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ROGER PILON

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FOREWORD

Forewords are of course after-words. After completing the doctoral dissertation, especially at Chicago, one is entitled to lean back and say "There." Under normal circumstances that might suffice by way of foreword (or afterward) for a dissertation. But historians of academia and intellectual autobiographies will one day record that the seventies had not been normal in the academy. I allude, of course, to the retrenchment that has accelerated through the decade, especially in the humanities, upsetting in its wake the most carefully planned careers. The episodic history that surrounds this dissertation is a case in point: substantially completed by 1976--and indeed, successfully defended in November of that year--it comes forth only now, some three years later. But let me begin at the beginning, the better to depict these unusual events, the better to explain a few points about the work that follows.

When I arrived at Chicago in the fall of 1971, fresh from an undergraduate training at Columbia, the decline of normalcy was only inchoate. True, graduate support had all but evaporated--and quite suddenly. But matters so mundane were thought by many too unphilosophical, and so we plunged into the business at hand (believing, no doubt, that our landlords would accept proofs for rent). Then it was that I turned from the history of philosophy, which had occupied my undergraduate days, to its contemporary side. It was Professor Alan Donagan in particular who first ordered for me vast areas of moral thought, stimulating in the process the mind of a rank empiricist--and indeed a crass utilitarian. Donagan would eventually become the second reader of this dissertation; but before that he would plant the seed of skepticism <u>about</u> skepticism, would show me in the process the importance of the philosophy of language to ethics, and would impress upon me especially the fundamental place of the theory of action in any normative study.

My first quarter behind me, I came next upon a fellow Columbian, Professor Alan Gewirth, whom I advised shortly thereafter that I intended to

write my dissertation, perhaps under his tutelage, on the subject of limited government. I do not know whether he took me an anachronism (recall that this was well before the Zeitgeist started shifting) or a harbinger, or simply someone of uncertain grasp, but I do recall that he received this datum with his characteristic aplomb--which I of course took for approval. So began our relationship--if not this dissertation--from which I have profited immensely. Not that my initial intention has broadened by my insistent exposure to this often unavailable mind; but from him I have learned to secure that end in ways I could not have imagined at the time. Steeped in Humean skepticism, I was brought to see the end of that path--though made ever mindful of its insights--and the promise of the Kantian vision. But I digress.

Things proceeded apace for the many years with which Chicago stamps the graduate experience--not so much from fondness for its students as from fondness for rigor--until it appeared that I would be through at last in June of 1977. But Donagan was out of residence that year, so the defense was moved up to November when he planned to be back for a few days. By that point all but the final thirty-five pages of the present version had been completed--my intention being to complete this section in the period between November and June. Alas, those plans were almost immediately overtaken by fortune--good, in this case! Teaching offers for my wife Juliana and me in California, followed by similar offers in Atlanta, and finally a return to California, together with a whole host of publishing and speaking opportunities, none of which could in good conscience be declined, for the difficulties of the times had by now become evident even to the most unworldly of philosophers.

Thus it was that the last two sections of chapter 3 and the brief chapter 4 of the present work got set aside in the fall of 1976. The former were written at last in the summer of 1978, as part of a very large article on the corporation which is due out this summer in the Georgia Law Review. But I was not able to incorporate those sections into the dissertation until the present summer, 1979, when I also added the final chapter and edited the whole. While editing I realized, of course, as only this distance could have enabled me, that I would organize and write this work somewhat differently were I to start afresh today. Thus do we grow through the years. In deference to the shortness of life, however, I decided to forgo that and to get the degree before yet another year had passed.

There is, then, a certain unevenness about this work of a kind to be expected in a piece not written at a single sitting. Not the unevenness one finds in a collection of separate articles, to be sure, but the kind that comes from stepping back and then picking up anew at a later date. I have been unable, for example, with the exception of a footnote here or there, to incorporate in the earlier parts the large body of literature on my subject that has appeared almost daily since the fall of 1976. In particular, I have not incorporated either Donagan's The Theory of Morality, which appeared in 1977, or Gewirth's Reason and Morality, out a year later, despite the special bearing of the latter upon the argument of chapter 3. (For a discussion of Gewirth's latest work, which will be useful addenda to this dissertation, see my "Ordering Rights Consistently: Or What We Do and Do Not Have Rights To," due out in September in a special issue of the Georgia Law Review devoted to the theory of rights.)

Nevertheless, here it is. Or as I said at the outset, "There (it is)." There are many, of course, to whom I have become indebted over this long period. For my two principal readers, Alan Gewirth and Alan Donagan, I cannot say enough. Donagan, with his steady, sure criticism, has been an inspiration from the first. From Gewirth I have received not only the keenest of insights but the warmest support. He has been socratic throughout. Special thanks too must go to my third reader, Professor Milton Friedman, whose spirit it was that brought me to Chicago in the first place. There are many institutions at which a dissertation such as mine could not have been written, or a man such as Friedman could not be comfortable. Chicago is not among them. I am grateful too to the ever ebullient chairman of my department, Professor Ted Cohen, for the understanding and good humor that have seen so many of us through these trying times. Professor Richard A. Epstein at the Law School is yet another of the Chicago people to whom I owe a deep appreciation. He has helped me immensely to see the applications of my thesis over a wide array of legal problems, which in turn have shed new light on the thesis itself. The competence of my typist, Gloria Valentine, would be exceeded only by her patience were the former not already consummate. She began this project some two years ago, when for a brief time it looked like I would bring it quickly to completion, and has been understanding at every turn, for which I am deeply

grateful. Finally, of course, there is Juliana, who has borne with me the birth-pangs of this thesis, in so philosophical a fashion, both as an astute commentator and as a patient, loving companion. Of late, however, she has urged its completion before the arrival of our first child. I have succeeded--but only by a few days.

TABLE OF CONTENTS

INTRODUCTION

We all want to be free, or at any rate most of us do; and we often claim that we have a right to be free. But in making such a claim we imply that others ought not to be free, that they have obligations toward us to do or to not do certain things. What kinds of actions or inactions may be justly prohibited, permitted, or made obligatory by this claim to be free and what in particular these findings imply in the way of governmental activity are the subjects of this essay.

1. Background: The Individual and Government

It will no doubt seem a little quaint to some to find a philosopher advancing a theory to limit government at this point in the twentieth century. I allude not so much to our having grown, since at least the Great Depression, to expect, even to demand that government become increasingly involved in our lives (or at least in the lives of everyone else) as to the intellectual Zeitgeist that has permitted this process to continue largely unquestioned. Anthony Quinton, in the Introduction to his 1967 anthology, Political Philosophy, pointed out that modern philosophers had come "to accept a more limited conception of their powers and, in consequence, of their responsibilities: . . . [v]ery briefly, philosophy has the task of classifying and analyzing the terms, statements and arguments of the substantive, first-order disciplines."[1] Accordingly, Quinton observed that the "great tradition" of political philosophy from Plato to Marx and Mill had "petered out," yielding to the less all-inclusive concerns of political science and political sociology, though "an occasional magnificent dinosaur stalks on to the scene, such as Hayek's Constitution of Liberty, seemingly impervious to the effects of natural selection."[2]

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[1]Anthony Quinton, ed., Political Philosophy (Oxford: Oxford University Press, 1967), p. 1.

