interests that are violated by cruel acts, which in turn implies that positive values are invoked to support the Priority Claim.

The fourth point, and I think the most important one, is that the Priority Claim appears to be arbitrary because the premise it is based on, namely that cruelty is the worst evil, appears to be arbitrary. I do think that it is self-evident that cruelty is an evil, and that a justification for this demands "one thought too many", as Williams would put it. But it also seems to me that the point is different from the claim that it is the *worst* evil, which is not as clear. Here is an example that Shklar provides, a scene from Nadine Gordimer's *Burger's Daughter*:

Rosa is confronted by a black drunk who is beating an agonized, heaving monkey. She cannot bring herself to stop him, because he is the real victim in her

eyes. He is "black, poor and brutalized," and as a white South African she is "accountable for him, to him," as he is for the beast. [...] Rosa is torn between putting cruelty and political oppression first. If the victim was a woman or a child, would she still go away?[39]

The scene here involves cruelty to a non-human animal, but the point is that it is not obvious whether non-intervention is worse than intervention even if the monkey was a person, and thus whether cruelty is worse than oppression.

This can also be seen comparing psychological forms of cruelty with other distinct evils, say with domination in the case of slavery under conditions that are not cruel. For instance, it is not clear or obvious at all that hate speech leading to shattering humiliation is worse than non-cruel slavery under a benevolent master. This is a genuine theoretical problem. It needs justification and as long as the justification is not provided, the premise will remain arbitrary and hence the Priority Claim, too.[40]

To counter this last point that the negative approach leaves the Priority Claim arbitrary, some philosophers, including Shklar (as I highlight in §27), argue that historical memory renders this claim plausible. Yet, it is not entirely clear to me how the justification is to work. It seems that there are three possible paths, which I discuss in the remainder of this section.

First, as Forrester points out: "emphasizing memory [can] remind norma-

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[39] Shklar (1984: 22).

[40] Again, the burden of proof leads naturally to a positive approach. To demonstrate that cruelty is always the worst evil, it seems apt to argue that the interests violated by cruelty are more pressing than those by other evils. If this is correct, it follows that the argument must refer to certain fundamental interests and thus to positive values.

tive theory of its recent past and the limits of the transhistorical standards on which it relied."[41] In particular, it can show us how people really are and thus teach us the limitations of lofty ideals in which people treat each other as free and equal. But it does not follow from the fact that other ideals are disqualified that we are left with the prohibition of cruelty as the fundamental end of politics. If anything, it seems to demonstrate the contrary: if cruelty is understood as a historical constant, this reminds us of the limits of the liberalism of fear, too.

The second possible rejoinder is that history brings to light the predicament of victims and reveals how people experience cruelty as the worst evil: we can hear it in the dirges of the victims, read in their diaries, see the immense suffering in their faces. But again, it seems problematic to base a political theory on the fact that suffering is perceived as the worst evil.[42] As Shklar admits, this would amount to a naturalistic fallacy, i.e. the move from the factual statement about how it is conceived to the normative claim that cruelty is the worst evil.

A third argument is that political knowledge can be gained through a particular combination of philosophy with "contextual, situated knowledge pro-

[41] Forrester (2011: 606).

[42] It is also problematic for another reason Arendt (1958: 50) notes, namely that the victim's pain "is the most private and least communicable" human experience.

duced by history",[43] as Stullerova argues to explain Shklar's method. First, history "facilitates a recognition of the self and the other as sentient beings, vulnerable to pain, and physical and mental damage."[44] In turn, the learning about cruelty in history "crucially distances one from others [...] – that the individual loses the capacity [...] to see herself as related to others, to be a social and moral being."[45] The basic idea here seems to be that engaging with historical material triggers compassion which in turn "stifles moral agency",[46] somehow leading to the knowledge that cruelty is the worst evil.

I think that this argument faces a number of problems but I just want to leave it to observing that the evil of cruelty is ultimately based here on the experience of the observer when confronted with brutal acts. And in the age of mass media, when people are confronted with an influx of images and have developed the capacity to endure continued subjection, it is doubtful whether the experience Stullerova describes sets in, i.e. whether it shocks the individual to the extent that she loses the capacity to see herself as a moral being. I do not deny that engagement with historical material *might* trigger that effect, but the causal relation seems too contingent here to show that cruelty is the worst evil.

[43] Stullerova (2014: 24).
[44] ibid: 37.
[45] ibid: 38.
[46] ibid.

Taking everything into account, I thus conclude that the negative approach is not sufficient to support the Priority Claim. In other words: it is insufficient to base the dystopian liberalism on the premise that cruelty is the worst evil. The last two points show that there are gaps in the argument that need be filled and call for the identification of positive values. And the first two points bring out that there are good reasons to supplement the negative approach with a positive one even if the former did warrant the Priority Claim.

§30 Three positive accounts

So far I have taken issue with the dominant strand in the dystopian liberalism. Before I move on and present my own argument, I wish to look at three theorists who have taken the positive approach. This means that they invoke premise (3) to support (1), not premise (2):

(1) The fundamental goal of politics is the avoidance of X

(2) X is the worst evil

(3) G is an important good

Each of the three theories fills out "G" in premise (3) in a different way. It should be noted that Shklar herself suggests (at least on one possible reading) to fill out "G" as negative freedom. I leave this argument aside until §34.

The fist account I turn to is Walzer's. I already said in §25 that he criticizes Shklar's articulation of premise (1). Instead of stating what should be

avoided, he argues that we need to know what is protected: "A liberalism of fear might describe [...] the things we most value and most readily defend: a particular regime and culture, individual autonomy, and the social space within which free men and women enact their life plans."[47] This is primarily a descriptive claim that is supposed to explicate what avoiding cruelty entails. But Walzer also seems to offer here an argument to warrant the principle, to discern a concern that motivates the principle. He thus writes: the "purpose" of the liberalism of fear is to "give the individual, conceived as an agent, room for agency."[48]

The protection of agency may well be a good reason to support the claim that avoiding cruelty is an important political end, yet it does *not* establish the Priority Claim. The problem is the following: the importance of agency seems to confer moral force on a bunch of possible principles such as avoiding marginalization or oppression. This gives rise to the question why avoiding cruelty is most important and hence more urgent than avoiding marginalization and oppression. But Walzer passes over this point.

Gutmann identifies a different positive value as the normative basis for the Cruelty Principle. She writes that "the concern for the integrity of the person rather than the value of negative liberty above all else makes more sense

[47] Walzer (1996: 18)
[48] ibid.

of the liberal commitment to avoid cruelty."[49] However, she nowhere explicates what she means by integrity in this context, which is a problem since it is very much a contested concept.[50] Moreover, Gutmann's suggestion faces the same problem as Walzer's does: she does not indicate why avoiding cruelty protects the value to a greater extent than other possible principles and therefore does not present a case for the Priority Claim.

Finally, a third option is suggested by Allen. He holds that the Cruelty Principle derives its normative force from the premise that cruelty is the worst evil, which in turn is the case because it violates certain minimal conditions required for living a "basically satisfactory life".[51] He writes:

> While some evils must be considered evil because they are inconsistent with and undercut certain ideals of living (e.g., treachery undermines the aristocratic code of honour), others – such as physical cruelty, intimidation, systematic fear, and life-threatening humiliations – are intolerable in the sense that they tend to erode any viable moral ideal of living whatsoever.[52]

Allen identifies the moral ideal of living as the fundamental value in support of the Priority Claim. This move circumvents the objection Walzer and Gutmann face since he at least claims that there is a certain sense in which cruelty is worse than other evils: it undercuts any moral ideal of living, whereas other evils erode only certain ideals. Therefore, the avoidance of cruelty is more

[49] Gutmann (1996: 67).
[50] See for example Cox et al. (2013).
[51] Allen (2001: 352).
[52] ibid: 351.

important than the avoidance of other evils. But the problem is of course that he does not spell out the argument. He does not show in what sense other evils do not erode any moral ideal of living. Indeed, it seems plausible that social exclusion for example is similar to cruelty in that it not only corrupts a particular ideal of living but has an impact on most (if not all) ideals. Though Allen maintains that cruelty is distinct, he fails to make good his claim.

§31 Defence of the Priority Claim: The general argument

Let me summarise what I have covered so far in this chapter. I looked at various arguments given in the history of dystopian liberalism to warrant the claim that avoiding the worst (in particular: cruel acts) should be taken as the most important political goal. I argued that these arguments are not sufficient to support such a strong claim and demonstrated that there is genuine need for a more forceful line of reasoning.

In view of that, I now come to present my own argument for the claim. The specific Priority Claim I defend is that the Cruelty Principle is lexically prior to various other principles that are taken to be fundamental. I will focus on liberal principles because my main aim is to convince liberals that one must endorse the Cruelty Principle if one champions freedom. In particular, I will focus on Rawls' liberty principle, i.e. his first principle of justice, which in turn

is seen as the first virtue of social institutions.[53] The reason for this is that it has become a paradigmatic statement of a liberty principle. Above this, I will also glance at some further liberal and egalitarian principles to show that the Priority Claim is also compelling if one is not a Rawlsian liberal.

The argument in support of the claim comes in three steps. In this section I present what I call a *general* argument for lexical priority. The argument is general in that it shows how a principle A can be lexically prior to another principle B. It is not general in the sense that it is the only argument. Based on the general argument, I then set out to demonstrate in §32 that the Cruelty Principle is lexically prior to Rawls' liberty principle. In a third step, I will indicate in §33 that the same is true regarding some further liberal and egalitarian principles.

I start with the first step. What needs to be the case for a political principle to be lexically prior to another principle? A natural place to look for an answer is Rawls's First Priority rule stating that the principle governing the distribution of liberties is lexically prior to the fair equality of opportunity principle as well as the difference principle. Yet, the argument Rawls offers to

[53] If I succeed in demonstrating that the Cruelty Principle is prior to this principle, I take this to show that avoiding cruelty is the first virtue of social institutions. To clarify the claim here: The "first" refers to the order of Cruelty Principle in relation to the liberty principle and further possible principles. It might be that all things considered the Cruelty Principle turns out to not be the first virtue of social institutions, that there is an even more fundamental concern for biological life or something similar to that, but I leave this question aside. The reason why I call it the first virtue of social institutions is that it is prior to principles that are often taken as first or most fundamental.

this effect has been subject to fierce criticism: H.L.A Hart for example considers the claim "dogmatic" and Barry even deems it "outlandishly extreme".[54] On Taylor's powerful analysis, Rawls' arguments fall too short: most of them fail because of the same error, and one line of reasoning is promising but "radically incomplete".[55]

Even though Rawls' own argument does not help with the question at hand, Taylor's examination of the argument does. According to him, the common error Rawls commits, which Taylor calls the Inference Fallacy, is that he derives the *lexical* priority of a principle from the *high* priority of the interest it serves. One of his arguments states for example that self-respect is perhaps the most important interest and that it is "therefore essential that the priority of liberty be firmly maintained."[56] Taylor observes that the lexical priority of liberties does not follow from the high importance of self-respect. Instead, Rawls would have to show the lexical priority of self-respect, i.e. "that it cannot be traded off for any other interest, no matter how high the rate of exchange."[57]

The analysis here reveals an important point about the general argument for lexical priority, namely that the priority of a principle depends on the lexical priority of the interest it serves. It is thus possible to state that a principle

[54] Barry (1973: 267); Hart (1989: 252).
[55] Taylor (2003: 248).
[56] Rawls (1971: 478).
[57] Taylor (2003: 251).

A is lexically prior to a principle B if the interest X it serves is lexically prior to the interest Y facilitated by principle B.

This opens up the question what it means for an interest to be lexically prior. The answer to this can be found in Taylor's reconstruction of what he regards as Rawls' "radically incomplete" line of reasoning, which he calls the Hierarchy Argument. Rawls maintains that an interest in rationality is lexically prior to other interests, where rationality is understood as a way of deliberation that aims to "find a plan which best organises our activities and influences the formation of our subsequent wants so that our aims and interests can be fruitfully combined into one scheme of conduct."[58] In short, the claim is that rationality is required to form further interests. And an interest in rationality can properly be seen to be lexically prior to other interests because its enjoyment is *necessary* for the formation of further interests.

The concept of necessity is somewhat vague here and it seems that there are two main ways to understand it as distinguished by Henry Shue, namely as an inherent necessity and as a means to an end:[59]

If A is a means to end B and it is impossible to reach the end B without using the means A, it is perfectly correct to say that A is necessary for B. But when I describe the enjoyment of physical security, for example, as necessary for the enjoyment of a right to assembly, [...] I intend to say that [...] being secure is an essential component of enjoying a right to assembly.[60]

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[58] Rawls (1971: 360).

[59] Shue (1980). Also see Carter (1995: 838). His distinction between causally effective means and essential components overlaps with Shue's distinction.

[60] Shue (1980: 27).

It seems to me that Taylor operates with the latter conception of necessity. The point he makes is that rationality is an essential component for the formation of further interests.

This gives me the remaining building-block in order to reconstruct the general argument for lexical priority: a principle A is lexically prior to another principle B if the enjoyment of interest X that principle A serves is an essential component for the formation of interest Y that is served by principle B.

It should be noted that the exposition of the argument leaves it open to what extent the enjoyment of interest X is necessary for the formation of Y, for example to what extent ("how much") rationality is necessary so that individuals can form subsequent wants. I do not think that this can be decided on the general level. Rather, it will vary depending on what the principles in question are. But the question needs to be addressed once all blanks in the general argument are filled in.

§32 The Cruelty Principle vs the liberty principle

I now come to the argument that the Cruelty Principle is lexically prior to Rawls' liberty principle. On the basis of the exposition in the previous section, this argument involves the following: (1) identifying what basic interest the Cruelty Principle serves; (2) identifying what interest Rawls' liberty principle serves;

(3) examining whether the enjoyment of the interest served by the Cruelty Principle is an essential component for the formation of the interest served by his liberty principle.

(1) The analysis of the concept of cruelty in Chapter 1 reveals what interest is protected by the Cruelty Principle. In §8 I state that cruel acts involve the obstruction of one's capacity to form mental states. Hence, I take the interest protected by the principle to be an interest in the formation of mental content, for example to form the belief that X is the case, to form a desire for X or the intention to do X.

(2) Rawls' liberty principles states that "each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all."[61] According to Taylor, the interest served by the liberty principle is rationality as a certain way of deliberation. It is the interest that comes first for Rawls, which he also calls the highest-order interest, as an element of Kantian autonomy. As Taylor writes, "it is the distancing involved in scheduling, prioritising, tempering, and pruning these desires in accordance with a plan of life."[62]

(3) I now argue that the enjoyment of the interest protected by the Cruelty Principle, i.e. forming mental content, is necessary for the formation of the

[61] Rawls (2001).
[62] Taylor (2003: 260).

interest protected by Rawls' liberty principle, i.e. rationality.[63] To see that this is the case, consider again what kind of mental states are obstructed when a person is subject to a cruel act (see §8 for a more comprehensive account):

Belief, hope, desire, love, liking, doubting, wondering whether, joy, elation, pride, remorse, guilt, rejoicing, irritation, puzzlement, acceptance, forgiveness, hostility, affection, expectation, admiration, respect, intention, wishing, wanting, imagining, fantasy, shame, lust, disgust, pleasure, aspiration, amusement.[64]

At least some of these mental states are essential components of rationality as understood by Rawls. I am thinking of mental states such as "wishing" and "wanting", or "belief" and "intention". If a person cannot want and cannot form a belief or an intention to act, then she cannot at all create a plan which best organizes her activities. This is because a plan is a scheme of what one wants to pursue. It contains intentions about what one is to do, which in turn are based on beliefs (for example about what others will do). These mental states are necessary components of what it is to be rational.

This is perhaps clearest in the case of "desire". Rawls writes that in the process of deliberation "desires that tend to interfere with other ends, or which undermine the capacity for other activities, are weeded out; whereas those that are enjoyable in themselves and support other aims as well are encouraged."[65]

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[63] So the relevance of avoiding cruelty derives ultimately from the fact that it is important for the formation of rationality. So avoiding cruelty in the case of non-human animals would not have the same relevance, given that it is not crucial for the formation of rationality, assuming that rationality cannot be attributed to them in the first place.
[64] These are examples of mental states given by Searle (1983).
[65] Rawls (1971: 360).

As can be seen, mental contents such as desires (but also joy) are essential components of the process of deliberation. In other words: If such mental content is blocked, rationality will be gridlocked, too.

To illustrate this, we can return to Murphy's description of torture being a paradigmatic example of cruelty. He writes that "the victim [of torture] could not be expected to understand what is happening while it happens, have a view about it, enter into discourse about it, or conduct any other [...] human activities during the process."[66] Being rational is among those activities in the sense that individuals cannot schedule, prioritise, temper, and prune their desires in accordance with a plan of life. This is not only true of torture but also of psychological abuse for example, given the similarity in effect I highlight in §10.

One might ask at this point how much of the ability to form mental content is needed for rational deliberation. But this question would fail to appreciate the point I make above in §24 when I introduce the Priority Claim and state that it is a claim about non-negligible cruel behavior. So the assumption is that the impact on the victim is deep and the ability to form mental content is imposed drastic restrictions on. In other words, I am treating it as a fixed variable, not as a continuous variable, which would be necessary to pose the question.

There is a further worry I need to address. It might be argued that Rawls'

[66] Murphy (1979: 233).

liberty principle not only protects the interest in rationality but also (by implication) the interest to form mental states. Taylor indeed points out that for Rawls the highest-order interest, which the liberty principle protects, consists of "preserving *both* our rationality and the conditions of its exercise."[67] If this is correct, then there will be no need for a further principle to protect the interest to form mental states.

I think that this response is problematic for the simple reason that the first principle is supposed to protect the highest-order interest. It is paradoxical to state that the liberty principle as the first principle of justice protects rationality as the highest-order interest but also the interest to form mental states as an even higher-order interest. What I suggest in this section circumvents this problem by saying that the Cruelty Principle protects the highest-order interest while Rawls' liberty principle protects rationality as a high-order interest.

Further, if one argues that there will be no need for a further principle to protect the interest to form mental states, one can as well respond that there will be no need for a further principle to protect the interest in rationality. This is because one might put the fair equality of opportunity principle first and argue that it protects the interest in a certain set of opportunities *and* the conditions of its exercise, and thus rationality. Yet, subsuming everything under

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[67] Taylor (2003: 260), emphasis mine.

one principle would mean to give up analytical clarity and would thus come at a high cost.

Taking everything into account, I conclude that forming mental states is an essential component of rationality and that it therefore follows, on the basis of the general argument presented in the previous section, that the Cruelty Principle is lexically prior to Rawls' liberty principle.

§33 The Cruelty Principle and other principles

So far I have focused on the priority of the Cruelty Principle over Rawls' liberty principle. However, I also think that the same argument works to establish the priority of the Cruelty Principle over other liberal and egalitarian principles.[68] As I cannot discuss all of them, I want to indicate in brief how the arguments may run.

Again, the line of reasoning would involve the following three steps: (1) identifying what basic interests the Cruelty Principle serves; (2) discerning what interests the competing principle serves; (3) examining whether the enjoyment of the interest served by the Cruelty Principle is necessary for the formation of the interests served by the other principle.

Given that I have already brought out what interest the Cruelty Principle

[68] I do not discuss telic egalitarian principles stating that it is in itself bad if some people are worse off than others. I simply do not think (on an intuitive level) that it is nearly as bad as if some people are subject to cruelty.

serves, I turn to (2) straight away. To give a crude characterization: Romantics can be seen to place an emphasis on a wide range of emotions and feelings, not on rational thinking, when considering the basic interests of individuals. Liberals like J. S. Mill do not point to rationality as the basic interest either, their focus is on happiness. Communitarians champion less individualistic sentiments like love and friendship. And relational egalitarians emphasize the utmost importance of respect and concern for other people.

(3) The claim now is that forming mental content is necessary for the formation of interests that are taken as fundamental on other political positions. I am thinking here of mental content such as joy, desire, love, elation, affection, admiration, lust, imagining, respect, pleasure, etc. It seems obvious that these mental states are essential for the formation of the interests I mention in the preceding paragraph. To give two examples: Affection is essential for relationships of love and friendship, and joy is an essential component of happiness. If this is plausible, then forming mental content is necessary in the sense that Shue specifies it: "any attempt to enjoy any other [interest] by sacrificing the basic [one] would be [...] self-defeating, cutting the ground from beneath it."[69]

So it follows on the basis of the general argument presented in §31 that the Cruelty Principle is also lexically prior to other principles. A final point

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[69] Shue (1980: 19).

should be noted about the argument for the Priority Claim. It rests first and foremost on the premise that the principle protects the interest in forming mental states. But I do not claim that this is the only argument that confers moral force on the principle. I argue in §21 for instance that avoiding cruel acts will also involve (in most cases) preventing severe forms of unequal power-relationships and unequal status. Such observations also confer force on the principle. But I leave such arguments aside in this chapter because my main aim here is to convince liberals, to demonstrate that one must endorse the principle if one is a liberal and champions freedom.

§34 The negative-freedom-objection

At the beginning of §32 I said that the argument for the Priority Claim involves three steps: (1) identifying what basic interest the Cruelty Principle serves; (2) identifying what interest the liberty principle serves; (3) examining whether the interest served by the Cruelty Principle is necessary for the formation of the interest served by the liberty principle. In step (2) I took Rawlsian rationality as the relevant interest but also said that the argument would still work even if I took Romantic conceptions of a good life or Mill's notion of human flourishing as the relevant interest.

The negative-freedom-objection addresses precisely this step. It consists of two premises: (a) that what really matters is not Rawlsian rationality but

negative freedom and (b) that this leads to a different result in the last step of the argument, namely that the absence of cruel acts and thus the ability to form mental content is *not* necessary for the formation of negative freedom. If both of these premises were correct, it would follow that the Cruelty Principle is not lexically prior to a liberty principle that protects negative liberty.

In fact, both of these premises can be found in the literature. Premise (a) for example is defended by Shklar herself. She writes that "liberalism has only one overriding aim: to secure the political conditions that are necessary for the exercise of personal freedom."[70] Freedom means that an adult is able to "make as many effective decisions without fear or favour about as many aspects of her or his life as is compatible with the like freedom of every other adult."[71] As Shklar notes, this conception of freedom "does resemble Isaiah Berlin's negative liberty, but it is not exactly the same."[72] She explains: "Berlin's negative liberty of 'not being forced' and its later version of 'open doors' is kept conceptually pure and separate from 'the conditions of liberty,' that is, the social and political institutions that make personal freedom possible."[73]

Premise (b) is defended by Skinner in response to Shklar. He points out that the claim that fear takes away liberty is susceptible to what he calls an

[70] Shklar (1989: 21).
[71] ibid.
[72] ibid: 28.
[73] ibid.

"obvious challenge" that Hobbes puts forward in chapter 21 of *Leviathan*, namely that "Feare and Liberty are consistent."[74] The argument is this: For freedom to be restricted, an external obstacle must intervene in such a way that the person "cannot move but within a certain space"[75] and thus is stopped from acting as she wants. "But neither fear nor any of the passions of the soul can possibly count as such an impediment."[76] Therefore, freedom is not restricted by fear. In turn, this means that the absence of extreme fear and thus of cruelty (See §10) is not necessary for the formation of negative freedom.

Skinner's criticism here is directed against Shklar's argument, but I want to stress that is also poses a serious challenge to the Priority Claim I defend. For if it is true (a) that what matters most is negative freedom (as Shklar claims) and (b) that the absence of cruelty is not necessary for negative freedom to be in place (as Skinner maintains), it follows that Priority Claim does not hold.

I have two options to respond to this objection, either addressing premise (a) or (b). In what follows, I focus on premise (b) and argue that even if we take negative liberty as what matters from a liberal perspective, the absence of cruelty turns out to be necessary for the formation of freedom. I wish to discuss three responses of which only one is successful.

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[74] See Skinner (1996: 150).
[75] ibid: 152.
[76] ibid: 179.

Response 1: I argue in §10 that cruelty can involve both physical and psychological force. One might point out that physical force does involve the use of physical objects as external impediments to freedom. This kind of cruelty can thus be seen as a constraint on freedom on Hobbes's account and hence the absence of physical force as necessary for negative freedom. But as it is obvious, this response to the Hobbesian challenge leaves me with another problem: psychological forces cannot at all be seen to pose an obstacle to freedom on this line of reasoning. So this reply is a non-starter.

Response 2: This reply is similar to the argument that Kramer invokes in favour of the claim that outright mind-control is a restriction of freedom:[77] He writes that the person whose mind is controlled "is not an agent endowed with freedoms and unfreedoms any more than is a corpse. Like the body of the elderly patriarch Abraham as described by St Paul, she is as good as dead."[78] Similarly, one could argue that a person who cannot form mental content is not an agent endowed with freedom any more than a corpse is. And if no freedom can be ascribed to the person, while before the cruel act one could, one might be tempted to follow that cruel acts do remove negative freedom.

However, the problem with this response is that a person who is as good as dead and can thus not be ascribed freedom at all, can in fact not be ascribed

[77] Kramer (2003).
[78] ibid: 256.

a lack of freedom either. As Kramer puts it: "were we to rule out attributions of freedom and unfreedoms to her, we could not say that her mind's captors are rendering her unfree [...]."[79] Likewise, we cannot say that the perpetrator is rendering the victim of cruelty unfree. If this is correct, it seems rather problematic to conclude that cruel acts take away freedom, just as it is problematic to say that mind-control makes an individual unfree.