[2]Ibid., p. 2.

Quinton prepared these remarks, of course, before the appearance of Rawls's A Theory of Justice, Nozick's Anarchy, State, and Utopia, or Gewirth's forthcoming Reason and Morality. It is problematic at this point, therefore, whether Hayek is to be seen as an atavistic dinosaur or as a prototype, but it is clear that the great tradition is at the moment enjoying a recrudescence. The present essay, though rather more modest in scope than these others, is nevertheless in their spirit; for it combines the analysis about which Quinton speaks with the normative concerns so central to the great tradition--in particular, the concern for individual freedom, which will be taken for the moment to be intimately bound up with limited government. Before introducing these matters in greater detail, however, it may be best to begin by placing the problem of individual freedom and limited government within a very brief and very general historical and theoretical context.

While the West's concern for the individual can be traced to antiquity and especially to early Christianity, it was not until somewhat before and during the Renaissance that the economic, scientific, and religious individual began to emerge sufficiently defined to adumbrate the moral and political problem of individual freedom. Thus the seventeenth century is usually taken as the period that gave birth to a concern for the individual in political society and to the liberal tradition of political philosophy which sought to address that concern. In saying this, of course, I do not mean to suggest that prior to the emergence of this liberal tradition these problems had not been entertained, nor do I mean to suggest that individual freedom was the sole concern of this tradition subsequent to its inception. On the contrary, the history of English rights, from Magna Carta onward, together with some of the anti-individualistic democratic variations spawned by the liberal tradition, are but two of the more general exceptions; it is both convenient as well as historically correct, however, to give emphasis to the intimacy of the connection between classical liberalism and individual freedom.

Having said this, it is necessary immediately to add a caveat, to distinguish the two themes at the heart of classical liberalism, viz., freedom and democracy, which Hayek identifies as being roughly characteristic

of the British and the French traditions respectively:

> The first of these [traditions] knew liberty; the second did not. As a result, we have had to the present day two different traditions in the theory of liberty: one empirical and unsystematic, the other speculative and rationalistic--the first based on an interpretation of traditions and institutions which had spontaneously grown up and were but imperfectly understood, the second aiming at the construction of a utopia, which has often been tried but never successfully.[1]

While the eighteenth century saw the purest exemplars of these two strains,[2] with the victory of the Benthamite Philosophical Radicals over the Whigs in the nineteenth century, Hayek continues, the two traditions became finally confused, merging into the liberal movement of that period. He concludes, however, that it has been the rationalist French tradition that has progressively gained influence, despite the reappearance more recently of the conflict between liberal democracy and social or totalitarian democracy.[3]

The historical development and methods of these two traditions aside, the theoretical differences between them turn in substantial part upon the distinction involved in the notions of the "source" and the "area" of control. In brief, under the democratic tradition the source of control is with a majority of the people; but majority rule, as many of the classical theorists made clear, is by itself no guarantee of individual freedom.[4] If there are areas or spheres within which individuals may act free from governmental

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[1]F. A. Hayek, The Constitution of Liberty (Chicago: University of Chicago Press, 1960), p. 54.

[2]In the British tradition Hayek lists Hume, Adam Smith, Adam Ferguson, Josiah Tucker, Edmund Burke, William Paley, as well as such Frenchmen as Montesquieu, Benjamin Constant, and Alexis de Tocqueville. In the French tradition he includes the Encyclopedists and Rousseau, the Physiocrats and Condorcet, as well as Hobbes, Godwin, Priestley, Price, Paine, and Jefferson after his stay in France. Ibid., pp. 55-56. Curiously, Locke is omitted from this taxonomy.

[3]Hayek (ibid., p. 431) quotes from Hans Kelsen ("The Foundations of Democracy," Ethics 66, part 2 [October 1955]: 95n.): "the antagonism . . . between liberal and totalitarian democracy is in truth the antagonism between liberalism and socialism and not between two types of democracy."

[4]For a more recent explication of this point see Robert Paul Wolff, In Defense of Anarchism (New York: Harper & Row, 1970). An extensive bibliography on the point will be found in Erik von Kuehnelt-Leddihn, Leftism: From de Sade and Marx to Hitler and Marcuse (New Rochelle, N.Y.: Arlington House, 1974), pp. 450-51, n. 13.

or majority interferences, however, as provided by the English common law rights that had evolved through the centuries, then liberty may be realized even in the absence of democracy. Sir Isaiah Berlin, in his influential "Two Concepts of Liberty," characterizes this distinction as that between "positive" and "negative" liberty respectively, the first in answer to the question, "Who is master?" the second in answer to the question, "Over what area am I master?"[1] He goes on to point out, as does Hayek, that

> . . . there is no necessary connection between individual liberty and democratic rule. . . . The desire to be governed by myself, or at any rate to participate in the process by which my life is to be controlled, may be as deep a wish as that of a free area of action, and perhaps historically older. But it is not a desire for the same thing.[2]

Whatever the difficulties that many have noted in various of Berlin's formulations (and to be sure, they are not without difficulty),[3] it is important to be clear about the distinction that both he and Hayek are making: they are saying that the kind or form of government under which one may live is to be clearly distinguished from the scope of the activities of that government. While a government's form may not be unrelated to the scope of its activities,[4] it is the latter that is of primary importance for the freedom of the individual vis-à-vis his government.

Several of these issues have been drawn together and cogently explicated by Alan Gewirth in his essay "Political Justice." Gewirth writes:

> If the doctrine of majority rule has traditionally gone by the name of democracy, the doctrines advocating limits as to the objects and the methods of all governments, including democracies, have gone by the names, respectively, of liberalism and of constitutionalism.[5]

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[1] Isaiah Berlin, "Two Concepts of Liberty," Four Essays on Liberty (Oxford: Oxford University Press, 1969), p. xliii. (Originally appearing as a monograph under the title of the essay, Oxford, 1958.)

[2] Ibid., pp. 130-31.

[3] References to some of these will be found in the Introduction to Berlin's Four Essays.

[4] It is a commonplace that democracy is the best guarantee of individual freedom. For richly documented arguments against this belief, see von Kuehnelt-Leddihn, Leftism.

[5] Alan Gewirth, "Political Justice," in Social Justice, ed. Richard B. Brandt (Englewood Cliffs, N.J.: Prentice-Hall, 1962), p. 142.

Here we have three kinds of limitations upon government. Democracy, by virtue of its entailing the consent of the governed, enables the individual to have at least some say in the determination of who governs him and hence, presumably, a say in how he is governed. (But again, this is a very pale liberty, because so attenuated.) Liberalism, by which Gewirth here means "the exemption of the individual from governmental restraints,"[1] refers to the area of immunity from governmental interference guaranteed by rights. And constitutionalism refers both to equal protection under the rule of law and to the control of governmental power by way of an explicit and relatively fixed ordering of that power. In these three means by which governmental power may be limited, then, we have the heart of our political inheritance from classical liberalism.

2. The Individual and Other Individuals

Thus far I have approached the subject of individual freedom in terms of the subtitle of this essay alone: I have been concerned with this issue, that is, only as it involves the relationship between the individual and his government, this on the assumption that to limit the scope of the activities of the state is to increase the freedom of the individual.[2] For very good historical reasons this side of the issue has traditionally received the greatest emphasis. (Those reasons are still very much with us, of course; for the problem of state control over the individual, far from having abated, has taken myriad and even monstrous forms in our own century.) But this is only one side of the problem of individual freedom: for individuals can of course be free or unfree vis-à-vis each other as well as vis-à-vis the state. Indeed, it was a fundamental tenet of classical liberalism that governments are instituted just to secure such freedom between individuals--a corollary of which was that government itself might become abusive of that freedom if it exceeded the activities the exercise of which served to justify it. Far from being an impediment to liberty, then, government was conceived by many as its very guarantor. The state was thus viewed as a means by which to

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[1] Ibid., p. 145.

[2] In this essay I will not be distinguishing the government (or civil society) from the state, as Hegel and others have done.

secure the just moral order as that order involved individuals or groups of individuals alone. Putting the issue this way serves to bring out the point that the foundations of the state--the reasons that serve both to justify its existence and then to limit its activities--are rooted not in political but in moral philosophy. Moral philosophy is thus prior to political philosophy. The problem of individual freedom, then, is ultimately the problem of just relationships between individuals; insofar as states or governments exist or are created to secure those relationships, it is derivatively the problem of the relationship between individuals and their governments.[1]

In this essay I will concentrate upon this more fundamental side of the problem of individual freedom, upon the question of just what the proper moral relationships are between individuals and how those serve to delineate areas or spheres of liberty. Following a long tradition, I will characterize these relationships in terms of the rights and obligations that go to define and constitute them.[2] It will be assumed, then, that if an individual has a general right against another individual (as opposed to a special right that arises from some special relationship between the two), then he has that same right against a group of individuals, including any group that may call itself the state. Thus I will be developing a theory of moral rights, a theory of those rights that are prior to or more fundamental than any political or legal rights that may subsequently arise.[3] I am interested in determining, that is, just what the moral order is--as defined by rights and obligations--

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[1]Cf. Robert Nozick, Anarchy, State, and Utopia (New York: Basic Books, 1974), p. 6.

[2]I am assuming here the traditional connection between rights and freedom. That assumption will be explored more fully in chap. 3, especially sec. 4.3. It should be noticed too that I am correlating rights and obligations, not rights and responsibilities, as is sometimes mistakenly done (see chap. 2, sec. 2). Moreover, "obligation" will be used throughout this essay as synonymous with "duty," though I recognize that H. L. A. Hart and a few others attempt to distinguish the two. See, e.g., H. L. A. Hart, "Are There Any Natural Rights?" Philosophical Review 64 (April 1955): 179, n. 7 (reprinted in Quinton, Political Philosophy, pp. 53-66, and also in Human Rights, ed. A. I. Melden [Belmont, Calif.: Wadsworth Publishing Co., Inc., 1970], pp. 61-75). Cf. also H. L. A. Hart, The Concept of Law (Oxford: Clarendon Press, 1961), p. 238.

[3]The sense in which the word "moral" is being used here will be discussed again below, briefly in chap. 1, sec. 4, and chap. 2, sec. 8, and more fully in chap. 3, sec. 1.

in a world without any arrangements of the kind we would call political or governmental. Presumably this is the order that a state, should one arise (or already exist), ought properly to secure.

Unfortunately I will not have a great deal to say directly about what I have called the derivative problem of individual freedom--involving the relationship between the individual and the state--for this side of the question is beyond the scope of the essay. (This is thus a theory "toward" limited government.) But the conclusions I will be drawing throughout speak very much to that problem in an indirect way. I will be showing, for example, that the whole class of putative moral rights frequently passing under the rubric "welfare rights" is spurious; these rights are unjustified and hence do not exist as moral rights. Insofar as rights of this sort have come to be part of the modern welfare state, the enforcement of the correlative obligations--necessary to secure any rights--is morally unjustified and hence is an infringement of the rights and therefore of the liberty of those assigned the obligations. (All of this will be spelled out in due course.) By showing, then, that certain kinds of rights do and other kinds do not exist as moral rights, I will be speaking indirectly to the derivative problem of individual freedom, this because existing governments may or may not attempt to enforce various of these rights: when governments enforce spurious moral rights they violate the genuine moral rights with which those spurious rights conflict; when governments do not enforce genuine moral rights and indeed prohibit private enforcement of those rights they violate the rights of those individuals thereby incapacitated.

These remarks should suggest, then, why the movement of the theory is toward limited government. It is not simply that the legitimacy of the state is suspect and therefore that its activities should be limited--an issue I will discuss briefly in chapter 4. It is, more immediately, that the modern state, as it has evolved from its theoretical roots in classical liberalism, has become ever larger, ever more voracious, ever more dominant and controlling in the lives of those individuals whose rights it was originally conceived to protect.[1] The modern welfare state, that is, in its discovery and multiplication of rights all out of proportion to those that can be shown to legitimately

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[1]For an excellent discussion of this see Milton Friedman, Capitalism and Freedom (Chicago: University of Chicago Press, 1962).

exist, and often, as a corollary, in its failure to protect these legitimate rights, is destroying the very liberty its precursor, the liberal state, sought to secure.[1] From this historical perspective, then, and in the context of the remarks in the preceding paragraph, the aim of this essay to sort out the genuine from the spurious moral rights is tantamount to an argument for a movement in the direction of more limited government.

3. State-of-Nature Theory

The discussion will proceed, then, along the lines of what has come to be known as state-of-nature theory. (It will not be necessary to describe the state of nature in any detail until chapter 3, for the discussion prior to that is largely formal: unless otherwise indicated, just assume a context or state of affairs absent any governmental institutions.) In virtue of this starting point, however, the argument is probably closer to what Hayek has called the French rationalist than to the British empiricist tradition, for it will largely concern rights in the abstract and not the particular rights evolved under, for example, the British tradition. By so proceeding my aim is not to construct a utopia--against which Hayek and many others have cautioned--though the picture to emerge from chapter 3 will be that of a perfectly libertarian world, at least in outline. Rather, it is to determine, again, just what the moral order is as that order is described by rights and obligations.

An undertaking of this kind, however, is by its very nature rational; for morality is grounded ultimately in Reason, as Locke and many others have

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[1] I have in mind such rights as those enumerated in articles 22-27 of the United Nations Universal Declaration of Human Rights, which include, e.g., the right to "periodic holidays with pay" (art. 24)! See D. D. Raphael, ed., Political Theory and the Rights of Man (Bloomington: Indiana University Press, 1967), pp. 143-48. While it is logically possible, of course, for a state to become a welfare state and yet escape the difficulties noted in the text--this is, after all, the utopian dream that has driven much modern political theory--history affords little evidence that this ever happens. Even Exhibit A of this faith--Sweden--is reaching the day of reckoning as liberties fast disappear: see Carl S. Holm, "Taxation in Paradise," National Review, 1 October 1976, p. 1065. On the British difficulties in this connection, see R. Emmett Tyrrell, Jr., ed., The Future That Doesn't Work: Social Democracy's Failures in Britain (New York: Doubleday, 1977).

argued. (This point will be developed more fully in chapter 3, section 1.)[1] Thus the world that emerges from chapter 3 is libertarian not because that is the presupposition or normative outlook from which I begin (though it is), but because that is the conclusion to which reason leads. Were we, however, to base the moral order upon or develop it from "an interpretation of traditions and institutions that have spontaneously grown up and are but imperfectly understood," we would have less than a thoroughgoing moral theory: we would have, rather, a very relativistic theory, one based upon the contingent facts of a given society. (Traditions and institutions per se, let us be clear, carry little moral weight; slavery, after all, was a social institution of long standing.) This is not to say, however, that traditions and institutions have no place in morality; rather, it is to say that they are not morally determinative but must themselves be judged by more fundamental moral criteria.