Response 3: A more promising route to counter the Hobbesian challenge is to question whether the account of freedom-restricting impediments is plausible and up-to-date. This criticism is most powerfully articulated by Kramer who presents the following case: Suppose Tony breaks Jack's leg so that Jack cannot walk any more.[80] Now imagine that Tony inflicts damage on Jack's brain so that Jack is again unable to walk. Hobbes's idea that obstacles must be external to the agent to qualify as freedom-constraining leads up to the result that Tony removes Jack's liberty in the former case but not in the latter. Yet, according to Kramer, this is entirely counterintuitive, showing that Hobbes's account implausible.

A similar argument is laid down by Carter in support of the claim that hypnosis and brainwashing can entail substantial reductions of negative freedom: "if I force you to think certain thoughts, then there are also likely to be

[79] ibid: 257.
[80] Kramer (2003: 43).

many actions that I am preventing you from performing."[81] His crucial idea here is that possibilities for action can be blocked by eliminating thoughts. If that is true, then there is no relevant difference between internal and external impediments regarding their potential to constrain freedom.

So Carter and Kramer agree that Hobbes' account of freedom-restricting impediments is implausible. Both maintain that brainwashing and hypnosis can curtail freedom, and Kramer even attributes this force to phobias, compulsive habits, unintelligence and mental retardation.[82] The reason for this view is that triggering a phobia for example can incapacitate agents, rendering the victim unfree. In light of that, Carter and Kramer suggest a different and updated account of negative-freedom-constraining impediments: it is sufficient that an obstacle renders an action impossible so that a person cannot do X.[83]

On the basis of the updated understanding of negative-freedom-restricting impediments, it is now possible to restate the question whether cruel acts curtail freedom. Interestingly, neither Carter nor Kramer consider excruciating

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[81] Carter (1999: 206).

[82] Similarly, Garnett (2007) argues that we can make sense of the idea of a quantity of liberty only if we are willing to count certain purely agential constraints, such as ignorance and physical incompetence, as obstacles to negative freedom.

[83] Carter (2012) writes elsewhere that it is useful to think of the difference between negative and positive freedom in terms of the difference between factors that are external and factors that are internal to the agent: "While theorists of negative freedom are primarily interested in the degree to which individuals or groups suffer interference from external bodies, theorists of positive freedom are more attentive to the internal factors affecting the degree to which individuals or groups act autonomously." But this is misleading, since his own account is intended as a conception of negative freedom and allows for internal impediments to freedom.

pain as a constraint on freedom. And where fear is considered, it comes up short: Kramer states that aversions to perceived dangers should not be taken as a barrier to freedom. His argument is that it is not impossible for the coward to overcome his fear. This contrasts with phobias that "may go well beyond a strong sense of squeamishness or revulsion" to physically restrict people.[84]

Though Kramer and Carter do not consider the question, I think that cruelty, both through physical and psychological force, should be counted as an obstacle. This is because cruelty involves the substantial obstruction of one's capacity to form mental states. As Scarry writes: "In the most literal way possible, the created world of thought and feeling, the psychological content that constitutes both one's self and one's world [...] ceases to exist."[85] If we now accept Carter's point that the elimination of thoughts amounts to a limitation of freedom, then it follows on this description that the curtailment of the capacity to form mental content and thus cruelty marks a limitation of negative freedom. The victim's experience of cruel acts is in this sense closer to the paralyzing experience of a phobia than to the fear of a coward.

To sum up this section: I hope to have shown that cruelty is an impediment to negative freedom and therefore that the absence of cruelty is necessary

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[84] Kramer (2003: 268). It should be noted that both would say that a threat from a gunman does not count as a restriction of freedom. But given that Kramer allows for phobias to limit freedom, it seems that it should depend on the weight of the fear the threat creates to ascertain whether freedom is limited or not.
[85] Scarry (1985: 30).

for the presence of negative freedom. Skinner's objection thus fails and hence the Priority Claim remains intact.

§35 Objections by Kekes

I now come to assess Kekes' criticism of the Priority Claim. He writes that "it takes no more than a little thought to realize that [the] slogan – that a liberal is one who believes that cruelty is the worst thing we do – is mere verbiage that cannot withstand the most elementary questioning."[86] Kekes directs his criticism towards the premise that cruelty is the worst evil, but this criticism also bears on the Priority Claim. The reason is the following: The Priority Claim is based on the idea that to form mental states is the highest-order interest and hence I am committed to the view that cruel acts are the worst evil because they violate the most fundamental interest of persons. If Kekes turned out to be right, his criticism would thus pose a threat to the Priority Claim.

Kekes identifies two arguments that he regards as mistaken: The first is that cruelty is the worst evil because of a particular state of mind at the side of the perpetrator, namely a lack of benevolence.[87] I won't discuss his criticism here since it does not address the view I defend, i.e. that the morally salient

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[86] Kekes (1996: 835).
[87] ibid: 841.

element of cruelty is what I pinpoint as the core of the concept: the effect the behaviour of the perpetrator has on the victim (see §8), not his state of mind.

The second argument Kekes regards as mistaken is that cruelty is the worst evil because of the effects it has on the victim, which does address the view I defend. Overall, he presents four points against this argument. In each case he aspires to show that taking cruelty as the worst leads to an implausible view of the morally worst. So it is either argued that this would count in actions and practices that should not be seen as the worst for the victim, or that it would disregard those that should be seen as the worst.

The first point states that taking cruelty as the worst evil disregards important items that can be seen as the worst. Kekes asks: "why could other evils not cause greater suffering than cruelty? Paternalism, religious and ideological dogmatism, national pride [...]?"[88] It is arbitrary in his view to discern cruelty as the worst evil if the effect on the victim is taken as the morally salient element.

This criticism does not apply to my reasoning in this chapter because Kekes operates with a different conception of cruelty. As I already discuss in §2, for him the "essential feature of cruelty is that it is a disposition of human agents. To be a cruel person, an agent must habitually be in the appropriate

[88] ibid: 840.

state of mind and perform the appropriate action."[89] Accordingly, it is an important question for him how cruelty is to be distinguished from other dispositions of human agents. In contrast to that, I argue in §2 why I am concerned with actions, not with persons. This excludes all dispositions from the category of the worst, and so the question why one disposition is included while others are not does not arise.

His second point is that the argument – that cruelty is the worst evil because of the effects it has on the victim – leaves the category of the worst too capacious and therefore implausible. According to Kekes, we would have to count in practices such as "justified punishment, painful therapy, physically demanding training, telling hurtful truths, and similar benevolently motivated inflictions of pain."[90]

In response to that, it is important to note that Kekes here directs his criticism against Hallie and draws on his conception of cruelty. I agree with him that Hallie's conception leads to an implausible view of what is morally the worst. But I also think that there is a way around it. The analysis of the concept I present in Chapter 1 presents four criteria to determine whether an action is cruel or not. Based on these four criteria, none of the practices Kekes mentions would qualify as cruel without further qualification. For example, physically

[89] ibid: 837.
[90] ibid: 840.

demanding training does not count as cruel because it does not meet the criterion that cruelty must be against the interest of the victim. In view of that, the category of the worst ceases to be too capacious with the proposed view of the concept.

Third, Kekes also argues that the category of the worst is too narrow in another sense. He thus asks: "Why is cruelty the worst thing we do? Why not genocide, terrorism, exploitation, humiliation, brutalization, tyranny, and so forth?"[91] He also inquires: "how does [cruelty] differ from betrayal, fanaticism, dishonesty, expediency, greed, and so forth, which also hurt sentient beings?"[92] Again, the problem with his criticism is that he operates with a different conception of cruelty. On the basis of the understanding of cruelty I present in Chapter 1, genocide, terrorism and tyranny are always cruel and thus fall under the banner of the worst. Moreover, I argue in §10 that severe exploitation and humiliation are cruel and thus count as the worst, too, just as betrayal and dishonesty can be cruel.

In response to this, Kekes asks why write about cruelty rather than about serious evil in general if cruelty is simply serious evil in all of its forms?[93] But this reply is at best a terminological worry. I think that the concept of cruelty has the advantage that it does not come with the metaphysical package as the

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[91] ibid: 835.
[92] ibid: 840.
[93] ibid.

concept of serious evil does. Yet even if this was not case, this reply would not undermine the move to see cruelty as the worst evil, but would only suggest to change the name of what I define as cruelty to serious evil.

The fourth point Kekes puts forward is again that taking cruelty as the worst would disregard certain actions that should be seen as the worst. This time he refers to "many innocent victims [who] have emerged from concentration camps and abusive families without being maimed or ruined",[94] which for him falls under the category of the worst but not the category of cruelty.

I think that Kekes' criticism would be to convincing if "being maimed or ruined" was a necessary element of cruelty, but this is not the case. As I argue in Chapter 1, it is sufficient that it is *likely* that someone is "being maimed or ruined". Accordingly, concentration camps and abusive families would count as cruel and would be included in the category of the worst.

Taking everything into account, it thus occurs that the objections by Kekes fail to establish that cruelty is not the worst evil and accordingly they do not pose a threat to the Priority Claim I defended in the previous sections. The main reason for this is that Kekes works with a different and less plausible (see chapter 1) conception of cruelty.

One more point should be noted: Kekes claims that even if we *assume* that cruelty is the worst, it would not follow that the political principle this

[94] ibid.

supports would be liberal.[95] This is based on the premises that liberals cherish autonomy and that the Cruelty Principle would "curtail the autonomy of cruel people."[96]

Yet, this is a rather crude characterization of liberalism. It is surely correct that liberals cherish autonomy; on the account I present, the importance of the Cruelty Principle also derives from the aspiration to safeguard rationality and autonomy. But it is not true that a theory is not liberal once it allows for the limitation of autonomy. Rawls' theory of justice is a case in point: He defends the view that each person's liberty must be compatible with a similar scheme of liberties for all. This allows for the limitation of autonomy where it is incompatible with the scheme of liberties for all. Hence, I do not think that "curtailing the autonomy of cruel people" disqualifies the Cruelty Principle as a liberal principle.

Conclusion

In this chapter, I wanted to demonstrate three main points:

(1) that the methodological negativism fails to establish the Priority Claim,

(2) that the claim can be shown based on the importance of the human interest in the formation of mental content,

[95] ibid: 843.
[96] ibid: 844.

(3) that Kekes' and Skinner's objections do not invalidate the claim.

Chapter 4

The informal structure: a conceptual analysis

Introduction

As I say at the beginning of this dissertation, the theory of dystopian liberalism I present consists of three elements overall. The first element is the Priority Claim; the second element is the identification of the informal structure as an important site to realize the Cruelty Principle. This is a claim about the *subject* of the principle. And the third element is the application of the principle to the informal structure. So far I have been concerned with the first of these elements and it is from this point onwards that I turn to the other two elements.

The task set in this chapter now is to offer an in-depth analysis of the concept of the informal structure and two further concepts that G.A. Cohen has introduced: the coercive structure and the social ethos.[1] This is essential for both of the elements to be expounded later in this dissertation. On the one hand, when I argue in Chapter 6 that the informal structure should count as a subject of the Cruelty Principle, it will be indispensable to grasp in what sense

[1] The social ontology I refer to is most fully expressed in Cohen's *Rescuing Justice and Equality* (2008), in particular in section 7 of the chapter *The Basic Structure Objection*. This chapter is a slightly modified version of Cohen (1997). See fn. 22 where I highlight one particular modification.

the informal structure is distinct, which also presupposes a proper understanding of the coercive structure and the social ethos. On the other hand, when I explore in Chapter 7 what concrete demands the Cruelty Principle places on individuals, we need to know what the building blocks of the structure are in order to determine how (i.e. through what mechanisms) citizens can do their part to avoid cruel acts.

I proceed as follows: First, I reproduce Cohen's conceptualization and pinpoint several problems his account faces (§35-§36). Next, I discuss two suggestions as to how some of these problems can be fixed. In particular, I examine Brian Barry's and Andrew Williams' view on what renders the coercive structure distinct (§37-§38). In light of the issues I ascertain, I then present my own account (§39-§42). To anticipate the upshot: Brennan et al. distinguish with unparalleled clarity between three kinds of norms: formal, moral and social.[2] I want to show that this typology overlaps neatly with the three terms Cohen introduced: The informal structure I define as the set of social norms, the social ethos as the set of moral norms and the coercive structure as a set of formal legal norms. I will explain these terms more fully later in §41.

[2] Brennan et al. (2013).

§36 Cohen's social ontology

The notion of the informal structure was introduced by Cohen in response to Rawls's view on the subject of justice. Rawls distinguishes between the basic structure of society on the one hand and "rules of practices of private associations or for those of less comprehensive social groups" on the other one.[3] Cohen intervenes at this point. On the most general level, he distinguishes between the coercive and noncoercive social structure, where structure is understood as a "set of rules."[4] Under the noncoercive social structure he then separates the informal structure from the social ethos.

Regarding the coercive structure, we should note first that Cohen takes coercive to mean *legally* coercive. The structure is legal in that it is "legible in the provisions of its constitution, in such specific legislation as may be required to implement those provisions, and in further legislation and policy which are of central importance but which resist formulation in the constitution itself."[5] The structure is coercive as it (a) prevents and (b) deters people from doing things. As Cohen puts it, the structure prevents people from doing things through creating insuperable barriers such as prison walls. Moreover, it deters people by "ensuring that certain forms of unprevented behaviour carry a risk of penalty."[6]

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[3] Rawls (1971: 7).
[4] Cohen (2008: 149).
[5] ibid: 133.
[6] ibid: 144.

An important characteristic of the coercive structure is how it relates to the choices individuals make within that structure. Cohen writes:

> [A]lthough the legally coercive structure of society is indeed discernible in the ordinances of society's political constitution and law, those ordinances count as delineating it only on the condition that they enjoy a broad measure of compliance.[7]

To illustrate: if stealing is illegal, the law will only exist on the condition that people by and large do not steal. If on the other hand everybody was stealing all the time, the thought seems to be that this would undermine the fact that the ordinance is part of the law.[8]

As to the informal structure, Cohen writes that it is a "set of rules"[9] that "manifests itself in predictable sanctions such as criticism, disapproval, anger, refusal of future cooperation, ostracism, beating (of, for example, wives who refuse sexual service)."[10] For example, it is predictable that I will provoke the anger of the Fellows of an Oxford College if I wear a hat during formal dinner, which may well involve a disinclination to assist me in administrative questions. This means that the rule not to wear a hat during a formal dinner is part

[7] ibid: 145.

[8] It should be noted that this is Cohen's updated view on the relationship between the legal structure and choices that individuals make. Earlier in the chapter, Cohen (133) writes that the structure "determines in a relatively fixed and general way what people may and must do, [...] irrespective of the constraints and opportunities created and destroyed by the choices that people make." The thought here seems to be that a law remains a law even where people do not comply with it.

[9] ibid: 135.

[10] ibid: 144.

of the informal structure. Cohen adds to this that typically the informal structure does not manifest itself in insurmountable prevention. However, this is not to say that there is none: Locking errant teenagers in their rooms is such a case of *pure* prevention, as he calls it.[11] This might for instance be a sanction linked to the rule that teenagers must not come home later than 10 pm.

Again, Cohen asks how the structure relates to the choices individuals make within that structure. He states that the informal structure is "bound up with" the choices that people customarily make.[12] It is worth to fully quote Cohen's explanation of what this means:

[T]he noncoercive structure of the family has the character it does only because of the choices that its members routinely make. The constraints and pressures that sustain the noncoercive structure reside in the dispositions of agents that are actualized as and when those agents choose to act in a constraining or pressuring way.[13]

Cohen elaborates further on this later in the chapter, stating that this is not a conceptual truth but a social-psychological one. He writes: "criticism and disapproval are ineffective when they come from the mouths of those who ask others not to do what they do themselves."[14] This is to show why the informal structure is "bound up with" the choices of individuals.

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[11] ibid. This view contrasts with the view presented by I.M. Young (2011: 55). She writes that "implicit rules" as part of social structures "appear as objective, given, and constraining", but they "do not constrain in the form of the direct coercion of some individuals over others", though she agrees that the rules "produce differentials in the kinds and range of options that individuals have for their choices." I think that Cohen is correct in observing that the informal structure can involve direct coercion.
[12] ibid: 134.
[13] ibid: 135.
[14] ibid: 144.

Let us now turn to the concept of social ethos. Cohen defines it (a) as a "set of sentiments and attitudes" and (b) as that "in virtue of which the normal practices, and informal pressures, are what they are."[15] He does not say much about point (a). Later in the book, he quotes Joshua Cohen referring to the ethos as consisting of "attitudes, preferences and sensibilities",[16] and it seems that he accepts this conceptualization as well. In his earlier work, he states that "equality requires [...] a moral revolution, a revolution in the human soul."[17] I think his language here reveals the idea that the respective sentiments and attitudes require a strong commitment.

Neither does Cohen say much about point (b). In his earlier work he explains that the social ethos consists of "motivations that inform everyday life."[18] The thought here seems to be that the attitudes and sentiments drive everyday action, which in turn gives rise to the informal pressures such as criticism, disapproval, anger and refusal of future cooperation.

We can find some examples in Cohen's text that clarify the two points to some extent. The particular egalitarian ethos he champions entails (among other things) that people *believe* that material inequalities are unjust and they act according to the beliefs in their daily lives. Furthermore, Cohen also speaks of the Protestant ethic as a social ethos, which involves "self-denial, hard work,

[15] ibid.
[16] ibid: 380.
[17] Cohen (2000: 2).
[18] ibid: 128.

and investment of assets surplus to needs."[19] It seems that at the heart of this social ethos is a certain *attitude* of self-denial that in turn informs everyday life and leads to hard work, etc. These two examples illustrate point (a), i.e. what beliefs, sentiments and attitudes can make up the social ethos.

Cohen also provides an example that illustrates how choices in everyday life generate informal pressures. The protagonists in this example are husbands in families that "in their overwhelming majority display an unjust division of domestic labour."[20] Historically, Cohen explains, some husbands have revised their behaviour, "in response to feminist criticism [...]. They made a path which becomes easier and easier to follow as more and more people follow it, until social pressures are so altered that it becomes harder to stick to sexist ways than to abandon them."[21] In this case, the social ethos is a set of feminist attitudes that bring forth certain patterns of behaviour that in turn create social pressures.

§37 Some problems with Cohen's social ontology

I shall point out five problems with Cohen's view on what the constitutive elements of the social world are. But before I start, I just want to acknowledge the vital importance of Cohen's work for this dissertation. Social theorists such as

[19] Cohen (2008: 128).
[20] ibid: 142.
[21] ibid.

Giddens have spent decades on the conceptualisation of social structures,[22] but in my view nobody before Cohen has put forward an analysis as intelligible and accurate. I think that it is a breakthrough for our understanding of the social world. In particular, I am thinking of his definition of the informal structure as a "set of rules"[23] that "manifests itself in predictable sanctions such as criticism, disapproval, anger, refusal of future cooperation, ostracism, beating (of, for example, wives who refuse sexual service)."[24] Nothing I say in this chapter challenges this definition and indeed all points I make are points that Cohen could accept as a refinement of it.

The first problem, as Cohen himself admits, is the distinction between the coercive and the informal structure. He states that both structures can exert pure prevention, i.e. pose insurmountable barriers to action. He also thinks that the two structures are "bound up" with the choices individuals make within them. Thus Cohen concludes that the distinction "is more blurred"[25] than he put it earlier in the chapter. Hence the challenge to disentangle them.

[22] See for example Giddens (1984).
[23] ibid: 135.
[24] ibid: 144.
[25] ibid: 146. Cohen (1997: 30) offers an alternative way to draw the distinction in the earlier version of the chapter. He writes: "The [coercive] structure may nevertheless be identified with a set of laws which are not themselves patterns of behaviour [...]. By contrast, the identity of informal structure is less separable from practice: no distinction is sustainable between widespread practices which manifest or represent informal structure and widespread practices which do not." Given that Cohen does not articulate this suggestion in the version published in 2008, I assume that he discards it.

The second problem I want to highlight is his conceptualization of the informal structure. As I say above, Cohen writes that the structure is "bound up" with the choices that people customarily make and with the behaviour it leads to. He thus writes: the "informal structure is not a behavioural pattern but a set of rules, yet the two are so closely related that, so one might say, they are merely categorically different."[26] What Cohen seems to state here is the bi-conditional that an informal structure is in place if and only if a behavioural pattern is in place, too.

But this is much too quick. A pattern of behaviour is neither necessary nor sufficient for an informal structure to be in place. To see this, let us consider a thought experiment presented by Brennan et al.[27] Suppose that people in country X are outraged when they discover that a person urinates in a public swimming pool. There is thus the rule at work that people must not urinate in public swimming pools and that manifests itself in strong disapproval, which makes it part of the informal structure according to Cohen's definition. Nevertheless, water samples do show that people regularly urinate in pools unbeknownst to the public. Brennan et al. point out that in this case the absence of the practice does not undermine the force of the rule, i.e. that people will react with outrage when it is known to them that a person has urinated in a public

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[26] Cohen (2008: 145).
[27] Brennan et al. (2013: 20).

pool. Hence it follows that a pattern of behaviour is not necessary for an informal structure to be in place.[28]

Now suppose that a large group of friends meets for lunch every Friday, under the condition that their meeting is optional because they are busy and do not want to commit to something. Nonetheless, it turns out that people generally show up and the lunch practice continues for a couple of years. Brennan et al. argue that the pattern in behaviour in this case does *not* imply that there is a rule in place that manifests itself in predictable sanctions, i.e. that people disapprove of each other in case a person does not show up.[29] A pattern of behaviour is thus neither sufficient for informal pressures to arise.

The third issue is on the distinction between the informal structure and the social ethos. On Cohen's account the informal structure is a set of rules that manifests itself in certain reactions and the social ethos is a set of "sentiments and attitudes" in virtue of which the reactions are what they are. It seems that the social ethos is seen as a constitutive element of the informal structure, that it gives existence to that structure.

This is a problem for two reasons: On the one hand, it means that the social ethos is a *part* of the informal structure, which would mean that they are

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[28] Cohen would reply to this "that criticism and disapproval are ineffective when they come from the mouths of those who ask others not to do what they do themselves." The problem with this premise is that criticism and disapproval are effective even if it comes from the mouths of those who do not do what they preach but where this is unknown to others.
[29] ibid: 18.

not distinct elements of the social world. On the other one, I do not think that the premise is true, i.e. that the social ethos gives rise to the informal structure. Suppose for example that everybody in a group of friends thinks that one must never accept a job in finance, that all are willing to react with disapproval in case one of them does accept a job in finance, but that each of them has entirely different reasons to do so. It seems that in this case the informal pressures are at work despite the fact that a social ethos is absent. It is absent because there is not a shared set of sentiments that drive the reactions. Hence it occurs that the social ethos is not constitutive of the informal structure.

Fourth, I think that Cohen's conceptualization of the social ethos is rather vague. As I say in §36, he refers to sentiments, attitudes, motivations, beliefs and ethics (e.g. the Protestant one) as composing the ethos, i.e. a pot-pourri of concepts, yet without explaining what the concepts mean and how they relate to each other. Moreover, it is not clear how exactly sentiments and attitudes (etc.) generate social pressures. He seems to think that they inform everyday life and that the resulting patterns of action place pressures on people. But this is not sufficient I think: Even if everybody in Oxford drank tea in the morning (out of a nostalgic sentiment), this alone would not pressure me to give up my coffee. More is needed, yet Cohen passes over this point.

Last but not least, it seems to me that the distinction between the coercive and the noncoercive structure (containing the informal structure and the social ethos) is problematic because Cohen does not explicate in what sense

the former is coercive and the latter is not. He does say in what sense the coercive structure and the informal one are coercive, namely in that both can involve what he calls *pure* prevention and thus deter action. However, it remains an open question what understanding of coercion underlies the distinction.

Taking everything into account, I should stress that indicating these points is not mere nit-picking or inconsequential. In Chapter 7 I want to ask what demands the Cruelty Principle places on individuals in order to create a desirable informal structure. And to respond to this question, we need to know what constitutes this structure. According to Cohen, individual choices, sentiments and attitudes as well as behaviour are essential to build up the informal structure. I hoped to show that this picture is not accurate.

Moreover, I want to argue in Chapter 6 that both the informal and coercive structures are subjects of the Cruelty Principle and that the social ethos is not. This clearly requires a proper understanding of the concepts and the distinctions. I hoped to indicate that more work is needed in this regard.

Finally, it is neither inconsequential for Cohen. Especially the second point puts pressure on his central thesis in his chapter, namely that principles of justice also apply to the actions of individuals. This thesis is based on the thought that "you cannot bring the informal norm within the compass of justice for that reason without also bringing within its compass the actions that give

the norm the substance and that account for much, if not most, of its effect."[30] But the second point challenges this thought and thus also his central thesis that justice places demands on individual actions.

§38 Barry on legal and other structures

At this point I wish to discuss two suggestions laid down by Brian Barry and Andrew Williams for how to draw the distinctions. In this section now, I first look at Barry's view on the legal structure as expounded in his work on multiculturalism. In short, his position is that the legal structure limits opportunities individuals have while other structures do not.