4. Outline of the Theory

Given then that this will be a rather abstract theory, one designed to reach over the vast area of the moral world, if only in a very general way, and given that the essay has numerous loose ends that can come together only in time, it would probably be helpful to set forth here an outline of the argument, an overview of the order the discussion will follow. (The heart of the theory does not begin to unfold until chapter 3; prior to that I will be clearing the underbrush, developing the tools that will find their use only later. Some may wish to avoid this early analysis--formal and dry as it is--and proceed directly to the more lively normative arguments of chapter 3.)

The aim of this essay, again, is to develop the groundwork for and outline of a theory of moral rights. This involves showing that there are such rights, contrary to a certain Benthamite positivist tradition; but in doing so it will become clear that there are not as many rights or the kinds

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[1] Although Hayek is much more sympathetic to the British empiricist than to the French rationalist tradition (as he describes them), perhaps for historical reasons, it is less clear where he himself stands on the matter of philosophical method: cf., e.g., Constitution of Liberty, pp. 67-68 with p. 159.

of rights that the more modern "humanist" tradition would have. In particular, the earlier mentioned welfare rights--which in the modern welfare state take the form of so-called social and economic rights--are shown to be unjustified and hence not to exist as moral rights; indeed, when they are made to exist--as in positive law--they conflict with and hence effectively negate the rights that <u>are</u> justified, the more traditional rights to liberty. Thus the world that emerges from these findings contains, at least in outline, all and only those rights that can be justified. Moreover, it is a consistent world in that the rights it contains do not conflict. So much for what the essay aims to accomplish.

In the first three sections of chapter 1 the concept of freedom is analyzed. The aim here is to show that the classical case for individual liberty cannot be secured by an analysis of freedom alone, as Berlin and others have often seemed to believe. A traditional distinction between negative and positive "kinds" of freedom, for example, sometimes thought of as a distinction between freedom ("proper") and power, or between freedom from and freedom to, has been shown by Gerald MacCallum to be specious.[1] He argues instead that freedom is best regarded "as always one and the same triadic relation."[2] Using the three-place schema that MacCallum has developed for analyzing statements about freedom, I go on to press the concept to its logical boundaries, which brings out the point that the idea is much more flexible than many of the friends of negative liberty (the classical liberals) have often supposed. Attempts to tighten up the meaning of freedom by conventional or stipulative definitions, moreover, are frequently arbitrary; and ultimately, of course, they beg important moral questions.

Using what I call the "objective approach" to questions of freedom, I then consider the relationship between obligations--which for purposes of the analysis I treat as objective facts of the world--and freedom. I consider what it means to say that there <u>are</u> obligations--especially as this involves the notion of acceptance--and conclude that obligations are best thought of as restrictions upon freedom, given that most of us fall short of Aristotle's

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[1]Gerald C. MacCallum, Jr., "Negative and Positive Freedom," <u>Philosophical Review</u> 76 (July 1967): 312-34.

[2]Ibid., p. 312.

virtuous man. I next examine and set forth at some length a distinction at the heart of the theory, between negative and positive obligations, or requirements, respectively, to not do or to do certain things; the notion of "changes in the world" serves to underpin the conclusion that the distinction between negative and positive actions and hence between negative and positive obligations is sound. In addition to the later uses to which I put this distinction, it has important ramifications in itself for the question of freedom; for positive obligations are in general much more restrictive of freedom than negative obligations. Among the implications of this finding for the more general conclusions of the thesis is this: the traditional rights to liberty, which have negative actions as their correlative obligations, are in general much less restrictive of freedom than the more modern social and economic rights, which have positive actions as their correlative obligations. It is thus no coincidence that the welfare state is purchased at the expense of freedom.

The upshot of chapter 1, in part, is that the classical case for individual liberty must be grounded in a concept richer than freedom. That concept, I argue in chapter 2, is the notion of a right. Unlike the three-place schema for freedom, the schema for explicating rights and rights-talk goes to five places. In chapter 2 I make no normative claims; rather, I consider the logical issues that will underpin any adequate theory of rights, including questions relating to each of these five variables. Because a right is a claim to stand in a certain relation to someone else, a claim purporting to be justified on some criterion, it already entails both relational and normative elements. Regardless of what those normative elements may turn out to be or what normative considerations are brought to bear upon talk of rights, the relational elements--and especially the relation of correlativity between rights and obligations--are crucial to establishing the picture of the moral world. Whenever a right is claimed, for example, it can always, indeed it must be asked what the correlative obligation is, who holds it, and what its effect will be upon other rights that may be held or claimed by the parties in question or by others. Only so will consistency be achieved, for only so will conflicts between rights be eliminated. (To have a system in which rights conflict with each other is to have rights

not all of which can in principle be enjoyed.) A world of consistent rights, I conclude, would be a world in which every individual could at all times enjoy whichever of his rights he chose to enjoy, subject only to the restrictions he incurred as a result of his own actions (e.g., entering into contracts, violating the rights of others). Thus, with the appropriate criminal, tort, and contract remedies, rights are alienable in such a world only by those holding them: in particular, an individual's rights cannot be alienated through someone else's enjoyment of his conflicting right, for there are no conflicting rights in a consistent theory.

In chapter 2 I consider in a general way what it means for a right to be justified and hence to be said to exist. Only in chapter 3, however, do the normative arguments proper begin. The first task is to get clear about the sense of "moral" that is being used, especially as this relates to existence questions. Moral rights, like all rights, can be said to exist insofar as their existence is accepted on some criterion; but they will reflect the deepest sense of "moral" only if their acceptance is generated by the appropriate criteria: only if the reasons for acceptance are rational--necessary to the subject of morality and sufficient to compel assent on pain of self-contradiction--will that acceptance not be arbitrary or contingent upon particular wants or preferences. Moral rights must be shown to exist, then, for reasons both necessary and sufficient to compel rational acceptance of their existence. Thus is morality grounded in reason.

Arguments satisfying these constraints have been set forth recently by Alan Gewirth. They develop the Principle of Generic Consistency (PGC): Apply to your recipient the same generic features of action that you apply to yourself: from this principle flow the rights and obligations necessarily and equally held by every individual. Gewirth's argument, very succinctly, is that every agent must accept on pain of self-contradiction that the generic rights he necessarily claims for himself, every other prospective agent necessarily claims as well; by virtue of mutual acceptance of these claims--generated by the necessary acceptance of one's own generic claims, which must be universalized--the corresponding rights can be said to exist.

The two basic rights to flow from Gewirth's theory--to freedom and

basic well-being--have been described differently in various of his papers. In general, they reflect, respectively, the voluntariness and purposiveness that he argues are the generic features of all action. Throughout all but the first two sections of chapter 3 I interpret Gewirth's arguments as they involve applications of the PGC. The idea is to flesh out the world implied by the PGC--which Gewirth argues is the supreme principle of morality--but to do so in a way that will produce a consistent world of rights and obligations; for Gewirth's sketches in this direction, I argue, have led to inconsistency. A preliminary question I consider is, Who holds rights, especially as this relates to children, fetuses, and animals? Then I turn to the central question: What are there rights to? This begins with a lengthy discussion of interpretation itself, which culminates in my positing an ideal starting point, a claim-free world of rational, adult, and competent individuals who in the beginning do not act: I call this spatiotemporal starting point the "status quo of noninterference." From this the historical picture--which Robert Nozick has shown to be crucial to questions of justice--can begin to unfold; thus will the difficult task of interpretation be facilitated.

I look first at what the PGC in fact says, which leads to the conclusion that the PGC, at bottom, is a principle of freedom. Starting from the status quo, only three relevant modes of action are possible: not acting, acting with no recipient, and acting with a recipient. The PGC applies in the last case only, thus leaving the agent effectively free (i.e., under no obligation) in the other two cases. It does <u>not</u>, that is, <u>require</u> action, nor does it <u>prohibit</u> action that has no recipient. This means that in the case of general relationships--as opposed to the special relationships that arise historically (e.g., as a result of promises, child begetting, right-violating actions, etc.)--there are no positive obligations toward others.

Gewirth argues otherwise; he believes that the PGC generates positive (or "welfare") obligations in special circumstances, even though there is no special relationship between the parties arising out of their (at least implicitly) consensual actions. To not act in these circumstances is to harm others, he argues. In reply I show that his impartiality requirement involves an equivocation, that his causal arguments will not go through (and if they did would open a Pandora's box), and that these positive obligations lead

directly to inconsistency--they conflict with rights that are implied by the PGC. Thus the whole class of putative moral rights falling roughly under the rubric "welfare rights"--and this includes most of the modern social and economic rights--is shown to be unjustified in that (a) these rights are not implied by the sound moral foundations that Gewirth has developed, and (b) they are inconsistent with other rights that are implied by those ineluctable moral findings. Nevertheless, such actions as Gewirth is urging can be fit under another, a different realm of morality: there is a distinction between what one ought to do and what one has an obligation to do. Here is a line that was at least implicit in classical liberalism, a line that contemporary liberalism has obfuscated.

I then proceed from the status quo to spell out in a very general way the rights and obligations that go to define general relationships. Here arguments for property enter; this criterion serves, in fact, to delineate the noninterference that I have earlier shown to be the basic right-object implied by the PGC. A further distinction between passive and active rights is drawn to aid in sorting out some of the difficult causal issues that arise in tort law, especially as it treats the problem of nuisance. I then turn to special relationships, first as they arise in the form of nonconsensual or forced exchanges, then as they arise in their various consensual forms.

In chapter 4 I consider some of the practical problems to which the forced exchanges give rise, difficulties frequently leading to arguments for the state. I consider Nozick's argument, which purports to be a non-practical, i.e., a morally justified argument for the state. He gets to the state, however, by way of a taking, a kind of forced exchange, which is a morally illegitimate move in the historical circumstances he describes. There is nothing to do, then, but look for another argument, or argue for anarchism, or fall back upon the practical argument for the state (which I believe is overwhelming). Nevertheless I make suggestions that if fully worked out might lead to moral legitimacy for the state: they are based upon the common law right to freedom from certain kinds of fear (a somewhat different argument than Nozick's). If we arrive at a state on either ground, however, the scope of the activities of that state should be limited by the

boundaries developed in the theory of rights that precedes these political considerations. The state has no right, in short, to be anything but the limited state of classical liberalism, for those grounds that may justify its existence will also limit its activities; and if it is not ultimately legitimate, then a fortiori it must be limited to the practical functions that necessitate it.

5. Limitations of the Theory

Let me conclude these introductory remarks with two brief but important comments. It is well to bear in mind that when a theory is developed--especially one such as this--there is ordinarily a certain centrally located range of cases it should be capable of handling. If it handles these well, perhaps that is all we should expect. But if we try to make our theory handle every conceivable case, including even those that are only logically possible--or worse, if we build our theory around the anomalous cases--we are likely not only to lose sight of the central goal but to produce the distortions that will result in our not being able to handle or handle well even the normal range of cases. (This is a variation upon the legal dictum that hard cases make bad law.)

Accordingly, the theory being developed here is aimed at tracing out the world of rights and obligations for what might be called the "normal state of affairs," which is not to say that it may not describe the non-normal state of affairs as well. I assume that this idea makes sense even if the denotation of "normal state of affairs" is unclear. To be sure, I would want to include our everyday world under this rubric, the world in which ordinary people go about living their ordinary lives. Thus I would want to say that such things as routine emergencies--because they are routine--do not count as nonnormal states of affairs (though to be sure, in the particular they do seem to be nonnormal). An individual cannot violate another's rights with impunity, for example, just because there is an emergency; which means that if he does do so ("for good reason"), then he is liable for whatever costs he has imposed upon that other as a result of the violation. But how this works in genuinely nonnormal states of affairs--e.g., wars or natural disasters--I am not quite sure; it may simply be that

the costs become so large or the accounting so impossible that it no longer makes practical sense to speak of rights violated, costs imposed, or obligations forgone. Notwithstanding the difficulties these situations raise (which I will mention from time to time), it would be well to proceed with an eye toward the ordinary range of cases, the normal state of affairs--thus will distortions be avoided. I grant that these remarks raise numerous questions (in particular: When, if ever, do consequentialist considerations intrude upon a theory of rights?), but they will have to be set aside for now.

The second comment I want to make here is not unrelated to the above observations. Just as a theory of rights may not be able to handle every conceivable state of affairs, neither does it constitute the whole of morality. (This point will be developed briefly in chapter 3, at the end of section 4.4.) Rather, rights and obligations set boundaries within which we may act; they draw lines that define in a rather precise way the outline of our relationships with others. The world of rights is a <u>rational</u> world; it is of the mind, not of the heart. (Jurists might say that rights reflect law, not equity.) As such, it may not always be satisfying to our deeper sensibilities; for like the freedom it secures, the world of rights is often stern, demanding, unfeeling. But while a theory of rights is not grounded upon the moral sentiments, upon what Hume called that "fellow-feeling with others," neither does it proscribe these sentiments and the actions that may spring therefrom, including what we would call--from a somewhat different perspective--moral actions. It is an uninteresting mind that does not distinguish what we <u>ought</u> to do from what we are <u>obligated</u> to do, what we have a <u>right</u> to claim from what we <u>ought</u> to claim. In short, though I will have little to say about the point in this essay, <u>there is more to morality than rights and obligations</u>. It is with this in mind that I would like the theory that follows--a theory of bare but fundamental rights--to be read and understood.