This view comes especially to the fore in his discussion of the so-called rule-and-exemption approach. Barry argues here that certain rules "define a choice set" and what "people choose to do within those rules is up to them."[31] In his view, laws count as such rules. For example, a law that prescribes the wearing of a helmet when riding a motorbike counts as a limitation of opportunities. In contrast, religious rules that prescribe the opposite – for instance in the case of Sikhs – is not a limitation of opportunities. Suppose that the religious rule manifests itself in serious social disapproval: if the Sikh wears a helmet, his friends and his wife and children won't talk to him anymore. Even

[30] Cohen (2008: 135).
[31] Barry (2001: 32).

then the rule would not count as a limitation of opportunities.[32] It is thus implicit in Barry's view that the legal structure is different in this regard from the informal structure.

In order to evaluate this view, it is essential to get clear on what Barry understands by "opportunities". The explanation he offers in *Culture and Equality* is by way of examples. The paradigmatic case he presents is the case of a ship in a harbour of which he says that it has an opportunity to leave the harbour provided that wind and tide are propitious. As Miller comments, Barry takes opportunity here to mean: the physical possibility to do X.[33] In his later work, Barry gives a definition of the term that seems to match Miller's analysis. He writes: an opportunity to do X exists "if there is some course of action lying within my power such that it will lead, if I choose to take it, to my doing X."[34]

To illustrate: Barry states in *Why Social Justice Matters*: "if I am wheel chair bound, it is obvious that I do not have the opportunity to attend a theatre that is not wheelchair accessible."[35] On the other hand, "if you belong to some Christian sect that teaches the sinfulness of reading any books except the bible [...] you still have exactly the same opportunity to read books."[36] What is the

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[32] Barry must accept this proposition. If he did not, this would imply that such rule causes inequality of opportunity and in turn that he has to allow for exemptions from the law in order to restore equality of opportunity, which he opposes vigorously in his book.
[33] Miller (2002: 43).
[34] Barry (2005: 20).
[35] ibid.
[36] Barry (2001: 38).

critical distinction between a disability and religious beliefs?[37] In the former case, it is not in the power of the person to access a theatre that is not wheel-chair accessible, even if he chose to do so. In the latter case, it is in the power of the orthodox Christian to go to the library and put her hands on other books if only she chose to do so.

With this account of opportunities we can now ask whether it is plausible that the legal structure reduces opportunities individuals have while the informal structure does not. As I point out above, Cohen argues that both structures can involve pure coercion in the sense that both can place insuperable barriers on individuals: locking up an errant teenager in a room is no less coercive than locking him up in prison run by state officials. It seems similarly correct to say that the former barrier removes opportunities no less than the latter: if locked up in a room, it is not within my power to play football on fields, even if I desperately wanted to do so.[38] It then follows that Barry's wedge between the two structures does not hold.

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[37] According to Mendus (2002), the critical difference is that religious beliefs are held freely and willingly while disabilities are the result of brute bad luck. Similarly, Owen and Tully (2007: 273) say that the relevant difference is that religious people identify with their beliefs and actively endorse them while people with disabilities and phobias do not. But as Barry (2002: 215) emphasizes in his rejoinder to Mendus, he does not subscribe to this view.

[38] Or when parents reduce the teenager's pocket money, this limits opportunities no less than paying a fine. The point is also defended by Young (2011: 55) who argues that informal rules "produce differentials in the kinds and range of options that individuals have for their choices."

In response to this, Barry could point out, with reference to Max Weber, that the state claims the monopoly of the use of physical force. By definition, this means that no higher authority exists (*de jure*) that can repeal preventive measures such as imprisonment in cases when the law is breached. In contrast, when a child is locked up in his room because he has breached the rule to arrive home by ten o'clock, he still has the opportunity to bring a charge against his parents and let the state intervene. But I think that such a response would be problematic. His parents might even block such a path of action so that it is not within the power of the child to indict his parents, even if he chose to do so; they can forcibly prevent him from exercising his rights.

This leads to the overall verdict that Barry characterisation of non-legal structures is misleading and that therefore the limitation of opportunities is not a feature that distinguishes the legal structure from those structures.

§39 Williams on the legal structure and the social ethos

Having discussed Barry's suggestion on how the legal structure is distinct, I now turn to Williams' view on the difference between the social ethos and the legal structure. In short, he maintains that the legal coercive structure is public in a sense that the social ethos is not.

To see what Williams means, we need to understand what is meant by public. According to him, rules are public if individuals are

able to attain common knowledge of the rules' (i) general applicability, (ii) their particular requirements, and (iii) the extent to which individuals conform to those requirements.[39]

On the basis of this account, Williams claims that the social ethos does not meet these three criteria, while rules of social justice do. His view is thus that individuals are *not* able to attain common knowledge of the rules' (i) general applicability, (ii) the particular requirements of the social ethos, and (iii) the extent to which individuals conform to those requirements. In contrast to that, individuals can attain such knowledge of the rules of social justice. This also provides a characterization of the legal structure given that the legal structure corresponds to the particular requirements of the rules of social justice. Williams' view is that individuals can attain knowledge of what legal structure is required by justice and also of the extent to which individuals conform to this structure.

Cohen discusses this view in the section entitled *Egalitarian Ethos at Home, in the Market, and in the State*.[40] He accepts what Williams writes about the social ethos. But he rejects his characterization of the legal structure. His argument is this:

Consider the extraordinary (and surely unobtainable) knowledge that a government would need to have to enable it to satisfy the difference principle, knowledge, that is, that would enable government to select an economic policy that is optimal with respect to enhancing the lifetime primary goods prospects of the least well off. How could government know, for example, that rises in provision for the worst off enabled by a shift from a universal to a means-tested

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[39] Williams (1998: 233).

[40] Cohen (2008).

distribution of some benefit compensates adequately for a decline (because of the stigma that attaches to means testing) in the strength of poorer people's "social bases of self-respect"?[41]

The central point in this rejoinder is that the government cannot attain precise knowledge of what legal structure is required by justice. Moreover, Cohen argues that if individuals cannot know what particular structures are required by justice, it follows that they can neither know to what extent people conform with those structures.[42]

I find Cohen's response to Williams convincing and it thus occurs to me that Williams does not succeed in identifying a difference between the legal structure and the social ethos. In other words: The legal structure is not more "public" than the social ethos.

§40 Key terms (1): norms

Let me just take stock of what I have so far covered in this chapter. I first introduced Cohen's social ontology and then attempted to demonstrate that the conceptualisations of the coercive legal structure, the informal structure and the social ethos remain problematic. In light of this, I now want to suggest a way to remedy the confusion. In this and the next section, I introduce key terms

[41] ibid: 362.

[42] Cohen also reformulates condition (iii) of the publicity requirement and shows that even then no distinction can be drawn between the social ethos and the legal structure.

before in §42 and §43 I give definitions of the informal structure, the coercive structure and the social ethos on the basis of these terms.

The first key term I turn to is: norm. Following Brennan et al. I shall set aside the statistical sense of the concept "as simply denoting what is common or habitual, as when we say that in an Australian household, having two vehicles is the norm."[43] Moreover, I also leave aside the concept as referring to "an objectively valid or normative principle, irrespective of whether the principle is anywhere accepted", as it is used for instance by philosophers talking about norms of morality.[44] Rather, what is of concern in this chapter is the norm as an *accepted rule*.

Let me explain. Such norms have two elements, a normative one and a socio-empirical one. The normative element is that "norms involve and are partly constituted by normative principles", which in turn are "general requirements".[45] Normative principles are requirements in that they "require things of agents; they describe what agents must and mustn't do."[46] And they are general in that they apply to "the performance of any agent (within a specified class) of certain types of acts in certain types of situation."[47]

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[43] Brennan et al. (2013: 2).
[44] ibid.
[45] ibid: 3.
[46] ibid.
[47] ibid.

Here are a few examples: a norm might require that women must wear headscarves or that they must not work or that they must take care of the home. These are *general* requirements, not least because the rules extend over the actions of a large group of agents, i.e. women. Likewise, a norm might demand that one must never lie or that it is inappropriate to not speak the truth. Such rules have an even wider scope given that they bear on everyone.

The socio-empirical element of norms is that the general requirements are social facts. This means that they are "essentially tied to the groups [...] in which, or of which, they are norms. What makes a normative principle a norm of a particular group [...] is that it is somehow accepted in that group [...]."[48] So the general requirements that men must not cry or that one must never get married for material benefits (e.g. to get rich) only, will count as social facts if and only if the rules are somehow accepted within a given population.

To be more precise, we can say that normative principles are accepted once people embrace corresponding normative attitudes. These attitudes can involve "at least the following: a) normative beliefs, judgments and other cognitive states, b) normative expectations, c) reactive attitudes and dispositions to have such attitudes [...]."[49] An example of a normative attitude is when a person has the belief that women must wear headscarves, or when he is "disposed to disapprove of women who don't wear headscarves [or] judge that it

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[48] ibid.
[49] ibid: 57.

is inappropriate to not wear headscarves."[50] So a general requirement is a social fact if people embrace the corresponding normative attitudes.

These two elements come together in the formal definition the authors offer: A principle P is a norm in a group G if and only if:

i) A significant proportion of the members of G have P-corresponding normative attitudes; and
ii) A significant proportion of the members of G know that a significant proportion of the members of G have P-corresponding normative attitudes.[51]

The normative element of norms comes to the fore through the fact that norms are seen as constituted by normative attitudes. And the socio-empirical element comes across through the stipulation that the attitudes must be held by a significant proportion of people in a given population.

In sum, it might be easiest to think of norms as accepted rules, as "musts and must nots" that reside in people's minds. The force of the norm will be evident to any outsider who enters the group and violates a rule, as she will encounter at least disapproval or even reactive attitudes such as resentment and indignation. But the force will also be evident to any insider. Thus Young writes that "individuals experience social structures as constraining, objectified, thing-like. Even relatively privileged individuals will often say that they 'have no choice' about doing or not doing certain things."[52]

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[50] ibid: 54. Accordingly, it is not necessary that individuals have the codified belief that one must not do X. It is sufficient for example that one is disposed to disapprove of those who do not do X.
[51] ibid: 54.
[52] Young (2011: 56).

§41 Key terms (2): formal, social and moral norms

Under the rubric of norms, Brennan et al. distinguish between formal, social and moral norms. In this section I reproduce parts of their analysis that will be important for the conceptualization of the informal structure vis-à-vis the social ethos and the coercive structure.

First of all, formal norms can be understood with Hart as "a union of primary rules of obligation with [...] secondary rules."[53] Brennan et al. explain these terms as follows:

In the Concept of Law, H. L. A. Hart famously distinguished between what he called primary and secondary rules. Primary rules simply enjoin us to perform or refrain from performing this or that action: to pass the port to the left; to refrain from driving with a blood alcohol reading of more than 0.05; to give money to charity; and so on. Secondary rules, by contrast, 'specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined'.[54]

The paradigmatic example of formal norms is the law. On the one hand, the law consists of rules that enjoin us to perform or refrain from performing particular actions, for example to pay taxes. On the other hand, "[s]ystems of law include rules that establish extremely complex structures both for creating and modifying law (such as constitutions, legislatures, executives) and interpreting and applying law (courts, bureaucracies, independent commissions, and so on)."[55]

[53] Hart (1961: 79).
[54] Brennan et al. (2013: 42).
[55] ibid.

It is in this sense that the law is a union of primary and secondary rules. Apart from the law, formal norms also appear as rules of certain clubs and associations, but only where primary rules governing behaviour come together with rules of change and adjudication.

A further characteristic of formal norms is that they often involve a particular kind of normative attitudes as constitutive of the norms. The observation is that "many of the secondary rules in operation within advanced legal systems will be sufficiently complex and specific that it will be implausible to suppose that members of the population at large have normative attitudes that correspond to them."[56] What makes them social facts nonetheless is that individuals by and large have *de re* normative attitudes, i.e. normative attitudes that reflect the more basic and fundamental rules of the legal system.[57]

In turn, social norms are defined as norms where the normative attitudes are grounded in social practices. Take for example the norm that one must wear black to a funeral or that a gentlemen must retain a sense chivalry towards women. What makes a norm a social norm is that people, when asked why they

[56] ibid: 49.
[57] It should be noted that is a different explanation of the social requirements of law than the one offered by Cohen (2008: 145), when he writes that the ordinances of the constitution and the law count as delineating a structure "only on condition that they enjoy a broad measure of compliance." The point here is that it is sufficient that people embrace normative attitudes corresponding to the more basic rules of the legal system. An example of such a normative attitude is that ethical standards for doctors must be decided by a body that is democratically elected.

embrace the corresponding attitude, might reply: because this is appropriate or because this is the way it is done around here.

To explain: Social practices can be seen as a "regularity in response".[58] The two relevant types of responses are the following: (a) behaviour (think for example of people wearing black to funerals) and (b) "reactive attitudes (think of the practice of blaming wrongdoers) or motives (think of the practice of getting married for love)."[59] It is important to register that the social practices need not in fact exist. As the authors explain, it suffices that people have the *belief* about the prevalence of the responses.

On the notion of grounding the authors write that "the grounds of a normative judgment are the considerations that justify, in one's mind, the normative principle that one accepts."[60] This means that an individual acts in accordance with the normative principle but also holds "others to account with regard to the conduct covered by the principle: to form expectations of others so far as the relevant conduct is concerned; to regard those who fail to act in accordance with the principle in a negative light; perhaps even to take more active steps to encourage compliance and sanction non-compliance."[61] To say that normative attitudes are grounded in social practices means then that the (presumed) regularity in response makes people accept the attitude.

[58] Brennan et al. (2013: 81).
[59] ibid: 67.
[60] ibid: 75.
[61] ibid: 77.

In contrast to social norms, moral norms can be seen, following Brennan et al., as practice-independent norms. These norms are constituted by normative attitudes that are *not* grounded in presumed social practices.[62] Take for instance the moral norm that one must not cheat on his or her partner. What makes it a moral norm is that people, if asked why they hold the corresponding attitude, would *not* respond: because this is the way it is done around here.

This raises of course the question what considerations they are grounded in instead. The authors do not in fact address this question at length, but it is pointed out that beliefs (even where demonstrably wrong) can form the grounds as well as intuitions and feelings. For example, it is sufficient that F "appears to one to be related to the principle in a certain way, that one somehow sees F as legitimating the normative principle [...]."[63] So one might think that one must not cheat on one's partner because one beliefs that adultery undermines trust and trust is essential for a good relationship.

Based on these definitions, I now highlight three differences between formal norms on the one hand and social and moral norms on the other. First, social and moral norms do not involve secondary rules. Take again the moral norm that one must not cheat on one's partner and the social norm that one must not wear a hat during formal dinner at an Oxford College. As Brennan et al. put it: "what is missing from such norms – what makes them non-formal

[62] ibid: 67.
[63] ibid: 69.

rather than formal – is precisely the absence [of] the networks in which they are norms, of secondary rules that establish mechanisms of legislation and adjudication."[64]

Second, neither of the non-formal norms involve *de re* normative attitudes. Moral and social norms are constituted by what the authors call *de dicto* normative attitudes. The point is that the content of the normative attitude must reflect the content of the norm itself. So if the norm is that women must not work, people must hold normative attitudes that correspond to the content of the norm: people in the group might judge that women must not work, but they might also be disposed to disapprove of women who work or judge that it is inappropriate for women to work.

Third, non-formal norms apply to different objects than formal norms. Brennan et al. argue for instance that moral and social norms can be directed to actions, emotions, motifs as well as thoughts. To give an example: "The incest taboo [qua moral norm] is not just a requirement not to have sex with one's close relatives. It is a requirement not to entertain the possibility of doing so, not to think about it, not even to ask oneself the question."[65] In contrast, po-

[64] ibid: 43.

[65] ibid: 51. This point was also articulated by J. S. Mill (1991: 9) who writes that informal pressures "penetrate much more deeply [than legal ordinances] into the details of life, [...] enslaving the soul itself."

sitive law (*qua* formal norms) makes demands on behaviour only: it enjoins us to perform or refrain from performing this or that action.[66]

Finally, I want to add what is *not* a difference between formal norms on the one hand and social and moral norms on the other. It might be thought that the former are "explicitly recorded, written down and codified in official documents, such as legal statutes, state constitutions [...]."[67] But the point is that social norms can as well be explicitly recorded and written down, for example in "books of etiquette that adorn the shelves of bookshops."[68]

§42 The informal structure

On the basis of the distinction between formal, social and moral norms, I suggest that Cohen's social ontology can be recast as follows: the informal structure is the set of social norms, the coercive structure is the set of legal formal norms and the social ethos is the set of moral norms that are grounded in shared considerations.

Let me elaborate on each of these definitions. The informal structure consists of accepted rules that are constituted by normative attitudes grounded in presumed social practices. To put it simply, it is the set of imperatives that

[66] This is not to say that the law does not shape emotions and thoughts. What is relevant here is the content of the normative attitudes people hold. In case of formal norms, what constitutes the norms are not attitudes that one must not think X or feel X, but rather that one must not do X.
[67] Brennan et al. (2013: 41).
[68] ibid.

say: if in Rome, do as the Romans do. What is to be done (the "ought") derives from the fact that this is the way things are done. These imperatives govern how we conduct ourselves towards others, for example towards friends, partners and family members, towards competitors in the market, whether public officials accept bribes, how political protest is being expressed, etc.

One might wonder why people accept normative attitudes on the basis of how things are done in a given population. Brennan et al. point out various possibilities: First, one might *identify* with the practices, for example with the practice that men do not cry. This means that the practice represents "aspects of a valuable identity; [it] may be part of what it means to be a member of the group of which one sees oneself as a part."[69] And in turn, this is why people accept the normative attitude that men must not cry.

Second, it might be that individuals ascribe some sense of social obligation to the practices. The practices appear "to represent something like authoritative expressions of the social groups to which we belong and owe some measure of allegiance."[70] The German idea of a *Leitkultur* that features prominently in political debates on immigration is a case in point. It shows how a significant proportion of the population sees in certain cultural practices, for

[69] ibid: 70.
[70] ibid: 71.

example in heterosexual marriages, an authoritative expression of a "core German culture". As a consequence, people accept certain normative attitudes, for instance that people of the same sex must not marry each other.

And third, it may be that people see the practices as significant through simple habituation. As Brennan et al put it: "Through force of habit, certain ways of doing things may come to strike us as particularly desirable and important."[71] If young women for example wear a headscarf when they grow up, it may be that the mere habit of wearing a headscarf forms, at least in part, the normative attitude that women must wear a headscarf.

It should be noted that this conceptualization of the informal structure does overlap with Cohen's understanding of it. First, I define the structure as a set of norms being normative principles (see §40), which corresponds to Cohen's idea that the informal structure is a set of rules. Second, I said above that social norms are constituted by normative attitudes that involve regarding those who fail to act in accordance with the principle in a negative light and taking active steps to encourage compliance and sanction non-compliance. This matches Cohen's definition that the structure manifests itself in predictable sanctions such as criticism, disapproval, anger and the refusal of future cooperation.

[71] ibid.

As I state above, the informal structure consists of social norms, and I should add that it consists of social norms only. This is to exclude certain other social phenomena, such as descriptive norms, i.e. rules that involve unilateral expectations. According to Bicchieri, an example of a descriptive norm is the dress-down Friday rule for office workers, or to invest retirement money into stocks.[72] Moreover, the definition of the informal structure also excludes habits, such as the rule to wake up at six in the morning, as well as traditions, such as the tradition to eat roast meat for Christmas.

Last but not least, conventions are excluded from the informal structure, too. In this context, conventions should be understood as a particular type of descriptive norms. As Bicchieri explains: "Descriptive norms, such as fashions and fads, can wane rather quickly, but some of them may crystallize into stable conventions, such as signalling systems or dressing codes. Such conventions are useful because they coordinate our expectations and often act as signals that facilitate interaction and communication."[73] For example, traders on the stock exchange signal with their fingers how many stocks they want to buy.

The reason for the exclusion can be put thus: Following Cohen, the informal structure manifests itself in disapproval and reactive attitudes. But descriptive norms such as fashions and fads, habits, traditions and conventions do not manifest themselves in such reactions. According to Bicchieri, we do not

[72] Bicchieri (2006: 29 & 30).
[73] ibid: 34.

feel "any group pressure to conform, nor do we believe that others expect us to comply [...]. Deviation from the norm is not punished, nor is compliance overtly approved."[74] Think for example of the trader on the stock exchange. Bicchieri writes that "the failure to [signal with his fingers] is not socially condemned [...]. Not following the convention simply means the trader will not be able to communicate what she wants [...]."[75]

§43 The legal structure and the social ethos

So much for the informal structure. What Cohen calls the coercive structure I want to define as the set of legal formal norms in society. By *legal* norms I mean, following Cohen, those norms that are legible in the provisions of the constitution, in such specific legislation as may be required to implement those provisions, and in further legislation and policy which are of central importance but which resist formulation in the constitution itself. What makes this structure distinct in relation to the informal structure is not that it is coercive, as Cohen suggests.[76] Rather, it is the fact that legal norms are *formal* norms in the sense specified above, i.e. as a union of primary rule of obligation with secondary rules.

[74] ibid: 31.

[75] ibid: 44. To be more concise, it can be said such rules are strictly speaking not norms because they do not have the normative element stating that one must or must not do X.

[76] I do not deny here that the legal structure is also coercive but only that it is the relevant difference.

One might ask at this point why I define the structure as the set of legal formal norms and not of all formal norms. The reason for this is that the aim of this chapter is to clarify a distinction Cohen suggests and to ascertain a difference between the legal and the informal structure. More work needs to be done on the question how to distinguish the formal norms that make up the legal structure from those of clubs and associations. But this question is not relevant in this context.

Finally, the social ethos I define as the set of those moral norms that are grounded in shared considerations. It should be noted that it is not the set of all moral norms but of those that are grounded in similar considerations. An egalitarian ethos would prevail for example if and only if the attitudes would be grounded in certain egalitarian beliefs. If individuals in a given population think that they must renounce superior remuneration, but all for different reasons (perhaps even inegalitarian ones) it strikes me as counterintuitive to speak of a particular social ethos.

This definition sits very well with Cohen's conception of the social ethos as sentiments and attitudes that (a) inform everyday life and (b) generate informal pressures. On the one hand, the social ethos is here defined as the union of considerations (such as sentiments and beliefs) that ground attitudes which in turn inform everyday life not least in the sense that the attitudes govern how one reacts to others. The picture painted here is, I hope, more precise than Cohen's in that it indicates how beliefs and sentiments and attitudes relate to

each other. And on the other hand, the ethos is also presented as a structure that generates pressures on others. After all, it is constituted by normative attitudes that trigger serious consequences in case of non-compliance with the requirement.[77]

Moreover, this understanding is consistent with the definitions of the social ethos we find in the literature. Wolff for instance identifies three levels of a social ethos: values, principles, and practice, and emphasizes that it is "a set of underlying values, which may be explicit or implicit, interpreted as a set of maxims, slogans, or principles."[78] It seems that we can take principles here as equivalent to the normative attitudes such as: women must not work. And what Wolff calls values can be seen as equivalent to shared moral considerations that ground these attitudes.[79] This last point is articulated very clearly by Joshua Cohen who says: "To use some familiar jargon, a social ethos is a matter of ethics at least as much as it is a matter of morality – as much an encompassing view about how to live as about what we owe to one another."[80]

[77] This is different explanation of the informal pressures than Cohen presents it. Not recurrent behaviour causes it, but prevalent normative attitudes.
[78] Wolff (1998: 105).
[79] Similarly, Titelbaum (2008: 303) writes that "although the individual ethos and the sense of justice have different content, the formal features of the former should be modelled on the formal features of the latter as Rawls presents them." As such the social ethos is a "motive" that "motivates [people] to act on certain principles", the idea being that principles are grounded in certain moral motives.
[80] Cohen (2001: 365).

This conceptualization of the social ethos helps see how it is different from the informal structure. Both consist of norms that are constituted by normative attitudes and both put the same pressures on other people within the population to do and think certain things. But in the case of the social ethos, these attitudes are grounded in beliefs, sentiments or intuitions while in the case of the informal structure the attitudes are grounded in presumed social practices. So the norm to wear black to a funeral would be part of the informal structure (if it is grounded in social practices) while the norm that one must renounce superior remuneration can be seen as a part of the social ethos (if it is widely grounded in the same considerations).

Conclusion

I pursued two main goals in this chapter:

(1) Demonstrating that Cohen's conceptualization of the informal structure in relation to the legal structure and the social ethos is problematic and that Barry's and Williams' theories do not help overcome the problems

(2) To offer an alternative definition: The informal structure is the set of social norms within a population, that is (roughly speaking), the set of accepted rules grounded in social practices. The coercive structure is the set of legal formal norms, and the social ethos is the set certain of moral norms, i.e. the set of accepted rules that are grounded in similar considerations.

Chapter 5

The empirical informal structure

Introduction

In the preceding chapter I defined the informal structure as the set of social norms within a given population. This definition is still abstract in the sense that it is removed from the empirical world. In this chapter I set out to provide a much more concrete account of the informal structure.

To see what the objective of this chapter is it may be helpful to return to Rawls' theory of justice. The subject of justice is specified as the basic structure. Rawls gives a definition of the basic structure in conceptual terms, but above this he also makes some brief remarks on what it corresponds to in the empirical world: the "political constitution, the legally recognized forms of property, the organisation of the economy, and the nature of the family."[1] In this chapter, I wish to explore, parallel to Rawls regarding the basic structure, what the informal structure corresponds to in the empirical world.

This is important for the following reason: The lack of an empirical account is a total deadlock for the theory of dystopian liberalism I want to develop. To be more precise: It is not possible to apply the Cruelty Principle to

[1] Rawls (2001: 10).

the informal structure unless such an account is available, and hence neither to explore what concrete demands this places on individuals. Whether we think of global justice or domestic justice, it is often understood, at least in part, what the subject of political principles is within the empirical world: the constitution, states, inter-governmental organisations, etc. As a result, we know what we are talking about, what is to be shaped following the principles. In contrast, it is a mystery what the empirical informal structure is and thus what would have to be shaped in accordance with the Cruelty Principle.

What I suggest in this chapter is that the best account of an empirical informal structure can be found in Part III of Honneth's book *Freedom's right*. Here he goes at great length to present a view of modern (Western) society as consisting of seven spheres (or: "systems") and what I defend, as the central claim in this chapter, is that a large part of the informal structure becomes apparent (or: shows itself) in these spheres.

To this end, I proceed as follows: first of all, I need to explain what social systems are on the conceptual level (§44) and demonstrate that these systems include sets of social norms and thus represent the informal structure (§45). Next, I set out to reconstruct Honneth's seven spheres (§46), which will add up to the bulk of this chapter. These three sections will allow me to pinpoint the empirical informal structure in §47. Finally, I will discuss two challenges (§48 - §50).

§44 Social systems: A definition

I start with the question: What are social systems? A rough definition can be found right at the beginning of *Freedom's right* when Honneth presents his view of the social world. He writes: "the first premise [is] that social reproduction hinges on a certain set of shared fundamental ideals and values. These ethical norms [...] determine 'from below', in the form of more or less institutionalized objectives, the guidelines that each individual's life path should follow."[2] As Honneth notes, this view of the social world goes back to Talcott Parsons:

> The best example of such a conception of society remains the action-theoretical model developed by Talcott Parsons, a model that clearly stands in the tradition of Hegel, Kant, Marx and Max Weber. According to Parsons, the ethical values that constitute the ultimate reality of a given society flow into its individual sub-spheres via the cultural system, determining the actions of its members by imposing role expectations, implicit obligations and socially inculcated ideals – in short, through an entire arrangement of social practices.[3]

This view has two elements: The first is that certain general ethical values give rise to various sub-spheres that make up the social world, which Parsons calls social systems. The second is that the sub-spheres in turn govern the actions of individuals. These two points pertain to two very different aspects of the social world. The first element explains the genesis of sub-spheres and the latter

[2] Honneth (2014: 3).
[3] ibid.

how the sub-spheres in turn shape human action. It is this second element that is interesting for the purposes of this chapter. In Honneth's view, these spheres consist of role expectations, implicit obligations and socially inculcated ideals that determine the actions of individuals.

Though this gives us a rough definition of social systems, it is not precise enough for the purposes of this chapter. After all, it does not show what the importance of social norms is within those systems. To understand Honneth's account better, I thus need to look at Parson's conception. Two concepts are of central importance: (a) the status-role and (b) interest.

I start with the concept of status-role, which is "for many purposes the most significant unit of the social system."[4] It has two aspects, the status aspect and the role aspect. The status aspect refers to a bundle of imperatives a particular status-role communicates to fellow individuals and thus shapes their actions. In Parsons' terms, it is "an object of orientation for other actors."[5] To give an example: Suppose A is a professor and B is her student. The status of the professor regulates how the student approaches her, how B phrases his emails, what he reveals in conversations, how he dresses when meeting her for supervision purposes, etc.

On the other hand, the role aspect is the "processual aspect", i.e. "what

[4] Parsons (1991: 15).
[5] ibid.

the actor does in his relations with others."[6] It is a bundle of directions that speak to the actor herself, not to others. As Parsons puts it: "the role may [...] be defined as the structured, i.e. normatively regulated, participation of a person in a concrete process of social interaction [...]."[7] For instance, the role of the professor may exert pressures on the individual to deliver lectures in a generally intelligible way, to contribute constructively to faculty meetings, etc. Yet, as Parsons adds, it is "an important feature of a large proportion of social roles that the actions which make them up are not minutely prescribed and that a certain range of variability is regarded as legitimate."[8]

Both status and role communicate directives, in the former case to others, in the latter case to the actor herself, which Parsons calls "binding in".[9] He distinguishes between two mechanisms that bind individuals. First, "by virtue of internalization of the standard, conformity with [the standard] tends to be of personal [...] significance." Second, it is the presence of sanctions or rewards that binds the person: "conformity [is] a condition of eliciting the favorable and of avoiding unfavorable reactions of others."[10] Suppose an individual acts in accordance with the rules that come with the role of the professor. When the first mechanism applies, she does so because the pattern itself is meaningful

[6] ibid: 16.
[7] Parsons (1961: 430).
[8] Parsons (1962: 24).
[9] Parsons (1991: 24).
[10] ibid.

to her, and it would remain meaningful independent of the reactions of others. If the second mechanism applies, she might do so for instance to avoid the disapproval of her colleagues.

So much for the notion of status-role. The next concept I need to introduce is more ambiguous and refers to an X that is being realized in the various social spheres. Honneth speaks of "individual purposes" as an umbrella term for "needs", "interests", "individual properties", "abilities" and "aims of self-determination".[11] He hereby avoids the term Parsons uses, namely "function", which has fallen into disrepute. For the purposes of this chapter, it seems appropriate to simply speak of interests and to understand the concept in a broad sense: to say that A has an interest in X means that X is an aspect of A's well-being.

On the basis of this understanding of status-roles and of interests, a social sphere can be defined as *a set of status-roles that serve the realization of certain interests*. They do so by way of tackling the problem of contingency, or as Parsons calls it: double-contingency.[12] It is "an unavoidable basic condition that generates a problem at the social level that requires a solution if social interaction and social order are to be possible."[13] It is somewhat contested in

[11] Honneth (2014: 131).
[12] First introduced in Parsons (1991).
[13] Vanderstraeten (2002: 79).

the literature what exactly the problem is,[14] but the central idea is that people must interlock their actions in the pursuit of shared interests.

Here is an example: Research universities can be seen as social spheres in which various status-roles (professor, teaching assistant, undergraduate student, etc.) enable the pursuit of knowledge. The roles thus have an integrating power: they secure cohesiveness, to use a phrase by Habermas,[15] and produce social order through structuring interaction.

As can be seen, the recourse to Parsons helps grasp the concept of social spheres better than through Honneth's rough characterization. It contains information that will allow me in the next section to pinpoint social systems as the realm where social norms reside.

But it is also important to register that the exposition of the term is not a distortion of Honneth's view. To show this, I want to indicate that the central element of social spheres, i.e. the status-role as a bundle of imperatives with the force to integrate action, is also an essential feature of his conception of social spheres. On the one hand, Honneth explains that "the behavioural expectations that subjects have of each other [...] are institutionalized in the shape of social roles" and that these expectations have "the character of a subtle duty".[16] He adds to this that we should not

[14] See for example Luhmann (1995) who sets out to reformulate Parsons' concept.
[15] Habermas (1987: 242).
[16] Honneth (2014: 125).

assume that the role obligations found in a given ethical sphere always have an obvious and transparent content. The behavioural demands normatively bundled in such social roles, as well as the activities that subjects can expect from each other, are usually open to interpretation and thus leave room for social negotiation.[17]

On the other hand, Honneth also writes that the social roles serve the realization of individual purposes through integrating action:

The behavioural expectations that subjects have of each other [...] are institutionalized in the shape of social roles that normally ensure the smooth interlocking of their respective activities. When subjects fulfil their respective roles, they complement each other's incomplete actions in such a way that they can only act in a collective or unified fashion.[18]

§45 Social systems and the informal structure

As I state in the introduction to this chapter, I want to suggest that the informal structure becomes apparent in social systems. But this is not at all obvious from what I have said so far. For I wrote in Chapter 4 that the informal structure is a set of social norms and in the previous section that a social sphere is a set of status-roles. To see the convergence, I now have to show that status-roles *include* social norms. I need to be clear here: the claim is not that status-roles consist of social norms only.[19] But I think that a comprehensive account of all

[17] ibid: 126.
[18] ibid: 125.
[19] It seems obvious that social systems may also contain moral and formal norms, or even descriptive norms (as described in §41 and §42). For instance, it cannot be doubted that some professors follow certain rules attached to the position because they regard those principles as desirable or because there is a formal code of conduct. What I mean by formal code is a set of general requirements that are the product of complex structures both for creating and modifying the set of requirements.

status-roles within a population would provide an account of the bulk of the most pervasive social norms at work within that population.

To show that status-roles consist of social norms, I need to demonstrate that status-roles meet two criteria. First, the directives attached to a given status-role must be *norms* in the relevant sense, i.e. accepted general requirements (or: must and must nots that reside in people's minds). Second, the directives must be *social* norms: the attitudes must in turn be grounded in social practices. If in contrast they were grounded in values or sentiments, they would be moral, not social norms.[20]

I think that both criteria are met. First, the directives attached to the status-role are general in the sense that they apply to the performance of any agent who occupies the particular status-role. Furthermore, the directives are also requirements in the simple sense that they require things from agents. The social role of the father requires for example that one shows concern for the well-being of one's child. In addition to that, those requirements reside as normative attitudes in people's minds. This is affirmed by the fact that, as Parsons highlights, non-compliance is sanctioned and the threat of sanctions in fact drives people to compliance. This means that there must be people who are disposed to disapprove of people who do X, or judge that it is inappropriate to

[20] See §41.

do X, or think that one must not do X. It therefore follows that status-roles contain norms in the relevant sense.

Second, it is also the case that the directives attached to status-roles are grounded in social practices. One path to show this is to demonstrate that the principles are embraced because certain prevalent practices represent aspects of a valuable identity. For if this is the case, then it follows that the rules are grounded in social practices.[21] Now consider how Parsons explains the "binding in" of status-roles. He writes that it takes place through a process of internalization in which conformity with the standards acquires personal significance.[22] It seems that this can be understood as stating not much more than that the practices represent aspects of a valuable identity.

Here is an example: Suppose that Johnson wants to be a good father and that he has internalized the rule that a good father must drive his children to school. It is in fact so crucial that he not only acts in accordance with that rule but also that sanctions others who do not live up to the same standard.[23] What internalization means here is that driving his children to school every morning

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[21] See §42. Brennan et al bring out (2013: 70) three ways in which individuals ground normative attitudes in social practices. One of them is that one identifies with the practices.

[22] Parsons (1991: 24).

[23] Brennan et al. (2013: 70) explain this as follows: "When we make normative judgments [...], we may be somehow affirming these identities."

represents an aspect of a valuable identity, that is, of being a good father.[24] It is a part of what it means to be a member of the group of which he sees himself as a part. So the principle is grounded in social practices. Therefore, it follows that directives attached to status-roles can be seen as *social* norms.

In light of that, I conclude that social spheres are sets of status-roles that bundle social norms. Considering that the informal structure is the set of social norms, it turns out that the structure becomes apparent (or: shows itself) in social spheres that make up the social world.

§46 Seven social spheres

So far in this chapter I have made an effort to clarify what social spheres are on the conceptual level. I first argued that spheres are sets of status-roles and then that a status-role is (among other things) a bundle of social norms. Now I turn to the empirical account. This is to say that I explore what spheres and status-roles are out there. The best account to date is provided by Honneth, not least because it is comprehensive and intelligible. In this section, I reconstruct his portrayal of the modern Western social world. His view also faces some problems, which I will discuss later in this chapter (§48-50).

The reconstruction picks out two elements in each sphere. I argue in §44

[24] According to the dictionary definition, internalization means "to make (something, such as an idea or an attitude) an important part of the kind of person you are." See the *Merriam Webster*. This matches the interpretation I suggest.

that social spheres are sets of status-roles that interlock such that particular interests are satisfied. In line with that, I will bring out (a) what status-roles and (b) what interests are relevant in each social sphere. However, not much depends on whether the account of interests is entirely accurate. It should be taken as a first approximation.

The first sphere Honneth looks at is the sphere of friendship. The relevant status-role here is the role of a friend, especially of a *close* friend, in contrast to a mere colleague or an acquaintance. According to Honneth, it is the interest in a certain experience that is central to the sphere of friendship: "modern friendship enables us to experience our own will as something whose articulation is desired by a concrete other and thus can no longer be closed off internally."[25] More to the point, it is an experience of self-expression: an expression of "even our most idiosyncratic and odd desires."[26] Honneth also describes the experience, writing that it involves "feelings of sudden relief and ease which are typical for communication between friends."

The second one is the sphere of intimate relationships. The most relevant status-role in this sphere is: the romantic partner. An interest in self-expression is also central here, just as it is in the sphere of friendship. But what is important above that, according to Honneth, is the "sexual intimacy and physical

[25] Honneth (2014: 139).
[26] ibid.

closeness [...]. The two individuals supplement and complete each other [...] by satisfying each other's physical needs, which each of them views as important for their own vitality and well-being."[27]

The sphere of the family, the third sphere that Honneth identifies, is distinct in the following respect: "While the structure of [the other two] spheres is consistently dyadic, families represent a third sphere typically characterized by the fact that at least one additional person, viz. a child, joins the two attached persons."[28] Hence, the salient status-roles in this sphere are: parent (father and mother) and child (daughter and son).

According to Honneth, a vital interest in this system is the child's interest in a certain education: "In today's families [...] children can experience early on what it means to participate as individuals in shared cooperation. [...] They learn to set aside their egocentric interests once another member of the family is in need of their help and support."[29] Moreover, there are also interests that the members of a family share. In short, family life promises that an "uncontrollable element of our nature is briefly undone."[30] Honneth explains: "Children can experiment with being their father's or their mother's partner in interaction, while parents can free themselves from the biological circumstances

[27] ibid: 151.
[28] ibid: 154.
[29] ibid: 175.
[30] ibid: 171.

of their age by acting as their children's play buddies. [...] In these moments, we can move forwards and backwards in our organic existence as if our external and inner nature imposed no limits upon us."[31]

These three social spheres fall under the larger sphere of personal relationships. What unifies these sub-spheres is that "individual needs and properties" are realized.[32] It is in the face of anonymization and isolation in the modern world that people pursue the "realization of [their] respective individuality" and "what they regard as their essential features."[33]

The fourth sphere is the sphere of consumption with the producer and the consumer being the protagonists in this sphere. The goal of the consumer is to meet individual interests through consumption, for example to purchase the equipment needed for the pursuit of hobbies and one's conception of the good. In contrast, the main goal at the side of the producers is to maximize profits, which involves an interest to produce goods that meet the demand at the side of the consumers and thus to generate revenues.

The sphere of production and services, which is the fifth realm that Honneth discerns, is a gathering place for the roles of the employer and the employee. The main goal of the employer is again to maximise profits and therefore that the employee performs well while the costs for human resources are

[31] ibid.
[32] ibid: 131.
[33] ibid: 133; 134.

kept as low as possible. On the other hand, Honneth brings out several interests of the employee that I will only mention here: an interest in a high-level of opportunities, in devoting oneself to gratifying and rewarding work, in co-determination at the workplace, and in standing as a moral equal vis-à-vis the employer (e.g. not to be treated as a mere means).

These two spheres add up to what Honneth calls the sphere of the market economy. What unifies these sub-spheres is that "particular interests and abilities" are being realized.[34] Given that Honneth does not say much more about how the larger sphere of personal relationships is different from the larger sphere of the market economy, it seems that the distinction is best understood as an heuristic to systematize the social world.

The sixth realm is the democratic public sphere where the role of the citizen can be seen as the salient status-role. According to Honneth, citizens come together in this sphere to influence political legislation. This involves "forming an [...] opinion in discursive exchange with other citizens about the policies to be implemented by representatives."[35] The democratic public sphere is thus "a type of experimental research community" in which people can "explore the social conditions of peaceful interaction."[36]

The outcome of this discursive exchange are directives that are to be

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[34] ibid: 131.
[35] ibid: 260.
[36] ibid: 272. Honneth takes this point from Dewey.

implemented on the political level, i.e. in the seventh sphere: the constitutional state. The relevant status-roles are: the civil servant and the elected representative. And the aspiration in this sphere is to transform the outcome of the exchange into binding resolutions. As Honneth puts it: "All constitutive elements of the modern constitutional state, especially with regard to its legal composition and the division of powers, must be understood in terms of the tasks accruing to the state by virtue of the fact that it must presuppose, protect and implement the will-formation of the citizens."[37]

These two spheres compose what Honneth coins the sphere of democratic will-formation. In sum, the social world thus consists, at least according to him, of three larger spheres: the sphere of personal relationships, of the market economy and of democratic will-formation. In turn, these larger spheres contain two or three sub-spheres.

This brings me to the end of the reconstruction: the account of salient (a) status roles and (b) interests in the seven spheres. Before I move on, I just want to add how I have departed from the textual source. Honneth calls his account a *normative reconstruction*: His objective is to examine "by following the historical development of [the] social spheres, the degree to which the understanding of freedom institutionalized within them has already been socially

[37] ibid: 305.

attained."[38] In other words, the normative reconstruction is an account of how the status-roles "make an especially significant contribution to securing and realizing the dominant institutional values of modernity."[39]

In contrast to Honneth, I did focus on what interests are being pursued in the various spheres, yet leaving out the further step of analysis which involves the question how the value of freedom is being realized. The reason for this is that it is not needed for the overview of spheres I want to offer in this chapter.

§47 The empirical informal structure

In §45 I argued that the rules attached to status-roles can be regarded as social norms and that the informal structure thus shows itself in social spheres. In the previous section, I gave an account of the different status-roles in seven social spheres. This allows me at last to pinpoint (at least a part of) the empirical informal structure: the social norms that are built into the status-roles in the seven spheres. For example, the social norms that are built into the role of the father are a part of the informal structure, just as the social norms that are attached to the roles of the citizen or of the consumer.

In turn, this makes it possible to break the deadlock I refer to in the in-

[38] Honneth (2014: vii).
[39] ibid: 6.

troduction to this chapter. The deadlock boils down to the fact that it is unknown what the empirical informal structure is and that it therefore remains unknown what is to be shaped in accordance with political principles (assuming for the moment that some principles should be applied to this structure). This blocks the exposition of an ideal informal structure. The account of the empirical informal structure I suggest breaks the deadlock. For it gives us a well-defined subject of principles and tells us what is to be shaped in accordance with them: the status-roles that are part of the seven spheres.

§48 Considering objections (1)

This account of the empirical informal structure faces two challenges that I will discuss in the following sections. In this section, I address the possible objection that status-roles do not *in fact* bundle social norms as Parsons and Honneth suggest. The objection states that this might be an interesting theoretical construct but that it is not a representation of the empirical social world. If this was correct, then this would undermine the main claim in this chapter that the informal structure shows itself in social spheres.

To counter this challenge, I have to show that people accept normative attitudes with the following structure: if one occupies the status-role S, one must do X, Y, Z.... In that case it would follow that status-roles bundle social norms. I cannot collect the data and the empirical evidence that would be

needed to *establish* that the status-roles bundle social norms. But I hope to highlight rules that make this proposition plausible.

To begin with, I want to look at some social norms that are attached to the status-roles in the larger sphere of personal relationships. In the sphere of friendship, Honneth observes that people "intuitively master the normative rule that 'true' friends owe each other the willingness to attend to their respective concerns and consult on difficult decisions; that they treat each other's secrets with discretion and not pass such information on to others; that in cases of crises, they should be there for each other with advice and care; and that they should offer sympathy even if they disagree with the other's decisions."[40] Most, if not all of these principles are also built into the status-role of the romantic partner.

The status-role of the parent encompasses a different set of rules. The most important one is that one must be concerned about the well-being of one's children and invest time and effort to this end, that one must not be hostile or irresponsible. According to Honneth, there are also directives that govern *how* the thriving development of children is to be secured. He observes that there has been a shift in Western societies from "the parental fixation on orders and

[40] ibid: 138.

obedience" to "a focus on negotiation, which is supposed to better suit children's independent personalities."[41] Further principles regulate the division of labour: The "patriarchal ideal of the family is gradually being replaced by an ideal of equal partnership which [...] stipulates that both parents are to share the work of child rearing and housework as fairly as possible."[42]

Honneth does not provide empirical data to show that these rules are norms in the proper sense, i.e. that they are *accepted* rules, that a significant proportion of the population has the normative attitudes with the structure: if one occupies the status-role S, one must do X, Y, Z.... This is a serious shortcoming. Nonetheless, I do think that it is somewhat plausible that these rules manifest themselves in predictable sanctions such as criticism, disapproval, anger, refusal of future cooperation and ostracism. For example, if I do not treat my friend's secrets with discretion, I will draw the scorn of the people in my social environment. If it is plausible that the rules manifest themselves in social sanctions, then it follows that people accept them.

Let me also highlight a few principles that are attached to the status-roles in the larger sphere of the market economy. On the side of the producer, there are rules that regulate the price of goods, for example that the means of maintaining or supporting oneself must be affordable, but also what is being

[41] ibid: 158.
[42] ibid: 164.

commodified. As Honneth puts it: "[i]n the nineteenth century, this question [...] only appeared in debates on the legitimacy of marketing female sexuality or alcohol"; but over the course of the twentieth century the question has also been posed regarding new products that have become possible through technological progress.[43]

On the side of the employer, rules state for example that catastrophic working conditions must be avoided, that certain measures must be set up to protect the physical and mental health of the employee. To this end, employers are often expected to "respect fixed working hours, [taking] a number of safety precautions and [paying] compensation in cases of workplace injury."[44] Another principle is that work should be humanized, i.e. that repetitive work that requires no initiative on the part of the worker must be avoided where this is possible.

As to the role of the consumer, there have been social movements that call for instance for moderation and restraint from luxury consumption (in particular: "conspicuous" consumption) on the basis that the pursuit of status relevant goods creates social hierarchies. Another well-known demand, again articulated by social movements, is that one must boycott goods (food, holiday

[43] ibid: 209.
[44] ibid: 230.

trips, household appliances, electricity) where the production has detrimental social and ecological effects.

Again, Honneth does not offer empirical data that shows that these rules are norms in the proper sense, i.e. that they are *accepted* rules. And I do not think that this would be possible for some of these rules. But it seems plausible that these rules are what Honneth calls "idealized" norms, i.e. "underlying principles [...] that have emerged under the pressure of social movements, moral protests and political reforms."[45] If this is plausible, it shows that the status-roles are being recognized as carriers of social norms, as something that should and *can* be regulated.

Overall, much more work needs to be done to address the objection. But I hope that it has become plausible that status-roles as part of the various social spheres bundle social norms. This means that people are confronted with a certain set of rules that reside in the minds of other people once they occupy a particular status-role.

§49 Considering objections (2)

The second challenge accepts that status-roles bundle social norms but it states that the selection of social institutions that bundle social norms is arbitrary. To be more precise, it observes that so far no reason has been given for why these

[45] ibid: 197.

status-roles are relevant for the informal structure and not other roles or social institutions.

To see what I mean, consider two further viewpoints in the literature that pick out other roles or institutions as relevant for the informal structure. Pettit writes that the

> civility [i.e. social norms] required is needed across a much broader range than these examples may suggest. Think of the politics that has been waged in many societies, to a lesser or greater effect, on behalf of consumers or prisoners or war-widows, on behalf of those with various handicaps, those in deprived geographical areas, or those who identify themselves as homosexuals.[46]

The implicit claim is that there is a wide range of roles in place in the social world that also bunch together social norms.

Likewise, Young identifies, following Pierre Bourdieu, social *positions* as the salient institutions of the social world. Positions are "general categories that define [...] constraints and opportunities [e.g. through the presence of social norms]."[47] She speaks for instance of positions of gender and class, which can be regarded to bundle social norms.[48] This contrasts with Honneth's view on the regulative social institutions.

In light of that, the critical question is whether one should accept his

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[46] Pettit (1999: 248).

[47] Young (2011: 56).

[48] For example, Sandy occupies a particular position in the social world. Young (2011: 59) writes that "the reinforced norms of a gender division of labour give her primary responsibility for the care and upbringing of her children."

view on the social world or another.[49] Honneth offers a half-baked defense of his position. He claims that the roles he discerns are well-established in the sense that individuals can distinguish between them:

> the members of [modern] societies are still capable of drawing clear boundaries between different systems of action and distinguishing between them in terms of their normative structure. The ability to distinguish between different roles in different areas of social life, i.e. to recognize the distinctions between obligations at work and in the family, has remained largely intact [...].[50]

Yet, the problem with this argument is that Honneth does not provide empirical evidence to show that people distinguish between different roles, so that they recognize different directives at work and in the family. I do not maintain that the premise is wrong but rather that it is an empirical statement without empirical evidence provided.

To be fair, he does refer the reader to the fourth chapter in David Miller's *Principles of Social Justice*. In this chapter, Miller illustrates how dependent on

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[49] In fact, Honneth (2014: 127) charges himself with this criticism, writing: "I will operate on the assumption, though I cannot yet offer a sufficient justification for it, that we can find such relational institutions [i.e. sub-spheres] today in the institutional sphere of personal relationships, in the sphere of the market economy and in the sphere of the political public sphere."
It should be noted that Walzer faces the same objection in this book *Spheres of Justice*, which he addresses in the paper *Liberalism and the Art of Separation* (1984: 325). Here he argues that the selection of spheres is rooted in "institutional integrity", that the spheres are "institutions with a particular history". The main problem I see is that this theory is not very informative, given that he does not spell out what "institutional integrity" means and what needs to be the case so that some "institutions, practices, relationships of different sorts" can be attributed this quality.
[50] Honneth (2014: 127).

the social context people invoke different principles of social justice. Here is an example:

> To the extent that the group is seen to be made up of independent individuals whose relationships to one another are simply instrumental, the desert principle is employed. To the extent that group solidarity emerges, the preferred distribution is shifted toward equality.[51]

But this makes it clear that people can distinguish between contexts, not between "different roles in different areas of social life". For instance, it is conceivable that a person switches from one role to another, say from friend to consumer, and yet the relevant context remains the same, e.g. that group solidarity prevails and thus the same principles are seen as salient. This would mean that the person does not distinguish between roles in terms of their normative structure.