CHAPTER I

FREEDOM

1. Freedom as a Triadic Relation

The history of the discussion about freedom is a long and often enlightening one. At the same time, even a cursory look at the analyses produced will show them all too frequently to be from the outset an admixture of descriptive and normative elements. To be sure, the concept admits of a large normative content in ordinary usage; but as is so often the case in moral discourse, ordinary usage is both confused and inconsistent and can serve only to guide, not to sanction philosophical explication. It will be argued here, in fact, that this normative element in freedom is better understood if the descriptive element is first set forth, i.e., if a more rigorous philosophical usage can be found that excludes normative considerations. It is for this reason that the discussion will begin with the excellent analysis of the term recently provided by MacCallum.

In challenging the common view that we may usefully distinguish two kinds of freedom--negative and positive--MacCallum argues constructively that freedom is best regarded "as always one and the same triadic relation."[1]

> . . . freedom is thus always *of* something (an agent or agents), *from* something, *to* do, not do, become, or not become something. . . . Taking the format "*x* is (is not) free from *y* to do (not do, become, not become) *z*," *x* ranges over agents, *y* ranges over such "preventing conditions" as constraints, restraints, interferences, and barriers, and *z* ranges over actions or conditions of character or circumstance.[2]

It is MacCallum's thesis, then, that whenever questions arise concerning the freedom of some agent or agents, they can be made intelligible not by positing two *kinds* or *concepts* of freedom but by treating freedom as always the same concept; so doing, disagreements may then be pursued by raising questions

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[1] MacCallum, "Negative and Positive Freedom," p. 312.

[2] Ibid., p. 314.

about the scopes of the variables in this three-place schema. Thus MacCallum is not giving a definition of freedom; he is not saying what freedom means or what it ought to mean. Rather, he is saying that whenever we talk of human freedom--however defined--these three elements will be involved, at least implicitly.

In response to this argument Berlin has raised a question concerning whether freedom is always a triadic relation--in particular, whether the third term in MacCallum's schema is always necessary. "A man struggling against his chains or a people against enslavement need not consciously aim at any definite further state. A man need not know how he will use his freedom; he just wants to remove the yolk."[1] This objection, however, is mistaken; for there is nothing in MacCallum's argument to suggest that z must range over some "definite further state," by which I understand Berlin to mean some particular act or acts--knowing "how he will use his freedom." Nevertheless, a man struggling against his chains must surely have some further state in mind, if none other than the state of being free to do what he could not do while chained (though he might not know what particular acts this state may include). MacCallum's "conditions of circumstance," in short, admits of broad interpretation, extending even to the freedom "to do nothing at all," for example.[2]

2. Freedom as a Matter of Fact

Although MacCallum does not argue explicitly that the analysis of freedom should proceed as nonnormatively as is possible, this approach is certainly consistent with his thesis--the schema he puts forward is, after all, a purely formal one. The question arises, however, whether freedom can be made entirely a matter of fact or whether, in the assignment of values to the variables, normative elements will necessarily intrude. The latter has recently been argued by S. I. Benn and W. L. Weinstein who claim, after explicitly granting MacCallum's thesis, that

> . . . we cannot assign just any value to these variables, for there are certain characteristics of the concept [freedom] that limit what in general one can appropriately say one is free from, and free to do. . . . [Concerning the latter,] to see the point of saying that one is (or is

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[1] Berlin, Four Essays, p. xliii, n. 1.

[2] See MacCallum, "Negative and Positive Freedom," pp. 317-18.

> not) free to do X, we must be able to see that there might be some point in doing it. Our conception of freedom is bounded by our notions of what might be worthwhile doing; it is out of its element when we find its objects bizarre.[1]

As examples of such "bizarre" objects the authors give the freedom or unfreedom to starve, to cut off one's ears, or to die.

The argument Benn and Weinstein give in support of this claim turns upon what they call "the normative functions of freedom."[2] Proceeding much in the vein of the traditional friends of so-called "negative liberty," they distinguish liberty from power, the former depending for its application upon whether there is a restriction or infringement external to the agent, upon whether this restriction is of other human origin, and in addition upon whether it is capable of being changed: "By extending the range of restrictive conditions judged capable of alteration, the concept of freedom can itself be extended."[3] The authors suggest, for example, that we cannot say that a man is unfree if he has to go roundabout to avoid a landslide, or if he has to submit to a painful vaccination to avoid smallpox, or if he cannot speak because he has been struck dumb. Likewise,

> a man who lacks the physical means--whether muscular strength or ropes--to climb a cliff, need not be unfree but only unable to climb it, though one way of depriving a man of his freedom to climb it is to take away his ropes.[4]

This is clearly a normative conception of freedom, though undoubtedly one that conforms in substantial part with our ordinary usage. At the same time, because it depends on so many normative considerations, it is likely as

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[1] S. I. Benn and W. L. Weinstein, "Being Free to Act, and Being a Free Man," Mind 80 (April 1971): 194-95. For another argument that similarly analyzes freedom in both descriptive and normative terms, after having explicitly acknowledged MacCallum's thesis, see D. M. White, "Negative Liberty," Ethics 80 (April 1970): 195-204.

[2] Benn and Weinstein, "Being Free to Act," pp. 194-200.

[3] Ibid., p. 199.

[4] Ibid., pp. 197-98. Suppose his ropes had been taken away so that another climber might be rescued: would we still say, on the analysis of Benn and Weinstein, that the first climber had been deprived of his freedom? The ensuing restriction is, after all, "capable of alteration."

well to produce considerable disagreement over whether, in a given case, an individual is or is not free.[1] I am inclined, for example, to say that the man who lacks muscular strength or ropes is not free to climb the cliff, regardless of whether someone else may or may not be responsible for this lack. To be sure, his unfreedom is not owing, ex hypothesi, to anything anyone else has done. But the fact of the matter is that in such cases we do say that the man is not free to climb the cliff (quite apart from whether this usage is recommended). Moreover, and more importantly, all so-called "external" restrictions, even those originating with other people, are restrictions only insofar as the agent ostensibly restricted hasn't the power or the will to overcome them; thus some will overcome them and others will not. If we say that those who have the power or will to overcome a putative restriction are free, what then are we supposed to say of this so-called "restriction"? Does it become a mere hindrance? Or a hindrance for some and a restriction for others?

Given that questions of freedom admit of such variability, that they turn upon how the term is defined or upon shifting or uncertain patterns of usage, it is well to ask again whether this concept should serve as the foundation of a moral or political theory, its hortatory force notwithstanding. Does not the line of argument frequently put forth by the friends of "negative liberty" place too heavy a normative burden upon "freedom," one it cannot bear, as even the brief remarks above bring out? The case for individual liberty ought surely to be better grounded. In the next chapter I will show that the concept of a right is substantially richer, that it entails other concepts--in particular, the idea of a correlative obligation--that make it better suited to serve as the foundation for a moral theory that aims to secure individual liberty. In proceeding in this way I do not mean to suggest that we can disperse with the idea of freedom; indeed, we will see in chapter 3 that noninter-

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[1] Benn and Weinstein argue (ibid., pp. 199-200), for example, that low wages, since they originate from the actions of others and have come to be seen as capable of being changed, have therefore come also to be seen as restrictions of freedom. Many a defender of "negative freedom" would be uncomfortable with this conclusion; yet it is entirely consistent with this normative conception of freedom (and with the descriptive conception I am about to put forth).

ference--which is a kind of freedom--is the basic object to which we have a right. In order then to prepare the way for these later considerations we should press the analysis of freedom to its limits by setting forth an entirely descriptive account of the idea, this by examining the three variables.