So the claim that the status-roles are well-established in the sense that individuals can distinguish between them is problematic.

§50 Considering objections (3)

In view of the problems his response faces, I now want to defend two further rejoinders to the objection above. First, Honneth's account has heuristic value: it conveys an overview of the social world that is conducive for the purposes of this dissertation. As I said earlier, the informal structure is the structure to

[51] Miller (1999: 64).

which I want to apply the Cruelty Principle. And Honneth's account of the social world has heuristic value in that it allows to extract a well-defined subject to apply the principle: the status-roles that make up the various spheres.

This is an advantage over Pettit's and Young's accounts of the social world and of social structures, which only allows to extract an ill-defined subject matter. It seems that in both cases the subject matter would be too capacious, given that Pettit wants social norms to be in place across a broad range of roles and Young speaks of a wide spectrum of social positions that individuals can occupy, dependent on their income, gender and race. It is thus not as clear what the principle would have to be applied to.

The second rejoinder is to show that Honneth's selection of status-roles is in fact not arbitrary but principled. In short, the reason for this is that the status-roles he identifies meet the desideratum social institutions have to meet in order to count as relevant empirical facts for an ideal theory. To explain this, I proceed in two steps: (a) To begin with, I ask what this desideratum is and (b) then I argue that the status-roles meet this desideratum.

(a) On the question what desideratum social institutions have to meet in order to count as relevant empirical facts, the best account is laid down by David Miller. In *Political Philosophy for Earthlings*, he argues that ideal theory is dependent on a range of empirical facts: on "general features of the human

condition" but also on facts "that hold true in some human societies but not in others."[52] He ascribes the same view to Rawls:

[T]he theory openly rests on a number of assumptions about the subject matter of justice, using that phrase in its broadest sense. For instance, it assumes that [...] the members of such a community nevertheless hold an irreducibly plural set of beliefs about the good life; that there exists a basic structure of social and political institutions capable of being regulated by principles of justice and determining, to a large extent, the different life-chances of individuals; [...] that the production and distribution of such goods occurs primarily through some form of market economy; that children are raised in families rather than communally; and so forth.[53]

Miller's account is an advance over Rawls' because he clarifies the issue at hand. On the one hand, Miller explains with more precision in what sense normative theories are dependent on a range of empirical facts. He writes: "The Facts [...] ground the theory in a presuppositional sense: unless they held true of the society to which the principles of justice are to be applied, principles of the kind that John Rawls proposes would be irrelevant. The facts do not determine the content of the principles [...] but they determine what the theory must be about."[54] So ideal theory is dependent on a range of empirical facts in the sense that these facts form the subject of the theory.

On the other hand, Miller explains plausibly *when* something is to count as a relevant empirical fact, so when the social institutions must feature in the normative ideal, namely *when a large proportion of the population is deeply*

[52] Miller (2008: 45).
[53] ibid: 40.
[54] Ibid: 45.

committed to the social institution. Miller's argument for this runs as follows: political philosophy is a branch of practical philosophy and as such it is supposed to give guidance for action. It "should be aimed at citizens generally, setting out principles that they might follow when supporting or changing their institutions and practices."[55] And if people are to follow the principles, the ideal must feature certain social institutions: those to which a large proportion of the population is fundamentally committed to. For if it did not, people would be asked to discard fundamental commitments, which in turn would undermine their motivation to implement the ideal.

(b) This gives me the desideratum social institutions have to meet in order to be relevant empirical facts for ideal theory. I now point out that the status-roles as part of the various spheres meet this desideratum. To see this, note that Miller affirms it in the case of the family:

> Rawls makes it clear that he does not require or presuppose any particular family structure – he is in favour of greater equality between men and women, he doesn't rule out same-sex marriage, etc. – but he nonetheless continues to assume that children will continue to be raised in small family units [...]. Why does he assume this? [...] What Rawls really means is that [...] proposals to get rid of the family altogether and replace it with some other institution for raising children step beyond those bounds [of feasibility] – not because they break some natural law (Rawls cannot be unaware that there are alternative ways of raising children that human societies have followed), but because in liberal societies people are fundamentally committed to family life in some form.[56]

[55] ibid: 44.
[56] ibid: 43.

Miller maintains that “people are fundamentally committed to family life in some form”, but this is not very precise. What this involves, I think, is that people in liberals societies are fundamentally committed to parenting, to acting as a mother or as a father, to assume a particular role. In turn, this means that they are committed to the presence of the status-role – in the sense that proposals to get rid of the role altogether would step beyond the bounds of what is feasible.

If this is true, so if people are taken to be committed to the role of the parent, then it seems *prima facie* plausible that people are also committed to the other status-roles that Honneth discerns: close friend, romantic partner, child, producer, consumer, employer, employee, citizen and civil servant. I do not see why people would be more willing to accept proposals to get rid of these roles than to get rid of the role of the parent, to give up on acting as a friend, a consumer or a citizen.

This is ultimately an empirical claim and more work needs to be done to demonstrate that people in fact care. But here is a reason why to expect that outcome. Miller states that people are fundamentally committed to family life, and this is presumably because family life serves the realization of certain interest. The status-roles that Honneth identifies also serve the realization of certain interests people feel strongly about (see §46 for a first approximation).

Hence, it is to be expected that people are committed to the presence of those status-roles, too.

So I conclude that the status-roles that form the various social spheres meet Miller's desideratum and therefore qualify as relevant empirical facts for ideal theories. This responds to the challenge I present in the previous section, i.e. that Honneth's selection is arbitrary. It might turn out that further status-roles exist that also meet Miller's desideratum and we need to consider to arrive at a complete account of the empirical informal structure. But it seems that an account of relevant social categories should include at the very least the roles that Honneth highlights. That is a good beginning.

Conclusion

I defended four main points in this chapter:

1) The rules attached to status-roles in social spheres can be seen as social norms, which means that they can be regarded as part of the informal structure.
2) The social world falls into seven main social spheres which encircle a range of status-roles.
3) The rules built into these roles make up the empirical informal structure.

4) The two challenges that Honneth's account of the social world faces can be overcome, i.e. that (a) the status-roles he highlights do not bundle social norms and (b) that the selection of relevant social institutions is arbitrary.

Taken together, Chapter 4 and Chapter 5 offer an in-depth account of the informal structure. The takeaway point is that the structure is the set of social norms that are attached to the status-roles I highlight in this chapter. The level of detail was required for the theory of dystopian liberalism I am presenting in this dissertation. On the one hand, the insights into the concept of the informal structure are indispensable to defend the claim that the structure should be taken as a subject of the Cruelty Principle, as I will show in the next chapter. On the other one, the description of the empirical informal structure is important for the investigation I will take up in Chapter 7. For it gives me a *site* to which the Cruelty Principle can be applied: i.e. the status-roles that make up the different social spheres.

Chapter 6

The informal structure as a site of the Cruelty Principle

Introduction

In the preceding two chapters I have presented an in-depth account of the informal structure vis-à-vis the coercive structure and the social ethos. On the basis of this account, we can now turn to the second main element of the dystopian liberalism I defend, namely the identification of the informal structure as a site of the Cruelty Principle. This means that the Cruelty Principle should be applied to the informal structure, that it should give directions for its shape.

This is not an uncontroversial premise. A widely held view in the post-Rawlsian literature is that principles of justice apply to the legal coercive structure alone.[1] Given that at least some demands of the Cruelty Principle can be seen as demands of justice (See Chapter 2, §23), it might now be argued that this principle *qua* principle of justice applies to the legal structure alone and

[1] It is not entirely clear what Rawls himself thought on this question. The subject of justice, for him (1993: 258), is the basic structure of society, which entails "the political constitution, the legally recognized forms of property, and the organization of the economy, and the nature of the family." While Rawls is clear on what is to be taken as a subject of justice, it is important to note that he does not intend it as a full account of the subject. As he puts it (1971: 58), "[a] general theory of justice would consider when rituals and other practices not commonly thought as just or unjust are subject" to an assessment on the basis of justice. In view of this, it is not entirely clear whether the informal structure is taken as a site of justice or not.

not at all to the informal one. In brief, the objection is that the subject of the Cruelty Principle must be restricted.

Hence I pursue two goals in this chapter: one goal is to counter the objection and the other is to put forward an argument for the claim. In the first part (§51-§54), I look at four theories of the subject of justice, each of them stipulating a different criterion to determine what the site is. I attempt to show that none of them gives us sufficient reason to exclude the informal structure from the site of justice.[2] It then also follows that those theories do not provide sufficient reason *not* to count the informal structure as a subject of the Cruelty Principle *qua* principle of justice.

In the second part (§55-§58), I present the main argument for the claim that the informal structure is to be taken as a site of the Cruelty Principle. To this end, I demonstrate that the coercive structure alone is not sufficient to

[2] The claim is familiar but not the argument. The familiar claim is that the informal structure is not to be excluded from the subject of political principles. Cohen (1997) was the first to put it forward and not the last. James (2005: 26) argues that informal social practices are subject to assessment according to principles of social justice. He refers to practices such as the following: "Men commonly sit on a bus bench with arms out and legs spread, without suffering social scorn. Women are expected to sit leaning forward, with knees touching, and arms folded in their laps." Moreover, Julius (2003) and Young (2011) defend the view that the basic structure as the subject of justice is more capacious than Rawls has it. It seems that their view on the basic structure can with some interpretative charity be seen to include the informal structure as well. But the argument I present is different in that it does not depend on one (possibly problematic) theory of the subject of principles of justice. Instead, I want to show that multiple theories lead to the same conclusion.

combat cruelty. This means, or so I argue, that barring any persuasive counter-arguments the principle should also be applied to either the informal structure or the social ethos, in addition to the coercive structure. I then explain why the informal structure is to be preferred over the social ethos. Overall, this leads to a precise account of the subject of the Cruelty Principle, including the informal and the coercive structure, but not the social ethos.

§51 Democratic legitimacy & Coercion

In the following four sections I will look at the four most common theories of the subject of justice, each of them stipulating a different criterion to determine what the site is. In each case I will assume that these also work as theories of the subject of the Cruelty Principle, given that at least some of its demands can be regarded as demands of justice.

I start with Nagel's account, which specifies coercion in conjunction with democratic legitimacy as the criterion to determine the site of principles. As he puts it, people must be the "putative joint authors of the coercively imposed system."[3] To limit the subject of political principles to the legal structure, two premises are required. The first premise is that the legal structure, in contrast

[3] Nagel (2005: 128). Similarly, Murphy (1998: 26) argues that the subject needs to "speak in the name of an entire political community."

to the informal one, meets this criterion. Second, it must be true that it is this criterion that renders a structure the subject of justice.

I think that the first premise is true both empirically and conceptually. On the empirical level, it is true that in those legal systems where particular deliberative procedures are in place the people can be seen as putative joint authors of the coercively imposed system. These legal systems can be attributed democratic legitimacy. Moreover, it is correct that in the case of the informal structure the people cannot be seen as putative authors, given that no deliberative procedures are in place. Rather, as Brennan et al. point out, the most common way in which norms have arisen over time is via the influence of powerful groups of people: First some people from the upper classes or with clerical authority set a rule about what behaviour is appropriate. Then it became a rule for the remainder of the population.[4]

We can now see on the conceptual level why the legal coercive structure is better suited to attain democratic legitimacy than the informal structure. As I flesh out in Chapter 4, the coercive structure is the set of *formal* legal norms. It thus comprises secondary rules that "specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined."[5] The presence of the secondary

[4] For a more detailed discussion, see Brennen et al. (2013: 171).
[5] Brennan et al. (2013: 42).

rules is a *conditio sine qua non* to set up democratic procedures. The coercive structure is thus well-suited to attain democratic legitimacy. In contrast, the informal one does not comprise secondary rules, as I explain in §41, which is a barrier for the formation of democratic procedures.

Though the first premise is plausible, I think that the second one is more problematic. It states that coercion that is imposed in a democratic fashion is a necessary feature for a structure to count as a site of political principles. And it is problematic given that it leads to a consequence that Abizadeh articulates as follows: "the more a state comes closer to a tyrant's rule, the less it can be criticized for being unjust."[6] In other words, a legal structure without democratic legitimation would cease to be subject to moral principles and moral assessment. This seems unacceptable. It thus turns out that democratic legitimacy cannot be a necessary requirement for an institution or structure to fall under the subject of justice.

In response to this, one might drop the democratic legitimacy requirement and keep up the coercion requirement. One might argue, as Valentini does, that coercion removes autonomy and that it is this feature that renders a structure a site of justice.[7]

But if coercion alone is the decisive criterion, then both the coercive and

[6] Abizadeh (2007: 352).
[7] Valentini (2011).

the informal structure are to be counted in. As I write in Chapter 4 (specifically in §38), both structures can be coercive even if coercion is understood as what G.A. Cohen calls pure coercion. The same point is also put forward by Blake who argues that people can "be denied their autonomy by being starved, deeply impoverished, or subjected to oppressive and marginalizing norms",[8] which means for him that individuals cease to be "authors of [their] own lives [...] able to develop and pursue self-chosen goals and relationships."[9] In the light of this, it would be arbitrary to include the coercive structure as a site and exclude the informal one. Such a view would, to use Valentini's phrase, "suffer from what might be called a fetishism of state coercion."[10]

In sum, I conclude that this account of the subject of justice does not offer a principled reasoning to exclude the informal structure.

§52 Pervasive Impact

So far I have argued that democratic legitimacy is not a suitable criterion to determine the site of justice, and that if coercion alone is taken as the criterion, then both the coercive and the informal structure would count as subjects. I now turn to another criterion that Rawls emphasizes: pervasive impact.

In his late work, Rawls spells out two ways in which pervasive impact is

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[8] Blake (2001: 272).

[9] ibid: 267.

[10] Valentini (2011: 209).

to be understood.[11] The first way is as profound impact on the extent to which social, natural and fortuitous contingencies, i.e. good and ill fortune, exert influence over our lives, that is, on individuals' opportunities in life and thus on their personal history. For example, property law can create material security and thus shape to which extent an individual is vulnerable to ill fortune, and is thus seen to have pervasive impact. The second way is not so much as impact on the life prospects of individuals but on what kind of person one becomes. Pervasive impact is understood here as a profound influence on how people conceive of themselves, what their final ends and purposes are, whether they pursue them with vigour and confidence or downheartedly and with low spirits.

If pervasive impact is taken as the criterion to determine the site of justice, does this mean that the informal structure is to be excluded? I think not. To see this, suppose there is the social norm that people with disabilities must be approached in a different way than people without disabilities, as partial or limited people. It seems that such a norm would have pervasive impact in both senses that Rawls specifies. On the one hand, it would allow that ill-fortune has a profound impact on the life prospects of disabled people, on what educational and job opportunities are up for grabs. On the other hand, it would also bring forth a certain self-perception as second-class citizens, that people with disabilities are embittered and apathetic in the pursuit of their ends. In view of

[11] Rawls (2001: 56). Also, see Scheffler (2006: 104).

that, it would again be arbitrary, on the basis of this account of the subject of political principles, not to include the informal structure.

One might object that this argument in contingent on a particular understanding of the concept of pervasive impact, and that on other accounts it would turn out that the informal structure does not have pervasive impact. Then it would follow that it does not qualify as a site of political principles.

I think that such a response would be misleading. In fact, it occurs that on *any* plausible definition of pervasive impact it would turn out that the informal structure has this feature.[12] This is because any plausible conceptualization of pervasive impact must rest on our considered judgments about individual cases. And it occurs that excessive marginalization of the sort just described would be judged a case of pervasive impact. This implies then that ostracism of that sort should always be seen as pervasive impact, no matter what the exact definition is. And given that certain social norms exert such force on individuals, it follows that the informal structure has pervasive impact on all plausible accounts of the term.

In conclusion, it follows that on the basis of this theory of the subject of justice, the informal structure is again not to be excluded.

[12] I am indebted to Laura Valentini for suggesting the following argument to me.

§53 Background conditions

Rawls also suggests a further criterion to determine the subject of principles: that the institutions or structures secure the background conditions under which the principles can be satisfied. What Rawls means by this is that the institutions and structures secure that the actions of individuals over an extended period of time do not undermine desirable political principles.[13] The example he gives is that "it is necessary to regulate, by laws governing inheritance and bequest, how people acquire property so [that transactions of individuals over time do not undermine] fair equality of opportunity in education, and much else."[14] Property law thus qualifies as a fit subject.

Let us see how the informal structure fares on this criterion. Consider the following point that feminists have emphasized over and over in reaction to Rawls' *Theory of Justice*. As Okin for example puts it:

> So long as the social structures that depend upon a gendered division of labour are still in place, so long as women rais[e] children and car[e] for the sick and elderly, and so long as this work is privatized, undervalued, and unpaid or underpaid, [...] women will remain systematically disadvantaged.[15]

We can restate this as follows: so long as certain social norms are in place that require a particular interaction between men and women, the actions of men

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[13] Rawls (2001). Also see Scheffler (2006) who argues that background conditions refer to those institutions that guarantee that actions of individuals, given the plurality of values they may pursue and assuming that they comply with the natural duty to support just arrangements, do not undermine desirable political principles.
[14] ibid: 53.
[15] Okin (1994: 42).

and women will bring forth a state of affairs in which women are disadvantaged in a systematic fashion. If this is correct, it follows that a particular informal structure needs to be in place so that the actions of individuals over an extended period of time do not undermine certain desirable political principles. Accordingly, it seems that neither this theory to determine what the site is gives us a reason to exclude the informal structure.

One might object now that I misinterpret here what Rawls means by securing background conditions. In his discussion of this account, Murphy draws a parallel between Rawls' theory and Nagel's ideal of a moral division of labour, stating that "the basic idea is the same. It is to take the business of securing justice off people's plates in their day-to-day lives, [...] to liberate them from day-to-day concerns about how well everyone else's lives are going."[16] According to this interpretation, what it means to secure background conditions is to allow individuals the pursuit of whatever they see fit in their daily lives, with no concern to bring forth a particular state affairs. One might argue that the informal structure disqualifies as a subject on this particular understanding of the criterion.

I do want to go into the question of what the correct reading of Rawls' text is but I will leave aside Murphy's interpretation. And the reason for this is that it does not lead up to a convincing account of the subject of justice. Nagel

[16] Murphy (1998: 258).

himself admits that the idea of the division of moral labour involves serious problems, in particular that it is not feasible to set up legal institutions that would have the intended effect on the lives of citizens.[17] And if no institutions or structures meet this criterion, then the subject of justice would be an empty set, which would result in a deadlock for any political theory.

§54 Ground rules

The last theory I want to look at is Thomas Pogge's. In his work on Rawls, he distinguishes between two different theories, a narrow and a wide one, the former of which he dismisses.[18] According to the wide conception, a structure counts as a site if and only if it serves as ground rules that shape a society. This means that is has to meet three criteria: First, the rules must "regulate the assignment of benefits and burdens (rights and duties, powers and immunities, goods and services) to participants in general."[19] Second, the rules must be constitutive of the terms of social interaction, which means that the rules define society's central procedures.[20] And third, the rules must be well-established, i.e. generally known and understood. An alternative way to formulate this third

[17] See Nagel (1991), Chapters 6 and 10.
[18] Pogge (1989: 23).
[19] ibid.
[20] Rawls (1955) draws the distinction "between the constitutive rules of an institution, which [define the central procedures] and the strategies and maxims for how best to take advantage of the activities for particular purposes." Ground rules need to be constitutive rules, not strategies or maxims.

criterion is to state that the rules must be public in the sense that Williams specifies it.[21]

Let us examine if the informal structure meets these criteria. First, as I point out in the preceding section, social norms may very well regulate the assignment of benefits and burdens of social cooperation, for example social norms that govern the interaction between the sexes, in particular the division of labour in the sphere of the family. Social norms qualify in this sense as ground rules.

Second, I also think that social norms may well define what the terms of cooperation are. Consider for example the situation in post-Apartheid South Africa. It occurs that the sets of attitudes among the so-called races, attitudes about how to interact and cooperate with other races, did establish with whom one trades or in what neighbourhood one lives. These rules do not merely serve as strategies for how best to take advantage of the terms of cooperation, but define the conditions under which people interact. I thus take it that social norms also count as ground rules in this sense.

Third, to see whether the informal structure is well-established, we need to ask if "individuals are able to attain common knowledge of the rules' (i) general applicability, (ii) their particular requirements, and (iii) the extent to

[21] Indeed, Pogge (2000: 164) writes in a later piece that he finds Williams persuasive in this regard.

which individuals conform with those requirements."[22] In Chapter 4, I defined norms as normative attitudes that a significant proportion of a population accepts. I also said that to "accept" a normative attitude means to regard those who fail to act in accordance with the principle in a negative light, to assume reactive attitudes, etc. So there are two groups of people: those who have the attitudes and thus know that there are certain rules and what these rules prescribe, and those who do not. It seems that for those who do not know them, it is possible for example by observing the reactions of people to one's behaviour or in conversation to find out that certain rules apply and what the particular requirements are.[23] Thus conditions (i) and (ii) are met.

Let us turn to condition (iii). Cohen calls it the assurance condition and reads it as follows: "no one can be obliged by a demand [...] unless [...] one could be assured that others are observing [the demands]."[24] Consider now, as Brennan et al. highlight, that for a principle P to be a norm it must be the case that a significant proportion of the members of a population know that a significant proportion of the members of the population have the relevant normative attitudes (see §40).[25] So if a social norm is in place, it is *by definition* the

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[22] Williams (1998: 233).

[23] I think that this a wide-spread phenomenon: let a person visit a foreign country and after a while she will understand what actions are perceived as appropriate and which are not.

[24] Cohen (2008: 348).

[25] See Brennen et al. (2013: 35).

case that people are assured that others accept the relevant normative attitudes. Since social norms thus meet the assurance condition, too, it means that they are well-established.

I thus conclude that the rules that set up the informal structure can indeed be regarded as ground rules because they may well meet all three criteria. It thus follows that this structure would qualify as a subject of political principles if this was taken as the relevant criterion.

It might be helpful to summarize what I have argued so far in this chapter. I hoped to demonstrate that the informal structure is coercive and has pervasive impact, that it secures background conditions to safeguard desirable values and that the rules composing the informal structure can be seen as ground rules. If this is correct, then it follows that the four most common theories of the subject of justice do not compel us to exclude the informal structure as a site. As a consequence, these theories do not compel us neither to discount the informal structure as a site of the Cruelty Principle *qua* principle of justice.

§55 Why the coercive structure is not sufficient

I now move on to the second part of this chapter and set out to demonstrate that there are distinct reasons as to why *specifically* the Cruelty Principle should be applied to the informal structure. The reasoning runs as follows: in this section, I argue that the legal coercive structure lacks the power to prevent cruel

acts to an adequate extent. In §56 I defend the point that the informal structure has important advantages over the legal structure, that it can offset the deficits at the side of the legal structure and should therefore be included as a subject. The final two sections address objections.

The main point I suggest in this section is that the legal structure lacks the power to alleviate cruelty to an adequate extent. In other words: the structure is incapable of properly realizing the Cruelty Principle. Recall now that this principle delineates a relational ideal, as I explain in Chapter 2, and that it thus prescribes a state of affairs in which individuals are not cruel to each other. This leads to the claim that the coercive structure lacks the power to prevent people from being cruel to each other.

This claim is abstract and it will be instructive to focus on a concrete case of cruelty when defending it: severe partner abuse. A survey by the *Office for National Statistics* shows that 1.6 million people in England and Wales suffered domestic assaults in the year ending March 2015, 1.1 million of them women.[26] It shows further that 63% of those women experienced non-physical abuse and 29% were victim of physical assaults. Even on the assumption that most of these acts do not qualify as cruel on the basis of the definition I gave in Chapter 1, the number of those that can be regarded as cruel will still be staggering. The

[26] Travis (2015).

point I suggest in this section is then that the coercive structure is incapable of bringing down such numbers substantially.

The premise in support of this claim is an observation about the limits of the law, i.e. that it faces serious problems to *deter* people from doing things and in particular from being cruel to others. Recall that Cohen writes that the coercive structure deters action in as much as it ensures that certain forms of unprevented behaviour carry a risk of penalty.[27] This view does not recognize the problems the law faces. It glosses over the fact that the risk of penalties is insufficient to be an effective barrier to action.

Here are three of the problems: First, the law operates on what Pettit calls a police-patrol mode of oversight.[28] This means that the police is responsible for vigilance. One issue with the police-patrol mode is corruption: it might be the case for example that the police ignores cases of partner abuse in exchange for privileges or hard cash. A further issue is inefficiency. As Pettit writes: "after all, no police officer can cover very much ground",[29] and no police can observe the incidents in all bedrooms at all times. Even if this was possible, the moral cost incurred through renouncing privacy would be immense.

This problem of vigilance leads up to inefficient deterrence. The reason for this is the following: There is no threat of penalty where action is not being

[27] Cohen (2008: 144).
[28] Pettit (1997: 250).
[29] Pettit (1997: 250).

watched. Suppose for example that a perpetrator of partner abuse knows that his cruel acts will never be exposed because he has bribed the police, or because he knows to protect himself against the vigilance practices of the police. In such a case, there is no threat of penalty for him. And if there is no such threat, the law will exert no influence over his actions in this regard.

Second, the coercive structure consists of formal norms and these norms have a limited *scope*, as I point out in §41. Such rules apply first and foremost to actions, not to attitudes, modes of deliberation and emotions. The main reason for this is, as Brennan et al. argue, that we do not want the police "to have authority over what happens inside our own heads. It conjures up images of an Orwellian world in which our thoughts and feelings are fair game for scrutiny and censure."[30] More to the point, the reason why we do not want an institution with such concentrated power to have this authority is in order to pre-empt systematic brainwashing and mass manipulation.

The limited scope of formal norms poses a serious problem for deterrence. To state that laws do not apply to emotions and attitudes implies that no threat of punishment obtains. And as I write above, if there is no such threat, emotions and attitudes won't be deterred. This is a problem for the prevention of cruel acts. For emotions and attitudes are linked with cruel acts. On the one

[30] Brennan et al (2013: 53).

hand, there are certain emotions that correlate with domestic violence and partner abuse, such as extreme jealously. On the other one, it occurs that attitudes themselves can be cruel, in particular reactive attitudes such as resentment or the refusal to regard a person as a moral equal, for example when such attitudes crush a person's self-respect. So given that emotions and attitudes are linked up with cruel acts, this means that a failure to deter emotions and attitudes implies a failure to deter such acts.

Third, criminal penalties may under particular conditions even encourage cruel acts instead of deterring them. An example of backfiring norms is given by Eric Posner in his seminal book *Law and Social Norms*. He asks the reader to imagine a population divided into Xs and Ys where X and Y refer to groups of people with different characteristics, say physical or religious ones.[31] Now suppose that Xs operate the criminal justice system to the disadvantage of the Ys, so that Ys rely on each other and form a solidarity group. Also suppose that a new law is passed stipulating that emotional blackmailing is illegal.

Posner argues that certain laws may well encourage deviance, in this case severe emotional blackmailing and thus cruelty, in order to *signal* loyalty

[31] Posner (2000: 98). He (2000: 99) also refers the reader to empirical evidence that shows that "increasing the punishment for certain crimes [...] encourages criminal activity by members of the out-group (Sherman 1993)." The crackdown on cigarette smoking is a good example: increasing measures to restrict smoking have "heightened the association of cigarette smoking with [...] rebelliousness" (106) and as being cool, increasing cigarette smoking among teenagers. The crackdown thus gave rise, beyond expectation, to the social norm with the following content: if you want to be cool, you must smoke.

to one's own group. So an attempt to avoid cruelty through legal action may even cause an increase in cruelty. In more general terms, the thought is that "crowd dynamics are unpredictable" and hence that legal sanctions can indeed backfire.[32]

These three points are intended to indicate the limits of the legal structure to deter cruel acts. This is not to claim that formal norms lack all power to deter people from being cruel to each other, which is clearly false. Rather, what I wanted to demonstrate is that the coercive structure is not a sufficiently effective barrier to cruel actions.

§56 What the informal structure adds

Given these problems at the side of the coercive structure, I now want to show that the informal structure is crucial, and in certain respects superior, for the prevention of relational wrongs in general and of cruel actions in particular. This clam has for example been put forward by Anderson, who writes that "full equality may not be achievable simply through redistribution of material resources. Equality may require a change in social norms [...]."[33] But as far as I can see, authors like Anderson and Scheffler do not address the question what the distinct virtues of social norms are to combat relational evils.

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[32] ibid: 106.

[33] Anderson (1999: 324). Also see Scheffler (2005: 24) who speaks of necessary egalitarian norms that support reactive attitudes and emotions.

To see this, suppose that the following social norm is in place: one must under no circumstances abuse his or her partner physically. This means that the principle is an accepted rule, which in turn implies that people by and large accept the normative principle that one must not do so. As I explain in §41, this involves that people hold "others to account with regard to the conduct covered by the principle: to form expectations of others so far as the relevant conduct is concerned; to regard those who fail to act in accordance with the principle in a negative light; perhaps even to take more active steps to encourage compliance and sanction non-compliance."[34] Let us say that "active steps" involve efforts to intervene and stop the violence, but also to consult relatives and as an *ultima ratio* even to blow the whistle and call the police.

I think that such an informal structure would have four main advantages over the coercive one. First, vigilance is much more effective. This is not least because one is surrounded by other people who might not be in the state of keeping watch but who will watch and listen carefully once they notice something, not ignore it. For example, there will be friends, colleagues and relatives who may well observe certain changes (like wounds) in the life of the victim, and even neighbours who might take note of what takes place next door, and then take action. Social norms thus turn people in one's social environment to

[34] Brennan et al. (2013: 77).

vigilant individuals. In turn, this means that a real threat of penalties is in place and thus more effective deterrence.

Second, social norms have a wider scope than formal norms, they apply to emotions and attitudes and can thus state for instance that one must never be insanely jealous. The power of such norms was already perceived by Mill who writes that the mandates of society, as opposed to what he calls the mandates of the magistrate, "though not usually upheld by such extreme penalties, [...] leave fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself."[35] The reason for this is that one is surrounded by people (friends, family, colleagues, etc.) who disapprove of certain emotions and attitudes, and who are (as opposed to the police) in the position to recognize these emotions and attitudes. It is the threat of provoking their contempt or disdain that may well shape one's inner life.

And if social norms can penetrate deeply into the details of life and deter emotions and attitudes, this also means that certain cruel acts can be deterred. This is because certain emotions and attitudes are linked up with cruel acts (see preceding section for two examples).

A further virtue linked to these two points is that the level of vigilance and the wider scope come at a comparatively low moral costs. I wrote in the preceding section that strict police surveillance comes at the cost of privacy,

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[35] Mill (1991: 9).

given that every detail of one's life would be exposed to an external agent. I also said that a wider scope of legal rules would make our thoughts and feelings a fair game for brainwashing and systematic manipulation. Social norms do not face these problems. On the one hand, privacy is less compromised where friends and one's family are watchful, because this still means that one's living space is not subject to constant police surveillance. On the other hand, social control is not given into the hands of powerful state officials who could abuse it in a systematic fashion.

Third, social norms introduce new types of punishment for perpetrators of cruel acts. Remember that the informal structure, as Cohen puts it, manifests itself in predictable sanctions such as criticism, disapproval, anger, refusal of future cooperation, ostracism, etc. If taken to an extreme, deviance from the norm can even bring forth complete social isolation, which is an additional burden, if not even a weightier one, than a prison sentence for example. The threat of such punishment is thus an additional deterrent factor.

Fourth, social norms weaken certain constraints on resistance against cruel acts. The *Guardian* for examples writes, with reference to the figures from the *Office for National Statistics*, that a third of the victims of serious sexual assault had not told anyone about their experience, and that "most of the victims who did not tell anyone said it was because they were too embarrassed."[36]

[36] Travis (2015).

Embarrassment is thus a constraint to speak out and resist cruel acts. Now remember that social norms create an environment of people who see the evil of those acts and disapprove of them. It occurs that such an environment, in which victims can expect more compassion and less shaming, relieves the burden for speaking out. And in turn, this makes it riskier for people to commit cruel acts.

In view of these four points, I conclude that the social norms can deter cruel actions in ways that the coercive structure cannot. Indeed, there is also solid empirical evidence that shows the force of normative attitudes on individual behaviour. As Emily McTernan highlights, "research in social psychology and economics suggests that social norms are powerful determinants of behaviour, and secure stable patterns of behaviour", for instance when it comes to paying taxes or drink-driving.[37]

I think that we should therefore apply the Cruelty Principle to the informal structure in addition to the coercive one, which implicates that the informal structure should be taken as a site of the Cruelty Principle. One might ask now what the underlying theory of the subject of political principles is. This account we can find in Ronzoni's work; she writes that an institution qualifies as a subject if it "will bring about the social conditions under which the principles

[37] See McTernan (2014: 95).

themselves can be said to be satisfied."[38] I hope to have shown that the informal structure is relevant in this sense.

I want to add one more point before I move on. So far I have focussed on the virtues of social norms, neglecting their adverse effects. When Mill for example states that such norms can enslave the soul, he means that they can place a substantial constraint on individual freedom. I won't discuss such problems in this chapter but in the next one when I suggest a range of norms that should be at work in an ideal world.

§57 Objection (1): The primacy of the legal structure

In response to the claim presented in the previous section one might now admit that the threat of legal penalties is insufficient to deter cruel acts on a large scale, but argue that this observation is not enough to show that the coercive structure is insufficient all things considered. In particular, one might maintain that (1) the coercive structure can shape the informal structure such that it in turn brings forth the desirable state of affairs.[39] In light of that, one may be

[38] Ronzoni (2008: 205).

[39] This counterargument is not a straw man I am building; it has been presented in the debate on the subject of justice. In her response to Cohen's claim that we must count the informal structure as a site of justice, Ronzoni (2008: 218) for example writes that a focus on the legal structure is not bound to ignore the importance of informal norms, because "the social norms that develop over time are themselves influenced by the basic structure of society." Likewise, Pogge (2000: 165) speaks of a *justice-optimizing tendency* of the coercive structure, which means that it can shape the informal structure and steer it into particular directions.

inclined to conclude that the coercive structure is sufficient to realize the Cruelty Principle and that the principle need not give additional directions to the informal structure, too.

I think that there are two main problems with this objection. The first one is that it leads to distorted judgments about the social world if we include only the legal structure as a subject. To see this, consider again the situation in post-Apartheid South Africa where racial exclusion is rooted in normative attitudes that people accept. I think that it misses the point to state that the problem lies in the legal structure and that we need a shift where reforms have taken place and legal discrimination has been abolished. This is a distorted account of the social world. Rather, we should call a spade a spade and notice that the problem lies in the informal structure and calls for a revision. In order to make this more precise diagnosis, it is unavoidable to count the informal structure as a subject.

The second problem has to do with premise (1) stating that the coercive structure can shape the informal one. Here is an example: Suppose that emotional blackmailing is a widespread cruel practice in partner abuse cases. So one partner knows sensible personal information about the other and threatens her to reveal the information in order to control her behaviour. Suppose that the threat causes extreme fear so that the act counts as cruel. Premise (1) states that a law prohibiting blackmailing will bring about (over time) the social norm

that one must not blackmail his or her partner, i.e. that people accept this normative attitude. So in short, the point is that attitudes can be made to follow laws.[40]

Let us now assess this claim. First of all, I think that G.A. Cohen's response (to the criticism put forward by Joshua Cohen) is not helpful here. His observation is that the relation between the coercive structure and the social ethos – and by implication between the coercive structure and the informal structure[41] – is not unidirectional. He writes:

> While it is undoubtedly true that the [coercive] structure profoundly affects the ethos, it is also true that the social ethos profoundly affects the character of the basic structure. It was not the character of Britain's basic structure in 1945 that caused it to be transformed in a socialistic direction after 1945, but a powerful democratic ethos that was formed in the experience of war. It was not the character of the American basic structure, but, perhaps, the consciousness-transforming consequences of the birth control pill, and at any rate certainly changes in consciousness, the rise of a feminist ethos, that led to women-friendly changes in the American basic structure after 1970. There is too much influence of the ethos on the structure for the fact that the structure affects the ethos to possess any discriminating force.[42]

Although I think that this observation is correct, it does not show that the legal structure cannot bring about a desirable informal structure. It only shows that the coercive structure is not an entirely independent variable. But it need not

[40] Similarly, Joshua Cohen (2001: 377) writes that "it might be that changes in institutions and policies would change the distribution [favourably to the worst off] and produce that shift by changing the preferences, attitudes, and sensibilities [...]."
[41] The decisive observation here is that normative attitudes can evoke changes in the legal structure of society, independent of how these attitudes are grounded. So what Cohen says about the social ethos is also true of the informal structure.
[42] Cohen (2008: 378).

be independent; it might have just enough profound impact in order to steer the informal structure or the social ethos into particular directions.

A much better rejoinder to this claim can be found in Posner's and Pettit's independent investigations of social norms. As to Posner, he takes issue with the "increasingly influential argument that the government should self-consciously try to change social norms."[43] And Pettit states that

> It is part of established wisdom that the state ought not to get in the way of the wonders which the invisible hand can bring about in the provision of market goods. It ought to be part of established wisdom that equally the state ought not to get in the way of the marvels which the intangible hand can facilitate in the supply of civic virtue.[44]

The authors support this position with powerful arguments. One point that Posner makes is the following: for social norms to follow the law, it must be possible that a certain law can be drafted. But legislators in democracies face the tide of opinion and therefore can only draft laws that are *not* met with hostile opposition at the side of the population. So even if social norms did follow legal rules, it would not be possible to entirely steer the informal structure because certain legislation that falls on the other side of the tide could not be passed in the first place.[45]

Suppose for example that legislators in Turkey would like to ban alcohol

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[43] Posner (2000: 7).
[44] Pettit (1997: 255). The intangible hand can be understood as equivalent to the informal structure in that both manifest themselves in predictable sanctions.
[45] ibid: 177. Also see p.131.

consumption, assuming that at one point in the far future people will adopt the attitude that one must not drink alcohol and thus give rise to the social norm. Posner's point is that the law will not be drafted as long as a large proportion of the population is expected to disapprove of that decision and willing to vote those legislators out of office. This is to show that the legal structure faces constraints in shaping the informal structure.

Moreover, Posner also takes issue with the claim that social norms in fact follow the law. According to him, the explanation for this is the "self-reinforcing nature of beliefs",[46] and we may add: of normative attitudes. Recall that in §42 I mention three reasons for why individuals ground normative attitudes in social practices, namely because they identify with the practices, regard them as authoritative expressions of the social groups to which they belong or because of simple habituation. These processes reinforce the attitudes. As a result, it turns out that government action "may fail to change [them], frustrating efforts to use the law to fine-tune people's [attitudes]."[47]

Pettit explicates in more detail what counterproductive effects can set in once the legal structure intervenes with the informal one. I would like to highlight two of those: First, certain criminal penalties, can lead to the "hiding of

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[46] ibid: 176.

[47] ibid. An example Posner offers is Bill Clinton's unsuccessful attempt to increase acceptance of homosexuality in the US military, where social norms did not follow government action (130).

virtue".[48] Take the law stipulating that one must not blackmail his or her partner. Pettit's point is that in such a case the original motivation becomes indistinguishable from knavish prudence, and that people might drop the normative attitude in order to not be seen as knavishly prudent.

Second, criminal penalties may also lead to what Pettit calls "labelling", i.e. the stigmatization of people, leading them to act according to label. In the case of laws against cruel actions, this might mean that the law is being interpreted as expressing a particular view about the people subject to these laws, namely as being cruel people. In turn, these people may in fact start to act according to the label, but also to drop normative attitudes that would otherwise counteract cruel acts. These two points show again that the coercive structure faces constraints in shaping the informal one.[49]

Overall, it follows that philosophers like Pogge and Ronzoni overestimate the effect the legal structure can have on the informal one. I do not claim that no steering is possible. Rather, all I wanted to show in this section is that there will be limitations to steer social norms via the legal system. Premise (1) thus fails, and if this is correct, then it follows that it is not enough to count the coercive structure alone into the subject of the Cruelty Principle.

[48] Pettit (1997: 219).

[49] Pettit (1997: 218) refers the reader to bunch of empirical studies in support of these two points.

§58 Objection (2): Social ethos, not the informal structure

A second possible objection I need to consider starts with the proposition that the social ethos should be taken as a site of the Cruelty Principle. On the basis of this point, one may argue that the informal structure falls out as a subject. The reason for this is that, as I explain in Chapter 4, the social ethos has the same deterrent effect as the informal structure. For example, the moral norm that people must not steal has the same force as the social norm that people must not steal in as much as both manifest themselves in social sanctions (such as disapproval). Hence, it would be redundant to have both the moral and the social norm is place.[50] So if the social ethos is taken as a subject, there will be no need to count in the informal structure, too.

To assess this objection, it will be helpful to recall the difference between the social ethos and the informal structure. As I explain in Chapter 4, the former consists of shared moral norms, which means that a large proportion of a given population accepts certain normative attitudes that are grounded in shared considerations. Cohen for instance speaks of the Protestant ethic as a social ethos, which involves "self-denial, hard work, and investment of assets surplus to needs."[51] To put it with the terms I suggest, this means that a large

[50] This also goes against Cohen's claim (2008) that both the informal structure and the social ethos should be taken as a subject of justice.
[51] Cohen (2008: 128).

proportion of a given population accepts the attitude that one must work hard and that this attitude is grounded in a belief in self-denial.

In contrast to this, the informal structure entails social norms, which means that a large proportion of a given population accepts certain normative attitudes that are grounded in social practices. It might be that some people *identify* with working hard in the sense that it is an "aspect of a valuable identity; [it] may be part of what it means to be a member of the group of which one sees oneself as a part."[52] And it might be that others accept the attitude that one must work hard through force of habit. The crucial point marking the difference to the social ethos is that the informal structure does not require a set of beliefs or intuitions or feelings about how to live to ground the attitude.

In light of that, we can now examine the proposition that the social ethos should be taken as a subject of the Cruelty Principle and thus be preferred over the informal structure. One might think that the social ethos deters action better than the informal structure. But this is false given that both cases, so independent of which is in place, people will *accept* normative attitudes. And this means that people hold "others to account with regard to the conduct covered by the principle: [...] to regard those who fail to act in accordance with the

[52] Brennan et al (2013: 70).

principle in a negative light; perhaps even to take more active steps to encourage compliance and sanction non-compliance."[53]

The problem with the proposition is though that the social ethos faces two serious problems the informal structure does not face to the same extent. The first one is articulated by Andrew Sabl in response to Cohen's suggestion to count the social ethos as a subject of justice. He observes that Cohen calls for a "wholesale change in personal motivation"[54] and then comments that

> Surely one thing liberalism means is a deliberate refusal to aspire to such mass conversions and mass indoctrination. On the contrary, good liberals [...] value a diversity of behaviours, motivations, and human characters, often judging some better and some worse but deliberately fighting the temptation to buy moral reform at the cost of uniformity. What is at stake here is [...] a moral point: respect for others often entails restraining oneself from judging the state of others' souls, or at least from claiming the authority to change them.[55]

In brief, the point is that demanding a social ethos is illiberal. This is because it prescribes a set of beliefs, intuitions or feelings that are to ground attitudes. As Joshua Cohen puts it: "a social ethos is a matter of ethics at least as much as it is a matter of morality – as much an encompassing view about how to live as about what we owe to one another."[56]

In contrast to this, the informal structure does prescribe certain normative attitudes but not a set of beliefs and intuitions to ground these attitudes.

[53] ibid: 77.
[54] Sabl (2002: 80).
[55] ibid: 81.
[56] Cohen (2001: 365).

It is in this sense not foundationalist. Rawls' idea of an overlapping consensus is a good analogy, for it stipulates that people support the same basic laws but not for the same reasons.[57] Likewise, the informal structure demands that individuals accept the same normative attitudes but without at the same time expecting them to hold the same set of reasons in support of the attitudes.

Second, as I state in the Introduction to this dissertation, I take John Rawls' procedure of delineating a realistic utopia as the methodological guideline for the theory I am suggesting. An important feature of a realistic utopia is that the ideal is feasible in the sense that people might aspire to change their institutions and practices according to the ideal.[58] And it seems that a wholesale change in personal motivation as Cohen proposes is not feasible in that sense. This is because of what Rawls regards as an inevitable feature of liberal modern societies, i.e. the fact of a plurality of reasonable, though irreconcilable, moral, religious, or philosophical doctrines.[59] In contrast to that, the informal structure is much less demanding given that it does not require that kind of change.

In view of these two points, it follows that the social ethos is not a fit

[57] Rawls (1993).
[58] Weithman (2004: 290) expresses this criterion as follows: "[The theory] must be capable of serving as a self-sustaining public philosophy for a pluralistic democracy. This requires that it be capable of informing the habits of thought and conduct that enable citizens and public officials to sustain the political practices the theory identifies as [desirable]."
[59] Rawls (1993).

subject of the Cruelty Principle. As a consequence, we need not abandon the informal structure as a site.

Conclusion

In this chapter I defended the claim that the informal structure should be taken as a subject of the Cruelty Principle. To this end, I defended two sub-claims:

(1) Common theories of the subject of justice do not compel us to exclude the informal structure as a site of the Cruelty Principle *qua* principle of justice;

(2) The informal structure is important to deter cruel acts and thus necessary to bring about the social conditions under which the principle can be said to be satisfied.

Chapter 7

Towards a less cruel world

Introduction

So far I have covered two of the three main elements of the dystopian liberalism I am presenting in this dissertation. The first element was the Priority Claim and the second was the identification of the informal structure as an important site to realize the Cruelty Principle. In this final chapter I now turn to the third one: the application of the principle to the informal structure. This is to pose the critical question: What specific shape of the informal structure is required so that cruel acts be prevented?

To this end, I will apply the Cruelty Principle to three social spheres presented in Chapter 5: the sphere of production and services, the sphere of the family and the democratic public sphere. This leads to the more specific question of what directives the principle gives to these three spheres. And given that the informal structure is the set of social norms, I will be concerned with inquiring what social norms need to be in place in those spheres so that cruel acts can be deterred.

In addressing this question, I do not intend to offer a comprehensive account of social norms. On the one hand, I won't discuss what social norms should be at work in the other spheres, and on the other one, I will present a

selection of social norms within those spheres I look at, not an attempt to capture all norms that are required. Rather, my goal in this chapter is to outline some practical implications of the theory of dystopian liberalism expounded in this dissertation and to show how an individual can in her everyday life do her part to contribute to a less cruel and more humane world.

Overall, the chapter falls into two parts. In the first part (§59-64), I suggest a range of social norms that should be in place in the three social spheres. But above this, I will also ask what exactly this means for individuals and argue that the application of the principle to social spheres places the *demand from the informal structure* on people, where this states, among other things, that one ought to accept certain normative attitudes.

In the second part then (§65-67), I will juxtapose the theory of social norms I suggest with another theory of how best to create a less cruel world, namely Shklar's and Rorty's. Whereas I argue that people ought to accept certain normative attitudes, Shklar and Rorty insist that a change in character is required. I will indicate some of the problems this view faces and show that the measures I suggest are of better service.

§59 Norms (1): The sphere of production and services

I start with the question what social norms are required by the Cruelty Principle in the sphere of production and services. As I state in Chapter 5, the salient status-roles within this sphere are: the employer and the employee. So a complete theory of norms in this sphere would amount to an account of rules that should regulate these two status-roles. Nonetheless, I want to limit the enquiry and only look at the status-role of the employer in this section and ask what norms are needed to avoid cruel employer abuse. This is because, given the power-relations at the workplace, the prevention of employer abuse is the more pressing problem.

But before I get there, I just want to say why this problem needs to be addressed via the informal structure. In Chapter 6, I defended the claim that the legal coercive structure lacks the power to prevent cruel acts to an adequate extent. It occurs that this particularly true when it comes to mitigating employer abuse. Hirsh and Kornrich note for example that despite the right to file charges of abuse on the job and despite "the persistence of sex and race discrimination in employment, few workers who experience potential discrimination mobilize their rights by filing formal charges. Further, only a fraction of charges that are

filed with regulatory agencies are resolved with outcomes favorable to complainants."[1] So the threat of punishment and accordingly deterrence is weak in this sphere.

Having said that, I now want to suggest two sets of norms as important to counteract severe employer abuse. The first one falls under the heading: avoiding sexual harassment. MacKinnon's influential study of the concept helps explicate what this involves.[2] In her book *Sexual Harassment of Working Women,* she defines it as "the unwanted imposition of sexual requirements in the context of a relationship of unequal power."[3] She emphasizes that sexual harassment can be both verbal and physical: "verbal sexual harassment can include anything from passing but persistent comments on a woman's body or to the experience of an eighteen-year-old file clerk whose boss regularly called her in to his office to tell her the intimate details of his marriage and to ask what she thought about different sexual positions." And physical forms "range from repeated collisions that leave the impression of accident to outright rape."[4]

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[1] Hirsh & Kornrich (2008). In the case of sexual harassment for instance, there is a range of reasons for this. MacKinnon (1979: 27) observes that "sexual subjects are generally sensitive and considered private; women feel embarrassed, demeaned and intimidated by those incidents. The feel afraid, despairing, utterly alone, and complicit [...] Even more to the point, sexual advances are often accompanied by threats of retaliation if exposed."

[2] Crouch (2001) for example writes that MacKinnon's work on the concept was "a major influence in the construction of the social and legal meaning of sexual harassment. It might with justice be said that everything written on sexual harassment since is a footnote to MacKinnon."

[3] MacKinnon (1979: 1).

[4] ibid: 29.