3. The Variables of Freedom

One of the principal advantages of analyzing freedom with the aid of a schema such as MacCallum has provided is that it enables claims of being either free or unfree to be made perspicuous. This point will be elaborated upon in this section. In doing this, however, there will emerge some seemingly absurd or trivial conclusions, conclusions that will appear to have little to do with the issues ordinarily thought central or important to the problem of freedom. These researches should be seen not as idle philosophical speculations, however, but rather as explorations of the logical boundaries of freedom, the better to understand the central issues.

3.1. The individual

Although discussing the three variables separately is a little artificial, and at times will be impossible, where it is possible analysis will be served by doing so. Beginning then with the first variable, the basic question is how the agent is to be defined. While the advocates of "negative freedom" have generally been straightforward here--settling upon something like the "rational adult" or the "natural person" of Anglo-American law[1]--the advocates of so-called "positive freedom" have enjoyed considerable latitude. On one hand, they have attempted to define the ideally "real" or "rational" person. Starting often from the observation that our passions or impulses sometimes influence our words and actions and that what we want at one time may not be what we want at another--or what we "should" want--the control of these passions becomes of paramount importance; thus freedom is defined in terms of this control or with reference to this ideal person. The individual is thereby protected or "freed"

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[1] Hobbes defines a "natural person" as one whose words and actions are considered as his own, excluding children, fools, and madmen. Thomas Hobbes, Leviathan, ed. Herbert W. Schneider (Indianapolis: Bobbs-Merrill, 1958), chap. 16.

from himself, as it were, an idea that stems at least from the pre-Socratics. Hegel argued, in this vein, that the good man is not coerced by good law since it compels him to do what he would freely choose anyway.[1] On the other hand, there is the attempt of the friends of "positive freedom" to define the person in terms of some larger whole such as the family, the state, the ethnic group, ancestry and progeny, and so forth. Here the freedom of the individual is very much bound up in questions about the freedom of these larger units, for it is with regard to them that he is said to be free or unfree.[2]

There are occasions, of course, when these variations upon our "ordinary" conception of the individual should be taken into account; when they arise we will do so. At the same time, there are reasons both practical and theoretical for their not figuring centrally in this essay. Practically, there are simply too many conceptions of what would or should constitute an ideally "real" or "rational" individual or of what larger units are to count such that a theory of rights of a manageable scope could possibly accommodate them all.[3] I admit to being uncomfortable about ignoring the question of what it is for a nation or a people to be free or unfree. But that question presupposes a conception of some sophistication of just what a social or national

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[1]"For law is the objectivity of spirit; volition in its true form. Only that will which obeys law is free; for it obeys itself--it is independent and so free." G. W. F. Hegel, The Philosophy of History, trans. J. Sibree, Great Books of the Western World, vol. 46 (Chicago: Encyclopaedia Britannica, 1952), p. 171. See also Bernard Bosanquet, The Philosophical Theory of the State (London: Macmillan, 1951), pp. 118-34, and T. H. Green, Lectures on the Principles of Political Obligation (London: Longmans Green & Co., 1941), pp. 2-3. Green distinguishes the man directed by monetary inclinations and desires from the man directed by rational convictions, the former in a sense unfree, for "from his bondage he emerges into real freedom" by becoming rationally directed. (But could we not as easily speak of a man in bondage to--or psychologically repressed by--these rational constraints?) On the other side, of course, was Bentham, who saw all law as a restriction of freedom.

[2]For a much fuller discussion of these issues see Berlin, "Two Concepts of Liberty."

[3]It would of course be well if psychology could help us in connection with the first of these; but the controversies in that discipline suggest that we are very far indeed from having a conception of the "real" individual other than that which is given by any particular individual himself.

unit is, which this essay does not consider (except very briefly in chapter 4); our subject, rather, is individual freedom.[1] A reason of a more theoretical cast for not treating these variations concerns our aim to construct a theory with the normal state of affairs in view, as mentioned in the Introduction: I take that state to be one in which individuals do in fact have differing conceptions of what their "real" or "rational" selves might be and of what therefore is in their best interest. Were we to live in a world in which all men were indeed ideally "rational" (assuming we knew what that meant) we probably would not need a theory of rights. (Indeed, this is the thrust of much of Hegel's thought.) On the other hand, were we to live in a world in which no one (or at any rate few) knew his "real" interests, freedom and rights would probably not be possible. By the "normal state of affairs," in short, I mean a world in which morality is possible;[2] I also mean a pluralistic world in which individuals pursue diverse interests of their own making, a world very much like the one in which most of those who will be able to read this live. For these several reasons, then, this essay will be concerned for the most part with the freedom and rights of the "natural person" first mentioned above. This is the individual whose wants, whose speech, and whose behavior are to be taken at face value: he is to be considered the best judge of his own best interest (which I take to be a necessary component of any reasonable conception of human dignity). The anomalous cases--children, dependent adults such as the mentally or socially incompetent, fetuses, the dying, and even animals--are better treated separately so as not to distort

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[1] It is no understatement to note that recent libertarian theory has provided very little in the way of conceptions of the body politic (where it is not altogether hostile to that notion). There are several reasons for this: (1) it is reacting against just such a conception in the modern tendency toward the welfare state; (2) it (usually) begins from or is influenced largely by state-of-nature theory; accordingly, (3) its emphasis is usually individualistic and often anarchistic. It is no accident, therefore, that libertarian casuistry has its greatest difficulty with questions of national defense.

[2] See, e.g., David Hume, An Inquiry Concerning the Principles of Morals, ed. Charles W. Handel (Indianapolis: Bobbs-Merrill, 1957), sec. 3, part 1. I follow the many classical theorists who argue that a sufficiently developed state of civilization is requisite for morality, especially for that morality that respects individual freedom.

the construction of the theory for the normal state of affairs. (But see chapter 3, section 3, below.)

3.2. Freedom and unfreedom simpliciter

With this conception of the individual in mind, then, let us turn to the other two variables, treating them together in a somewhat discursive fashion (which in the early stages will probably raise more questions than it answers). There appear, in the first place, to be two questions at bottom. What does it mean to say that an individual is free? What does it mean to say that an individual is unfree? But underlying (or perhaps bounding) these is a further question. Does it make sense to say that an individual is either free or unfree simpliciter?[1] These questions are important insofar as an examination of them will serve to fix the logical boundaries of freedom.