According to MacKinnon, two forms of harassment deserve particular attention. The first is "quid pro quo, in which sexual compliance is exchanged, or proposed to be exchanged, for an employment opportunity."[5] The pattern it follows is this: (1) sexual advance, (2) noncompliance/compliance, (3) employment retaliation/opportunity. In terms of retaliation, "women may be threatened with demotions and salary cuts; unfavourable material may be solicited and put in their personal file; or she may be placed on disciplinary layoff." In one case, the supervisor, following the rejection of his elaborate sexual advances, "first cut back the woman's hours, then put her on a lower-paying machine. When she requested extra work to make up the difference, he put her to sweeping floors and cleaning bathrooms. He degraded and ridiculed her constantly [...] and fired her at two o'clock in the morning."[6]

The second type "arises when sexual harassment is a persistent condition at work."[7] In one case, a supervisor constantly "incorporated palpably sexual gestures into his movements. When speaking to [the woman] he would lean against her, immobilizing her between his own body and the chair and the desk. Sometimes he would stand with his hands shaking in his pockets and rock against the back of a chair, as if he were stimulating his genitals."[8] In another

[5] ibid: 32.
[6] ibid: 35.
[7] ibid: 32.
[8] ibid: 42.

case, "a black woman, the only one working in particular soap factory reported that soap carved in the shape of a penis was periodically sent down her assembly line."[9]

On the basis of this understanding of sexual harassment, it is now possible to explicate the content of the norms in the first set. The rules require an opposition to both quid pro quo sexual harassment and sexual harassment that is a persistent condition at work. I should add that this is only a selection of norms, so in addition to those there may also be others that require an opposition to other forms of sexual harassment.

I now briefly come to the second set of norms important to counteract severe employer abuse. It falls under the heading of avoiding obtrusive invasions of privacy, or what Jonathan Wolff calls: shameful revelations. Those are cases "where people are required to demean themselves: to behave in a way, or reveal things about themselves, which can rationally be expected to reduce their respect-standing." They are required "to do things, or reveal things about themselves, that they find shameful."[10]

To be more concrete: An important norm in this second set prescribes that employers must refrain from screenings that lead to shameful revelations, e.g. through drug-testing, personality-testing, and electronic recording. A further

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[9] MacKinnon (1979: 47).
[10] Wolff (1998: 109)

norm requires that one must also refrain from malicious gossip. The link between the encroachment upon personal privacy and humiliation is also brought out by Margalit who maintains that violations of privacy restrict individuals' control over what is to be within their power, which leads to "degradation as the destruction of human agency."[11]

The central claim in this section is that the norms in the two sets, when in place, counteract cruel acts. This is based on the premises that both sexual harassment as described above and shameful revelations at the workplace are cruel. This means, given the definition in Chapter 1, that they exert a drastic force on the other person, which involves the invasion of the other person's mental life. This is true of sexual harassment. To use MacKinnon's articulate phrase: "feelings are a material reality of sexual harassment."[12] Indeed, there is evidence that the costs include "physical as well as psychological damage: The anxiety and strain, the tension and nervous exhaustion [...] take a terrific toll on women workers. Nervous tics of all kinds, aches and pains (which [...] can be devastatingly painful) often accompany the onset of sexual harassment. These pains and illnesses are the [...] inevitable backlash of the human body in response to intolerable stress."[13]

[11] Margalit (1996: 204).
[12] MacKinnon: (1979: 55).
[13] ibid: 52.

Moreover, it is also true that the victim of shameful revelations is subject to a drastic force. The act is humiliating, and humiliation at the workplace has devastating consequences. Fisk writes that it "can itself be as devastating as physical or economic harm."[14] She points out that severe humiliation is "extremely corrosive for the psyche of the victim",[15] that it has a "debilitating"[16] impact and that people subject to it feel "confused, powerless, *paralyzed* [...]."[17] Also, it has been "implicated – directly or indirectly – in many, if not most, clinically recognized emotional and social disorders."[18] These disorders, too, testify to the drastic impact.

In sum, given that sexual harassment and shameful revelations are cruel in the relevant sense and that the social norms I suggest counteract these practices, it follows that these social norms will help prevent cruelty.

§60 Norms (2): The sphere of the family

I now ask what social norms are required by the Cruelty Principle in the sphere of the family. The salient status-roles within this sphere are the parent and the child, yet I will focus on the status-role of the parent. This is not because chil-

[14] ibid: 76.
[15] ibid: 78.
[16] ibid: 73.
[17] ibid: 78.
[18] ibid.

dren cannot be cruel towards their parents, but rather because violence between partners and towards children seems to be the more prevalent problem. In particular, I want to highlight two sets of norms that ought to regulate this status-role (though the first one may also be applicable to the roles of son and daughter).

But before I start, I again want to say why this problem needs to be addressed via the informal structure. As I argue in §55, the law operates on the police-patrol mode of oversight and faces vigilance problems. This means that the police is responsible for vigilance and the problem is, as Pettit writes, that "no police officer can cover very much ground."[19] In particular, no police officer can observe all incidents in the realm between people's own four walls. Second, even if it were possible, vigilance would invade peoples' privacy and thus come at a high moral cost. In contrast, vigilance is more effective with social norms and less morally problematic (see §56). In turn, this implies a more effective deterrence.

This brings me to the two sets of norms: The first one is geared towards preventing breaches of trust where trust is of existential import. The most common forms of betrayal are "harmful disclosures of confidential information, disloyalty, infidelity and dishonesty."[20] So this set involves rules stating for

[19] Pettit (1997: 250).
[20] Rachman (2009: 304).

example that one must not be dishonest or disloyal or unfaithful to one's partner, that one must not disclose confidential information, at least not when it erodes trust where it is in place and of existential importance for the other.

This still leaves open when trust is of existential import. To see this, it will be helpful to consider a further question, i.e. why trust is so important in the first place. Baier offers a credible explanation, writing that "whatever matters to human beings, trust is the atmosphere in which it thrives."[21] She argues that "we need [the help of others] in creating, and then in not merely guarding but looking after the things we most value."[22] These things include but are not limited to: "our own life, health, reputation, our offspring and their well-being [...]." So according to Baier, trust is important because it is essential to protect things we value. This allows me now to define when trust is of existential import: when it protects goods that have existential value, to wit, are essential to lead a meaningful life, where the absence makes life seem futile and not worth living.

And the second set of rules falls under the heading of avoiding serious emotional abuse or neglect of one's child. Glaser separates five categories of child abuse and neglect, three of which are relevant in this context: (1) Emotional unresponsiveness, meaning that the parent does not "respond to the

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[21] Baier (1986: 231). This is a quote by Sissela Bok that Baier prepends to her paper.
[22] ibid: 236.

child's emotional needs, with no provision of an adequate alternative"; (2) Negative attributions and misattributions to the child, including "hostility towards, denigration and rejection of a child"; (3) Developmentally inapposite interactions, involving for instance an "exposure to [...] traumatic events and interactions", which the child cannot handle yet.[23] The norms in this second set call for an opposition to such practices, especially a fierce opposition to abuse and neglect where this is a persistent condition, where these three points happen over and over again, placing a most serious strain on the children.

The central claim in this section is that these rules, when in place, counteract cruelty. This is based on the two premises that (a) breaches of trust, where it is of existential import, are cruel and (b) serious child neglect is cruel, where this means, with reference to the definition I offer in Chapter 1, that a person's mental life is being invaded. I think that there is evidence in support of both premises. Premise (a) is true because, to invoke MacKinnon's articulate phrase one more time, feelings are the material reality of breaches of trust, especially disappointment and grieve, being the emotion that ensues from the loss of something that is valued.[24] It seems plausible that grieve and disappointment have a similar effect as shame and pain in that the feeling "thrusts aside one's other concerns as it clamorously absorbs attention to itself."[25]

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[23] Glaser (2002: 702).
[24] I take this definition of grief from Nussbaum (2001).
[25] Kramer (2014: 162).

Moreover, the breach of trust is implicated in an emotional disorder to which clinical psychologists refer to as betrayal trauma. It is said to be detrimental because it violates "basic assumptions of interpersonal and social relations"[26] and thus to be "highly correlated with symptoms of depression, anxiety, and other symptoms of emotional distress",[27] with "shock, [...] damaged self-esteem, self-doubting and anger."[28] The emotional disorder also testifies to the drastic force of breaching trust.

I also think that there is solid evidence in support of premise (b) stating that serious child neglect is cruel. In his influential study tellingly entitled *Soul Murder,* Leonard Shengold shows for example that "substantial emotional neglect of children – not caring for them and not caring about them as separate human beings – may have more devastating effects on psychic development than does physical abuse" and that therefore "brutal or subtle acts against children result [...] in their psychic and spiritual annihilation."[29] In particular, it has "distorting and *inhibiting* effects on the victim's fantasy life and, especially, emotional life [e.g. on the capacity for joy]."[30]

One plausible explanation for this is that "not being cared about means being deprived of the soul's basic nourishment: the accepting and welcoming

[26] Birrell & Freyd (2008: 49).
[27] ibid: 50.
[28] Rachman (2009: 304).
[29] Shengold (1999: 11).
[30] ibid: 5. Emphasis mine.

feelings and smile of the parenting figure."[31] And now recall Scarry's point that a "state of consciousness other than pain – such as desire – will, if deprived of its object, begin to approach the neighbourhood of pain, as in [...] prolonged, objectless longing."[32] What it means to approach the neighbourhood of pain is that one's ability to form mental content is substantially obstructed.

Given that both premises are plausible, I conclude that the social norms I propose, those that prohibit the breach of trust and child abuse and neglect, should be in place in order to avoid cruel acts.

§61 Norms (3): The sphere of the democratic public space

In this section I will be concerned with inquiring what social norms are required by the Cruelty Principle in the democratic public sphere. As I explain in Chapter 5, the most relevant status-role in this sphere is the role of the citizen, who as a member of an experimental research community is taking part in a discursive exchange with others about the policies to be implemented. So the question is: what rules should regulate the exchange?

Before I start, I just want to highlight why there is a need for norms in this sphere. I said in §60 that there is a weak *de facto* threat of punishment regarding employer abuse and thus deterrence of certain cruel actions is weak,

[31] ibid: 11.
[32] Scarry (1985: 166).

too. In §61, the point was that the state actors face vigilance problems, which also means that deterrence is weak and thus social norms are needed. In the sphere of the democratic public space, the problem is a moral one: even though surveillance of public spaces is possible, it would place enormous intelligence in the hands of a powerful agent, who can abuse it. Social norms can deter acts and yet avoid this moral problem.

Now, I would like to highlight one set of norms that is geared towards avoiding hate speech. According to Waldron, hate speech involves "the use of words which are deliberately abusive and/or insulting and/or threatening and/or demeaning directed at members of vulnerable minorities, calculated to stir up hatred against them."[33] Here is an example Waldron offers: "A man out walking with his five-year-old son and his ten-year-old daughter turns a corner on a city street in New Jersey and is confronted with a sign. It says: 'Muslims and 9/11! Don't serve them, don't speak to them, and don't let them in.'"[34] So the rules that fall into this set demand that one must not use words that are abusive and/or insulting and/or threatening and/or demeaning directed at members of vulnerable minorities, especially not in a way that it becomes a persistent condition in the public sphere.[35]

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[33] Waldron (2012: 1).

[34] ibid.

[35] In reply to this, someone might respond that sometimes it might be permissible to use abusive or insulting words. For example, the rule implies that hate speech is impermissible even in cases when the person has perpetuated great crimes. I am ready to bite the bullet in response to such cases. This follows from the normative priority of the

The central proposition in this section is that these norms, if in place, reduce the extent to which cruel acts take place, which in turn rests on the premise that hate speech is cruel and invades one's mental life. To see this, consider Waldron's description of the effect of hate speech:

Of course an assault on one's dignity will be felt as hurtful and debilitating. And no doubt those who assault another's dignity in this way will be hoping for certain psychological effects – hoping to cultivate that among minority members a traumatic sense of not being trusted, not being respected, not being perceived as worthy of ordinary citizenship, a sense of being always vulnerable to discriminatory and humiliating exclusions and insults. Those feelings will naturally accompany an assault on dignity [...].[36]

This can be explained with reference to two observations. On the one hand, hate speech is humiliating. Waldron for example states that hate speech often "aims to besmirch the basics of [one's] reputation, by associating ascriptive characteristics like ethnicity, or race, or religion with conduct or attributes that should disqualify someone from being treated as a member of society in good standing."[37]

On the other hand, hate speech incites serious *fear* of others. With reference to the example two paragraphs back, Waldron thus writes:

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prevention of cruelty which I defended in Chapter 3. Also, note that my account focusses on the of abusive or insulting words directed at members of vulnerable minorities. While one might think it permissible for some to use such words against powerful actors (for example, marginalized people engaged in a campaign against a powerful elite that oppresses them) I find it hard to think of cases where directing such language against members of vulnerable minorities is permissible.

[36] ibid: 106.
[37] ibid: 5.

> Don’t be fooled into thinking you are welcome here. The society around you may seem hospitable and non-discriminatory, but the truth is that you are not wanted, and you and your families will be shunned, excluded, beaten, and driven out, whenever we can get away with it. We may have to keep a low profile right now. But don’t get too comfortable. Remember what has happened to you and your kind in the past. Be afraid.[38]

The paralysing effect of fear is not only attested by philosophers such as Burke, who asserts that “nothing robs consciousness so effectively of all reason as fear”,[39] or by Heidegger who claims that one “loses one’s head” when in fear.[40] It is also well-documented in the psychological literature. Sandra Bloom thus writes: “As fear rises, we may lose language functions altogether. [...] As the level of arousal increases, ‘dissociation’ – the loss of integrated function of memory, sensation, perception may be triggered.”[41]

It is this unique combination of fear and humiliation that explains the material reality of hate speech. In sum, if we accept that hate speech has drastic force, it follows that the norms I suggest in this section are needed to mitigate cruel actions.

It is this unique combination of fear and humiliation that explains the material reality of hate speech. In sum, if we accept that hate speech has drastic force, it follows that the norms I suggest in this section are needed to prevent cruel actions.

[38] ibid: 2.
[39] See Svendsen (2008: 38).
[40] See ibid.
[41] Bloom (2004: 81).

§62 The demand from the informal structure

The norms I just presented offer an image of what a desirable informal structure looks like once we apply the Cruelty Principle to different social spheres. In this section now, I ask what exactly the application of the principle to social spheres implies for individuals. In short, the answer is that it places what I call the *demand from the informal structure* on individuals.

To see what the demand from the informal structure entails on a general level, consider that political principles have a particular role in Rawls' theory of justice. Scheffler puts it as follows:

> The principles for the basic structure are primary in the sense that the principles for individuals depend on them. We cannot know how considerations of distributive justice should affect individual conduct until the principles for the basic structure are in hand.[42]

His point is that political principles generate demands for individuals. They do so in the following way: the principle applies to a particular subject and provides a vision of what social institutions are called for. Yet for these institutions to be in place, it is imperative that individuals "do their part". So the principle places certain demands on the items that count as the site of the principle which in turn generate individual responsibilities in relation to these items. Likewise, the Cruelty Principle provides a vision of what social institutions are

[42] Scheffler (2006: 104).

called for (see previous section) which generates specific demands on individuals to bring forth that structure, and what I call the demand from the informal structure refers to this set of demands.

Given that the informal structure is a set of social norms, the demand from the informal structure implies that one ought to do her part so that these norms are in place. To explain what this involves, I need to return to the definitions that I introduce in Chapter 4. Here is the definition of norms: a principle P is a norm in a group G if and only if:

i) A significant proportion of the members of G have P-corresponding normative attitudes; and
ii) A significant proportion of the members of G know that a significant proportion of the members of G have P-corresponding normative attitudes.[43]

This definition reveals two central criteria as to what the demand from the informal structure involves. First of all, one ought to have certain normative attitudes as this will increase the chance that condition i) is met. To reiterate: normative attitudes involve "at least the following: a) normative beliefs, judgments and other cognitive states, b) normative expectations, c) reactive attitudes and dispositions to have such attitudes."[44] The paradigmatic form of such an attitude is that one *must* do X.

Second, one ought to communicate to others what normative attitudes one holds and also that this is how a significant proportion of the population

[43] Brennan et al. (2013: 54).
[44] ibid: 57.

thinks, as this will increase the chance that condition ii) is met. It might even entail that we encourage others to communicate their attitudes to others. So suppose that we want to generate the social norm that parents must not neglect their children. To this end, it is not sufficient that one has the normative belief that one must not neglect one's child, but also that this belief is communicated in discussions with friends, family and colleagues, or even through social media, when a suitable occasion presents itself.

There is another definition we need to consider, namely of *social* norms: a principle P is a social norm if the normative attitudes that constitute the norm are grounded in social practices, i.e. accepted on the basis of social practices. To reiterate: To *accept* a normative attitude means holding "others to account with regard to the conduct covered by the principle: to form expectations of others so far as the relevant conduct is concerned; to regard those who fail to act in accordance with the principle in a negative light; perhaps even to take more active steps to encourage compliance and sanction non-compliance."[45]

This definition helps formulate the first criterion above with more precision, stating that one ought to have normative attitudes in order to contribute to the establishment of social norms. It is now possible to specify what it means to have a normative attitude, namely to *accept* it. This means that the attitude shapes one's interaction with others. To return to the example above, this might

[45] ibid: 77.

require that one openly criticizes partners who neglect their children, that one shows anger or even refuses to take part in events with them.

Further, this definition tells us how the attitudes need to be grounded, namely in social practices. There are several possibilities for that, as I explain more fully in §41. One might identify with the practices, or in other words: the practice might represent aspects of a valuable identity; one might ascribe some sense of social obligation to the practices; another possibility is that one regards the practices as significant through simple habituation. But what is *not* necessary, as would be in the case of the social ethos, is that one adopts particular values that in turn confer moral force on the principles.

Overall, this adds up to the following understanding of the demand from the informal structure: (i) one ought to accept the required normative attitudes (that are grounded in social practices) and (ii) one ought to communicate to others what attitudes one holds. A further point worth noting is that demand (i) feeds into demand (ii), given that accepting attitudes involves reacting to people in certain ways, which in turn reveals what attitudes one has.

The demand from informal structure stipulates what one has to do in order to do "her part" to establish social norms. A different question is how under non-ideal conditions, so when individuals do not comply, i.e. do not meet (i) and (ii), others can be moved to do so. I will leave this question aside, since my purpose in this dissertation is to develop an ideal theory. But ultimately, I

think that the most promising strategy will be to initiate so-called bandwagons. The assumption is that people have different thresholds to accept normative attitudes and that these thresholds are dependent on how many others accept these attitudes. So the idea is to first convince those with a low threshold, which will then move those with a slightly higher threshold, and so forth.

§63 Pettit on the generation of society-wide norms

To bring out the nature of my account, I now want to compare and contrast the demand from the informal structure with Pettit's account of civility. He speaks to the same question,[46] to wit, how society-wide norms can be brought into existence, but his view is different than mine.

Overall, Pettit specifies four criteria: First, "if it is a norm in a society that someone should behave in a certain way, then [...] relevant parties will generally behave in that way."[47] He writes that "were that not true, the norm would not be established in the society: it would represent nothing more than an unfulfilled wish or prescription."[48]

Second, it must be the case that "relevant parties generally approve of the behaviour in question and/or disapprove of the absence of such behaviour.

[46] Pettit (1997: 243) poses the question how certain norms can come into existence that "work in harmony with [republican] laws." But the way I understand Pettit is that the four criteria he discerns in response to this question apply to the establishment of "society-wide norms" in general.
[47] ibid.
[48] ibid.

If we say that it is a norm across a certain society that you should contribute to any collective enterprise that benefits you, then we mean to imply [...] that people also tend to approve of anyone who makes them or to disapprove of anyone who fails to do so."[49] To be more precise, Pettit states that to approve and disapprove "will be to have a disposition to praise or blame the person – to their face or, more likely, behind their backs – if a suitable occasion presents itself."[50]

Third, it also must be the case that "the approval in question should help to ensure the compliance."[51] So it is not sufficient that one praises or blames the person; one must also do this in a way that encourages her to comply with the norm. According to Pettit, this is weak condition "since it says nothing about how effective the approval should be in ensuring the compliance [...]. It serves to mark off genuine norms from patterns of behaviour that generally attract approval but that are in no way affected by that approval."[52]

And fourth, is must be a commonly known what the rules are. Pettit goes on to explain: "Everyone is going to want to know what the norms in their soci-ety are, and equally everyone is going to be in a position to tell what they

[49] ibid.
[50] ibid.
[51] ibid: 244.
[52] ibid.

are."[53] But above this, it is also essential that "those facts are salient to everyone [...] so that everyone is in a position to recognize, not just that it is a norm that something or other should be done, but also that everyone relevant recognizes that this is a norm."[54]

Let us examine each of these criteria. To begin with it should be noted that Pettit shares Cohen's view that I discuss §37, namely that the informal structure is "bound up" with the choices that people customarily make and with the behaviour it leads to. In opposition to that, I argued that behaviour is neither necessary nor sufficient for social norms to be in place. This observation has implications for how social norms can be brought into existence. Indeed, it forces us to reject Pettit's first criterion: if behaviour is not essential for social norms to be in place, we need not behave in certain ways to give rise to the desired norms.

Here is an example: Suppose that we want to establish the social norm that one must not urinate in public swimming pools. Brennan et al. point out that in this case it is not necessary that people in fact abstain from doing so, that the norm can be in place even if people regularly urinate in public pools unbeknownst to the public.[55] So to establish the norm, we need something else, not actual behaviour as Pettit suggests.

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[53] ibid.
[54] ibid.
[55] See Brennan et al (2013: 20).

His second criterion is more to the point. As I say in the last section, norms are constituted by normative attitudes that people *accept*. This involves that individuals form expectations of others so far as the relevant conduct is concerned; to regard those who fail to act in accordance with the principle in a negative light; perhaps even to take more active steps to encourage compliance and sanction non-compliance. Pettit is thus correct when he states that relevant parties need to approve of the behaviour in question and/or disapprove of the absence of such behaviour. But his account is less precise as it does not state what other reactions can serve to establish norms, too.

Beyond that, there is a peculiar addition to the second criterion that seems misguiding, namely the point that one ought to blame the person "to their face or, more likely, behind their backs." I think that this addition is inconsistent with his third criterion stating that disapproval should help foster compliance. In particular, it seems that criticism behind one's back, so if the person is not aware of the criticism, misses the purpose to ensure compliance.

This brings me to the third criterion. I think it is correct that reactions to deviant behaviour must help to foster compliance, but the third criterion is now redundant in view of the updated definition of the second criterion. Accepting normative attitudes, the concept itself, entails certain reactions in interaction with others and can go as far as taking active and effective steps to encourage

compliance. So Pettit's third criterion is now built into the demand placed on individuals to accept certain attitudes.

Finally, Pettit's fourth criterion is again more to the point. As Brennan et al. point out, it is necessary for a norm to be in place that a significant proportion of a population knows that a significant proportion of the population accept the normative attitudes. This is precisely what Pettit's fourth criterion states. However, his account is less accurate than the demand from the informal structure that I present in the previous section. This is because he does not spell out what this implies for individuals, i.e. that one needs to communicate to others what attitudes one holds when a suitable occasion presents itself.

To conclude: This discussion of Pettit's view shows that there are significant similarities between his and my account of how people can bring about social norms, how they can "do their part". But there are also differences and these differences should be seen as refinements and revisions of his account rather than a rejection.

§64 Two caveats

Having introduced the demand from the informal structure, I need to add two caveats to the theory of social norms I propose. These are conditions under which members of a given population are not required to meet the demand from the informal structure.

The first one is a reaction to the observation that social norms themselves can be cruel. This is because the demand from the informal structure requires that one reacts in certain ways to non-compliance with a rule, for example with disapproval, and it might for example be that these reactions are humiliating to the extent that they are cruel. More, it may be that the anticipation of these reactions is cruel, e.g. when the anticipation of sanctions provokes extreme fear. So the first proviso is that one must not meet the demand from the informal structure where this is cruel, or to be more precise: where it causes more cruelty than it can be expected to prevent.

The second caveat follows from the Priority Claim I defend in Chapter 3. The proposition is this: when there is a genuine trade-off, the priority claim means that [a departure from the principle is permissible] only when major gains in terms of other properties can be bought with negligible departures. So the proviso is that cruel acts must not be opposed where they are negligible (say, two seconds of excruciating pain) and major gains in terms of other properties can be bought. This caveat is under-defined given that I left aside the question when cruel acts are negligible. Nonetheless, it is important to note that there are limitations to the demand from the informal structure.

Above this, there are, as McTernan notes, two criticisms that can be put forward against the theory of social norms expounded in this chapter. First, "social norms are an example of the pernicious effects of social pressure on

freedom" and can "compromise citizens' autonomy" to a troubling degree.[56] Second, "when people fail to live up to a social norm they have internalised, they may feel shame."[57] But this is not sufficient to suspend the demand from the informal structure (unless the infliction of shame and the pernicious effects is itself cruel) because the avoidance of cruelty has priority over the avoidance of shame and pernicious effects.

§65 Rorty and Shklar on avoiding cruelty in practise

I said in the introduction that this chapter falls into two parts. My aim in the first one was (a) to suggest a range of social norms that should be in place in three social spheres in order to avoid cruelty and (b) to explore what exactly this means for individuals. I now move on to the second part and examine a competing account of how best to avoid cruelty as an everyday vice, namely Shklar's and Rorty's.

In this section I briefly reproduce Rorty's and Shklar's positions. The two accounts are similar in two important respects: First, both recognize the limitations of the legal structure to realize the Cruelty Principle and thus insist on the importance of *civic virtue*. Both explore what an individual must and must not do so that cruelty is avoided. Rorty investigates character traits that "help

[56] McTernan (2014: 102).
[57] ibid: 103.

us become less cruel."[58] And Shklar writes that the "liberalism of fear, which makes cruelty the first vice, [...] impose[s] a public ethos on us."[59] This also adds up to a theory of character traits to secure a stable and reliable pattern of behaviour.

Second, both employ a similar method to arrive at a theory of civic virtue, namely literary criticism. Rorty is an avid reader, convinced that the study of literature, in particular of Nabokov's and Orwell's books, can teach us how to be less cruel. Likewise, Shklar "allowed the greatest of the storytellers to do some work for [her], as [she] borrowed their most telling characters and scenes as examples", not only to "illustrate some general moral or political propositions" but above this "to reveal something directly", "for their ability to force us to acknowledge what we already know imperfectly."[60]

Rorty starts his account with an analysis of Nabokov's work. According to him, the main protagonists in the novels *Pale Fire* and *Lolita*, "dramatize, as it has never before been dramatized, the particular form of cruelty about which Nabokov worried most – incuriosity."[61] What characterises them is that they are "exquisitely sensitive to everything which affects or provides expressions for their own obsessions, and entirely incurious about anything that affects anyone

[58] Rorty (1989: 141).
[59] Shklar (1984: 5).
[60] ibid: 229.
[61] Rorty (1989: 158).

else."[62] In other words, they are people who "turn the lives of other human beings into images on a screen, while simply not noticing that these other people are suffering."[63]

Apart from Nabokov, Rorty also looks at Orwell's writings to discover that, though both "had different gifts, and their self-images were quite different", both of them "warn the liberal [...] intellectual against temptations to be cruel."[64] He is referring here to the third part of *1984* that is about the antagonist O'Brian, a member of the Inner Party who is in charge of torturing the main character. According to Rorty, O'Brian is a "curious and perceptive intellectual",[65] but what is characteristic of him is that he derives excitement from the intellectual exercise to "tear human minds to pieces and put them together in new shapes of [his] own choosing."[66] Further, he exemplifies a certain fatalism, the acceptance of "the fact that liberal hopes had no chance of realization", that "the scenario can no longer be changed",[67] for whom "the whole idea of being answered, of exchanging ideas, of reasoning together [is] a symptom of weakness."[68]

[62] ibid.
[63] ibid: 157.
[64] ibid: 144.
[65] ibid: 183.
[66] ibid: 177.
[67] ibid: 183.
[68] ibid: 176.

Now, Rorty claims that the analysis of Nabokov's and Orwell's work can help us become less cruel, though he spends hardly any time spelling out what exactly we can learn. What he has in mind, I think, is that insights into the *causes* of cruelty reveal that one needs to adopt certain character traits if the goal is to avoid cruelty. To be more precise, one must avoid a particular type of incuriosity as well as of fatalism. Or to put it with more positive terms: On the one hand, one ought to be curious about the inner lives of others. On the other one, one ought to be optimistic or at least aware of the fact that social institutions are built by humans and can hence be changed by them. Rorty's view seems to be that optimism counteracts a fatalism that spurs submission and violence.

Similar to Rorty, Shklar too points to certain character traits to secure that people are not cruel to each other, both positive and negative ones. On the positive side, she argues that a "self-restraining tolerance" is required, one that "fences in the powerful to protect the freedom and safety of every citizen, old or young, male or female, black or white."[69] Moreover, she also highlights courage as an important character trait: "Courage is to be prized, since it both prevents us from being cruel, as cowards often are, and fortifies us against fear from threats, both physical and moral."[70] However, courage is not sufficient to

[69] Shklar (1984: 5).
[70] ibid.

prevent one from being cruel.[71] It is also required that one is compassionate and "instantly identifies with a weak suffering being", as well as a "sense of justice",[72] involving the belief that no person can *deserve* to be subject to cruel acts.

Furthermore, Shklar writes that "negative egalitarianism" is "an obvious corollary of putting cruelty first."[73] This egalitarian outlook is understood as a certain "modesty", as being unassuming in the estimation of one's own status and abilities in relation to others. According to her, this hinders that others are seen inferior, which in turn prevents a certain distance (and degradation) and thus "opportunities for cruelty".[74]

On the negative side, Shklar thinks that people must not succumb to cynical forms of misanthropy. She thus writes that "it is undeniable that misanthropy has the most destructive political possibilities. To hate men as they are is enough to do anything for the sake of a new and improved humanity; to clean up the human race [...]."[75] Further, Shklar cautions the reader against heroism and Machiavellian virtues. In particular, she criticizes an unrestrained passion for fame as well as the disposition to concern oneself with outcomes only and to make enormous sacrifices for them.[76]

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[71] See ibid: 24.
[72] ibid: 25.
[73] ibid: 29.
[74] ibid: 28.
[75] ibid: 3.
[76] See ibid: 242 and 243.

In sum, both Rorty and Shklar put forward a theory of civic virtue where emphasis in put on the importance of character traits in order to avoid cruelty. But in contrast to Rorty, Shklar also spells out what is to be understood by the concept of character. Her view is expressed most clearly in the concluding paragraph of *Ordinary Vices*:

> Liberal democracy is more than a set of political procedures. It is a culture of sub-cultures, a tradition of traditions, and an ethos of determined multiplicity. It puts enormous burdens of choice upon all of us, and ought to be seen as very demanding. But it has never been easy to choose the dispositions required for a good character.[77]

This statement reveals a crucial aspects of Shklar's account of civic virtue, to wit, that the public ethos she calls for is a certain form of character that consists of particular *dispositions* that shape individual action. To be more precise, character is not "a set of discrete, heroic, ethically significant decisions, but the imperceptible choices of dispositions [...]", "an indissoluble amalgam of motives and calculations."[78]

§66 Some problems with Rorty's and Shklar's accounts

Rorty's and Shklar's approach to eliminate cruelty is very different from the approach I proposed in the first half of this chapter. Whereas they bank on character traits to instrumentally produce stable non-cruel behaviour, I suggest

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[77] ibid: 248.
[78] ibid: 243.

social norms. In this section I assess their approach and point out five shortcomings. In the next and final one, I demonstrate in what sense my approach is superior. Taken together, the two sections also serve to mark the differences between the two approaches.

To see the first two points, it will be instructive to highlight a relevant parallel between Shklar's conception of the public ethos and G.A. Cohen's conception of the social ethos. The parallel is that both call for what Joshua Cohen dubs an "encompassing view about how to live"[79] (see §43). In particular, Shklar calls for an amalgam of motifs and calculations, and I think that these motifs are best understood as sources that ground choices, as a set of considerations that justify, in one's mind, the choices one makes. When she speaks of an egalitarian outlook for instance, it is plausible to read this as follows: the *belief* that one is not superior to others is to guide one's actions.

In view of that, her theory is vulnerable to the two objections against the social ethos I put forward in §58 of the previous chapter. First, Shklar is ultimately an advocate of what G.A. Cohen describes as a "revolution of the human soul".[80] The problem is that such a revolution is not feasible. Shklar might even not disagree: At one point she writes, revealing approval, that "Kant knew that most men to be as Machiavelli pictured them", but that he had nonetheless

[79] Cohen (2001: 365).
[80] Cohen (2000: 2).

grasped what would be a "thoroughly democratic liberal character".[81] Likewise, Shklar's character might be intended as an ideal but unrealistic vision. Be that as it may, it certainly is a problem for the realistic utopia I set out to formulate in this dissertation.

Second, I think that her approach is illiberal.[82] This is again based on the point that her theory prescribes certain character traits and thus is rather intrusive. To put it with McTernan: "to inculcate virtues in citizens implicitly involve illiberal 'soul engineering'. Attempting to make citizens virtuous is likely to be deeply invasive of citizens' inner lives: to inculcate a character trait is, by definition, invasive of that inner life."[83]

Third, I said above that Shklar's conception of a public ethos resembles Cohen's notion of a social ethos. But in contrast to Cohen, neither Shklar nor Rorty detail that character traits manifest themselves in disapproval, anger and refusal of future cooperation. For example, Shklar does not state that people need to be modest and think badly of people who are not. This implies that the virtuous individuals do not produce informal pressures on fellow people. This is a problem for the obvious reason that the virtues do not *deter* actions or

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[81] Shklar (1984: 234).

[82] To clarify: Shklar's political theory is not illiberal in the sense that it allows for the government to interfere with the choices of individuals. To the contrary, she (234) agrees with Kant that "since a good character depends on being self-made, the interference of coercive authorities in inherently self-defeating and destructive." Rather, the claim here is that her political theory involves an ethical theory that is illiberal.

[83] McTernan (2014: 101).

attitudes if they lack these pressures. So the public ethos, as presented by Shklar and Rorty, is ineffective to discourage cruel acts.

In response to this, one might now say that the civic virtues can without much complication be turned into virtues that have the deterrent effect. In particular, one might maintain that people need to *accept* the normative attitudes with the content of the character traits proposed, so for instance that one must be modest. This would then mean that people hold others to account with regard to the conduct covered by the principle, that they regard those who fail to act in accordance with it in a negative light, etc. In turn, this would produce informal pressures.

To reply to this, I want to highlight the fourth shortcoming of Shklar's and Rorty's theories, namely that the virtues they discern are too generic so that they would lack the deterrent effect even if they were turned into normative attitudes. Suppose for instance that people by and large accept the normative attitude that one must be compassionate. Given that it is not specified what groups of action are to count as not compassionate, this will still leave it open what actions to disapprove of. In turn, this will impair the power of the informal pressures.

The interlocutor might now insist that this reply does not show a deep failing of Shklar's and Rorty's theories. After all, it might be that the generic

rule that one must be compassionate can be broken down to more concrete directives. I am happy to concede that. Nonetheless, the third and the fourth point indicate that the theories are problematic as they stand.

Fifth, Rorty and Shklar overrate the causal relation between character and action. In §2 I gave the example of a good Samaritan who, although most of his life a compassionate person, may yield to social pressures and torture a person. I gave this example to show that someone who is not a cruel person can nonetheless commit cruel acts, and that accordingly character traits do not stop people from committing most violent crimes.

The strongest version of this criticism is laid down by McTernan who "attacks the view widely held by liberals that cultivating virtue is the best way to make citizens behave, on the grounds that it is an ineffective method by which to secure desired patterns of behaviour."[84] It is ineffective because of what she calls the situationist challenge stating that "people's behaviour is the result of their environment and not of stable character traits", as shown by a series of experiments is social psychology.[85] An example she provides is this: "to avoid

[84] McTernan (2014: 85). It is the strongest version because McTernan shows why the attack is not invalidated by more recent developments in social psychology, in particular by interactionism, the now dominant school (see section II.)

[85] ibid: 86. She highlights "Isen and Levin's dime experiment, where helpful behaviour correlated to whether subjects found a dime in a phone booth or not; Darley and Batson's 'Good Samaritan' experiment, where whether subjects stopped to help a man apparently having a heart attack correlated to whether they were in a hurry or not; and the infamous Stanford prison experiment, where allocating subjects the roles of prisoner or guard resulted in tyrannous behaviour."

adultery the best strategy is not to attempt to develop a more faithful character, but to avoid situations in which there is a bottle of wine and someone you find attractive."[86]

§67 The advantages of the theory of social norms

The theory of social norms I suggested fares better with respect to these five points than Rorty's and Shklar's theories of civic virtue. To begin with, it is more feasible because it asks for less: not a revolution of the human soul (to use the phrase by Cohen[87]), but first and foremost the acceptance of certain normative attitudes. I admit that once the Cruelty Principle is applied to more spheres and thus to larger parts of the informal structure, this will yield a substantial index of attitudes that people ought to accept. This will also push the boundaries of what is feasible. Nevertheless, the advantage of the theory of social norms is that it does not require a sweeping shift in character.

Second, the demand is less intrusive. This is not to say that the demand does not pose any limits on the extent to which individuals can pursue and

[86] ibid: 87.
[87] Cohen (2000: 2).

revise their own conception of the good. Rather, the point is that it does not prescribe that individuals should have particular character traits. The concept of an overlapping consensus is again helpful to clarify this point: individuals ought to accept the same normative attitudes but without at the same time expecting them to have the same set of reasons (or the same set of motifs) in support of these attitudes (see §58). As McTernan writes: "social norms are less normatively 'thick' than virtues, given that social norms do not traditionally have, nor require, roots in a conception of the good life for humans."[88]

There is also another way to put this point: the demand from the informal structure specifies political duties and not moral duties in the narrow sense. The concept of political duties goes back to Kant and refers to those duties that, as Rauscher explains, "concern only actions that have influence on other persons, directly or indirectly, meaning duties to the self are excluded."[89] Accepting normative attitudes is a political duty because it is constitutive of a structure that has profound influence on other persons. It is thus less intrusive in the sense that it does not stipulate duties to the self.

Third, the demand from the informal structure has the deterrent effect that Rorty's and Shklar's civic virtues lack. As I point out in §62, accepting normative attitudes involves (among other things) regarding those who fail to act

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[88] ibid: 102.
[89] Rauscher (2012).

in accordance with the principle in a negative light and even to take more active steps to encourage compliance and sanction non-compliance. This is what gives rise to the deterrent effect of social norms.

Fourth, and in contrast to the character traits Shklar and Rorty identify as important, the norms I suggest in §59-61 are specific. Take for example the rule that one must not expose one's child to exposure to traumatic events and interactions. It explicates when to disapprove of a particular course of action, or to take more active steps. The theory of social norms therefore gives better guidance than Shklar's and Rorty's theories of civic virtue.

Last but not least, social norms offer better protection in the face of social dynamics than virtues. This claim must not be misunderstood: If social dynamics can bring forth a state of affairs in which people give up deeply rooted values and moral convictions, it seems plausible that such dynamics can also unsettle normative attitudes grounded in social practices. I do not deny that this is possible. Nonetheless, social norms deter actions and thus pose an additional obstacle to people to be carried away by social dynamics.[90]

In response to this last point, one might refer to an objection that Costa presents against Pettit, stating:

> Civility or 'good customs' may either rely on widespread virtue (understood as stable traits of character) or not. If civility does rely on virtue, then the reliability of good behavior comes from the stability of virtue. But it is also possible that these are simply good norms that are not grounded on personal virtue. If

[90] Also see McTernan (2014: 98).

civility does not depend on virtue, these good customs would not be robust, given that as social conditions (such as the economic climate) change, social norms may change for better or for worse.[91]

The objection is that 'good customs' are instable if they do not rely on widespread virtue (understood as stable traits of character).[92]

I think that this objection is misleading. To see why, suppose there are two groups: The majority and significant proportion accepts the normative attitude grounded in social practices that as a parent one must not expose children to traumatic events. I specified in §59 (and explain more fully in §41) that there are different reasons as to why one might accept normative attitudes that then generate social norms: one might identify with the practice, ascribe some sense of social obligation to it, regard the practice as significant through simple habituation. Costa overlooks the fact that these sources provide stability for the attitudes in the face of social change.

Now suppose that the other group does not have the attitude. But given the deterrent effect of the attitudes of the others, they will be discouraged to deviate from the rule. As I indicate in §56, there is plenty of empirical evidence to support the effectiveness of social norms. Costa also ignores this point when stating that behaviour is not stable if it does not rely on widespread virtue.

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[91] Costa (2009: 411).
[92] ibid.

In sum, I hope to have shown in the second half of this chapter that the theory of social norms is to be preferred over Shklar's and Rorty's theories of character traits when it comes to avoiding cruelty. For it is more feasible, more desirable on the normative level (i.e. less illiberal) and more effective.

Conclusion

This chapter is entitled *Towards a less cruel world* and accordingly my main aim was to suggest a scheme towards that goal. To this end,

1) I applied the Cruelty Principle to the informal structure, in particular to three social spheres, and suggested a range of social norms that should be in place in those spheres;
2) I argued that to set up such a structure individuals must accept corresponding normative attitudes;
3) finally, I showed that the theory of social norms is more appealing than Shklar's and Rorty's theories of civic virtue.

Conclusion

1. Invigorating the dystopian liberalism

In this concluding chapter I want to highlight the contribution of this thesis to the following three fields of learning within which the thesis falls: theories of dystopian liberalism, ideal theory and Rawls' political theory. Above this, I will also indicate some areas where further research is due.

I start with the contribution to theories of dystopian liberalism. Overall, I addressed three gaps, the first of which is the definition of extreme violence and in Shklar's case: of cruelty. I showed that Shklar, Kekes and Hallie fail to get various aspects of the concept right, and I suggested a definition that covers a subclass of what is judged as cruel in ordinary language. In attending to this issue, I provided a clearer idea of what is to be avoided in social interaction.

A second gap shows itself when it comes to the normative justification of the claim that avoiding the worst is of first priority. To demonstrate this, I offered a systematic examination of various arguments that have been given in support of this claim – for example laid down by Montesquieu, Berlin and Williams, but also Shklar, Walzer and Gutmann – reaching the conclusion that

those arguments fail to convince. In reaction to this, I proposed a new normative foundation for the dystopian liberalism based on the premise that the prevention of cruelty safeguards the fundamental human interest to form mental content.

There is a further question in this context I did not dwell on but which merits further attention. I defended the point that the Cruelty Principle has priority over various liberty principles, but I did not investigate, at least not in an in-depth way, the question how it relates to egalitarian principles. I do not think that this a deep problem for this dissertation, given that the aim was to discern a first principle of liberalism. Nonetheless, I do need to return to this question in future research in order to arrive at a thorough assessment of the normative relevance of the principle.

The third gap I identified is the incomplete theory of institutions, or more precisely: the absence of an account of a desired informal structure. Rorty and Shklar suggest theories of civic virtue, but as I showed in Chapter 7, these theories cannot be simply expanded into a theory of the informal structure. In view of that, I proposed a range of social norms that should be in place in three social spheres and I explored what demands are placed on individuals so that these norms come into existence.

This opens up new avenues for research, for my focus was only on some social spheres and this provides a framework from which to develop a more

comprehensive account of social norms. On the one hand, I did not discuss what social norms should be at work in the other social spheres, and on the other one, I only presented a selection of social norms within those spheres I looked at. So the next step would be to work on a thorough theory of social norms and thus of the informal structure.

Moreover, as I explained in Chapter 2, I focused on avoiding interpersonal cruelty and explored how a whole range of acts between individuals can be prevented, e.g. sexual harassment and severe child abuse. Yet, a fuller and more comprehensive analysis would need to tackle other issues as well. For example, it would need to examine what social norms are needed to counteract a kind of structural cruelty that arises from the cumulative effect of the actions of many people. Many circumstances that are judged as cruel, such as extreme poverty, are – to use Young's phrase – the "outcomes of the normal and accepted actions of millions of individuals, outcomes often not intended by them, even though after decades of repetition they can be predicted."[1] A complete account would thus need to explore how this systemic kind of cruelty can be mitigated. In addition to this, a full theory would focus not just on the duties of citizens to each

[1] Young (2011: 64). It is worth noting here that we also use the concept of cruelty to refer to other system-level phenomena: we might describe social practices governing the treatment of the vulnerable, the ill, those with disabilities as cruel – where their plight may result not simply from one or two individuals acting in a certain way, but rather as the unintended cumulative effect of the actions of many people.

other, but also what rules public officials have to adhere to so that cruelty is eliminated.

So a fuller and more comprehensive theory would suggest social norms that not only counteract interpersonal cruelty, but also structural and institutional cruelty. Nothing I say rules out that this is important. In fact, this dissertation even offers resources to address structural and institutional cruelties. I argued in Chapter 7 that people have to accept certain normative attitudes so that social norms arise and counteract interpersonal cruelties. One attitude I highlighted was that one must under no circumstance sexually harass an employer. Likewise, one could argue that people have to accept certain normative attitudes that give rise to other social norms, which then counteract structural and institutional cruelties.

In addition to addressing the three gaps, I also laid down a framework, following Rawls, to develop a theory of dystopian liberalism, consisting of three main building-blocks: the defense of the principle, the identification of the subject of the principle and then the application of the principle to the subject.[2] This makes it possible to think about theories of dystopian liberalism in a much more systematic fashion.

Overall, by attending the three gaps in the literature and providing an adequate framework, I intended to invigorate the dystopian liberalism as an

[2] Rawls (1971).

alternative to dominant theories of liberalism. One may now think that the range of modifications renders my theory unrecognizable as a theory of dystopian liberalism. Yet, the main pillars of Shklar's liberalism of fear are preserved. She argues that the fundamental goal of politics should be the avoidance of cruelty where cruelty is defined as "the deliberate infliction of physical, and secondarily emotional, pain upon a weaker person or group by stronger ones in order to achieve some end, tangible or intangible, of the latter."[3] The theory I suggest similarly aims at preventing physical and psychological harm as well as relieving the plight of the vulnerable and weak. This is especially visible in Chapter 7 when I suggest rules that aim at protecting employees (especially female), children and minorities from physical and emotional pain.

2. Developing a new ideal theory

Ever since the publication of Rawls' *A Theory of Justice*, ideal theory (in the tradition of analytical philosophy) has typically meant a theory of the state. For the main debate in the burgeoning literature has arisen on the question how the *state* should distribute liberties, opportunities and wealth to give people what is due to them. Today, when research is conducted for example on justice in immigration, on global justice or climate justice, the guiding question is what the state should do. Similarly, when Waldron calls for a *political political*

[3] Shklar (1989: 29).

theory, he explicitly states that "political institutions [such as constitutional structures] are the main subject of political theory – or ought to be."[4]

To be fair, there has been considerable opposition to the dominance of this approach: G.A. Cohen and I.M. Young prominently claim that the subject of political theory should be extended – a claim that is based on the observation that measures taken by the state are not sufficient to bring forth a just social world.[5] Indeed, Cohen and Young insist that social structures be included as a subject to arrive at a comprehensive ideal theory. Yet, this view still faces important problems that I flesh out in the Introduction to this dissertation: (1) the concept of social structures is underanalysed, (2) it remains unclear what these structures are in the empirical world, (3) the proposition that they should be taken as site of political principles rests on contested premises, and (4) no systematic account of desirable social structures is yet at hand in the literature.

I addressed all of these problems throughout this thesis. In Chapter 4, I provided an in-depth analysis of the informal structure *qua* social structure that overcomes the challenges to Cohen's account. In Chapter 5 then, I argued that social spheres are sets of status-roles that bundle social norms and that therefore the informal structure becomes apparent (or: shows itself) in these

[4] Waldron (2016).
[5] Cohen (2008) and Young (2011).

spheres. In conjunction, the two chapters deepen our understanding of the informal structure. They thus help grasp what is meant by the proposition that the structure should be counted as a subject of principles.

Moreover, Chapter 6 offered a comprehensive examination of theories of the site of justice and how the informal structure fares on these theories. The conclusion that the structure should be counted in is not original, but the argument is more stable than those that can be found in the literature. And the reason for this is that the conclusion does not rest on a single theory of the subject.

Finally, Chapter 7 presented an ideal theory of the informal structure, proposing a range of social norms that should be in place in three spheres. The account goes beyond what can be found in the literature, the few ad-hoc suggestions by Cohen and Julius on what attitudes men should have towards women. It also goes beyond Young's analysis of what rules should be in place in the housing market.

However, there is more work to be done. What I argued in Chapter 6 is that the Cruelty Principle should be applied the informal structure, but I think that it is possible and also that it will be instructive to apply other principles to the structure. Take for example the (relational) egalitarian principle that social hierarchies should be avoided. In applying this principle to the various social spheres, it is possible to build a systematic account of how hierarchies

can be opposed in everyday life, i.e. of what normative attitudes individuals need to accept to that end.

Overall, in addressing these four gaps I hope to have shown that Cohen's and Young's approach to normative political theory, the project of complementing theories of the state with theories of social structures, can be taken much further. In fact, this means to carry forward a project Cohen and Young inherit from Marx. For it was him who distinguished in his text *On the Jewish Question* between the state and civil society and argued that "the state can liberate itself from a limitation without man himself being truly free of it",[6] that indeed civil society also needs to have a particular shape so that individuals can be free.

3. Objections to Rawls' theory of justice

Some of the main points I defend in this dissertation are criticisms of Rawls' political theory and can be seen as contributions to the examination of his views. I want to highlight two of those: First, I said in the preceding section that extending the subject of political principles marks a break with how most political philosophers conceive of the subject since Rawls' publication of his book. But it is not entirely true that it is a break with Rawls' position. He thus writes that "[a] general theory of justice would consider when rituals and other

[6] See Wolff (2002: 42).

practices not commonly thought as just or unjust are subject [to principles of justice]. Presumably they *must* involve in some way the allocation among persons of certain rights and values. I shall not however pursue this larger inquiry."[7] In view of that, Part 2 of this dissertation is not so much a break but rather a contribution to this larger inquiry in that it clarifies how "rituals and other practices" can be conceptualized and why exactly they are to be taken as a subject alongside the legal structure.

Moreover, I addressed a central tenet of Rawls' theory, the point that the liberty principle, qua first principle of justice, is the most important political principle. It is a claim that has provoked a fair bit of criticism. Goodin for example writes: "we have been misled by Rawls and the many philosophers following him [...] into thinking of justice as the first virtue of social institutions. [...] There is more to it than that."[8] I took this criticism further and demonstrated that Rawls, given the argument he offers for the priority of the liberty principle over the other principles of justice, must himself accept the lexical priority of the Cruelty Principle over his liberty principle.

In sum, the main aim of this dissertation has been to invigorate the dystopian liberalism as advocated by Shklar and more recently been endorsed by

[7] Rawls (1971: 58). Emphasis added.
[8] Goodin (2007: 425).

Richard Rorty, Jacob Levy and Bernhard Williams. While pursuing this aim, I intended to present a new type of ideal theory and also to suggest modifications to Rawls' political theory.

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