Taking unfreedom simpliciter first (which is the more difficult notion), we would perhaps want to say that if a person were bound and gagged over a period of time he was unfree simpliciter, for there is virtually nothing he could do or be during that period. Still, it could be the case that he wanted to be so constrained--he is a masochist, or this is an aid to transcendental meditation which he enjoys, or he needs an unusual excuse to avoid an unpleasant engagement--in which case it is doubtful that he is made unfree. Moreover, and more importantly, even if he does not want to be bound and gagged, he is not unfree insofar as he is still free to live; so perhaps unfreedom simpliciter would involve death. But even here, if the person wanted to die--say to avoid a painful death, or torture, or so that he might become a martyr--death would not appear to make him unfree; rather, it would enable him to realize his want. Nevertheless, in the absence of the want to die, death is probably the paradigm case of unfreedom simpliciter, for it eliminates the possibility of realizing any future wants (as well as wanting itself).

It may not be possible to come to any clear conception of what unfreedom simpliciter would mean, but the attempt to do so has served to bring out the importance of wanting for questions of freedom. Thus what may at first

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[1] Although MacCallum is less than enthusiastic about the notion of freedom simpliciter ("Negative and Positive Freedom," pp. 327ff.), it does serve a useful analytic function, as will be seen shortly.

appear to be a case of unfreedom could in fact turn out to be an instance of freedom realized, owing to the presence of the requisite want. The y variable, then, cannot always be determined straightforwardly, without taking into account the particular wants of the agent. This "subjective" side of freedom will be pursued further shortly, but freedom simpliciter should first be considered.

MacCallum remarks: "One might suppose that, strictly speaking, a person could be free simpliciter only if there were no interference from which he was not free, and nothing that he was not free to do or become."[1] Notice, however, that for there to be nothing that a person is not free to do or become just is for there to be no interference from which he is not free. Thus we needn't be concerned with restrictions, for ex hypothesi there are none here. A world in which it was possible for a person to be free simpliciter, therefore, would be a world in which the unrestricted gratification not only of every want but of every possible want as well was possible. Is such a world possible? Clearly not, for there can be no world in which the want for a logical impossibility could be gratified. A person cannot be free logically to both do and not do the same thing at the same time and in the same respect, to draw a round square, or even to talk to a married bachelor. The restriction is contained in the want itself.[2] Hence, no one can ever be free simpliciter, despite our being able to say what freedom simpliciter would involve.

Now to draw these points together, given that unfreedom simpliciter (in the absence of a want to die) is probably death, and given that freedom simpliciter is logically impossible, a living individual is at all times in a state of both freedom (vis-à-vis unfreedom simpliciter) and unfreedom (vis-à-vis freedom simpliciter). These are the logical boundaries of freedom, then, the limits of what is possible in the way of freedom or unfreedom for the individual. Thus no claim by an individual (other than a decedent) that he is either free or unfree simpliciter could ever be sustained; only the more modest claims of being free or unfree with regard to such-and-such are at all defen-

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[1] Ibid., p. 328.

[2] I am assuming that wants can be for both logically possible and impossible things.

sible. These logical boundaries having been set, then, the ground in between remains to be examined.

3.3. The subjective approach

What was referred to above as the "subjective" side of freedom is perhaps the best place to begin. This expression serves, again, to point out and emphasize the place of wants in questions of freedom.[1] Wants have as their content future states of affairs (including the immediate future), usually involving the wanting individual; the want can be for a change in the state of affairs (e.g., the individual wants to perform an action), or for a continuation of the present state of affairs (e.g., he wants to continue what he is doing), and the involvement can be as minimal as that of spectator or passive or distant enjoyer. But given an individual (the instantiation of the x variable), that individual's want will serve to pick out more or less roughly from an infinite number of possibilities an instantiation of the z variable. It then becomes a mere empirical inquiry (though a sometimes complicated one) to determine what there are (or are not) in the world in the way of restrictions to or interferences with the realization of that want, i.e., what there are that serve to instantiate the y variable. From this inquiry the degree of freedom or unfreedom of the individual can be determined; and this determination, given the individual (x) and his want (z), will be entirely a matter of fact.[2]

In general, whatever either prevents or hinders the realization of a want, or is a source of frustration in the pursuit of a want, is a restriction and can serve as an instantiation of the y variable. The problem of individuating and classifying these various kinds of restrictions is of course con-

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[1] I am assuming here, of course, materialism notwithstanding, that there are such mental phenomena as wants. But while I understand wants to involve desires, pro-attitudes, and so on, I am concerned in this chapter not with these evaluative aspects but simply with the existence of wants as such; given that wants exist, that is, I am interested to see what their place is in any attempt to describe the freedom or unfreedom of an individual. The normative implications of wants will be treated in chapter 3.

[2] In saying that the degree of freedom (or unfreedom) can be determined I do not mean to suggest that it can be precisely quantified, but only roughly arrived at; i.e., "matter of fact" is not synonymous with "mathematically calculable."

siderable;[1] but it is a necessary prerequisite to any normative analysis. In doing the normative analysis it may indeed turn out that such a distinction as was noted above (section 2) between internal and external restrictions will be both defensible and relevant; but a restriction's being dismissed as normatively irrelevant makes it no less a restriction. The fact of the agent's unfreedom vis-à-vis that restriction remains, despite the decision that this fact is of no or of little moral significance. (The discussion that follows immediately, in fact, will concentrate upon those restrictions--usually little considered--that will later in the essay be shown to be largely unimportant from a normative point of view.)

Pressing these points further, as was earlier remarked, will produce some seemingly trivial or absurd but nevertheless helpful conclusions.[2] It has already been noticed that some wants--those for contradictory states of affairs--cannot in principle be realized. Apart from freedom simpliciter, however, freedom with regard to a particular want, as was suggested above, would involve a complete absence of impediments of any kind. Are there any kinds of wants that are, so to speak, "free"--wants the realization of which involves no restrictions? Another way of asking this question is this: are there things that could serve as content for wants, the realization of which would involve no cost? This way of putting the matter serves to emphasize that wants are for things (in some sense) valued, whereas restrictions, or costs, are disvalued, not wanted. If we had our way everything would be in this sense "free," i.e., without cost. But clearly, almost no want would satisfy these requirements, for nearly everything valued has some cost or other attached to it. Even those things that most approximate these conditions--activities enjoyed for their intrinsic and not for their instrumental value--are often done at some cost, if none other than the cost of not being

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[1] In chapter 3 (and rather less importantly below) this problem will be taken up at only a very general level. For a comprehensive treatment see Felix E. Oppenheim, Dimensions of Freedom (New York and London: St. Martin's Press, 1961).

[2] If we did not press this exploration of freedom (as a matter of fact) to its logical limits, we would have to justify stopping at some point short of the limits--perhaps because beyond that point the issues are normatively unimportant. But then we would no longer have a descriptive account. Moreover, we would beg important questions.

able to do something else of intrinsic value at the same time. If I want to go for a swim and go to hear a lecture but cannot do both, one will be done at the expense of the other, i.e., each want is a restriction upon my freedom to realize the other. Thus it turns out that even wants themselves can be restrictions: by virtue of our having them, and their not all being able to be realized, we cannot be free from the unpleasantness of having some or many of them frustrated. Indeed, Pitirim Sorokin has argued that "one could increase one's freedom as well by limiting his desires as by increasing his opportunities to satisfy his desires."[1] And we do in fact say that a man with few wants is a free man; he is not burdened by the frustration of having multitudinous wants unmet. Noticing the unfreedom that arises from our having incompatible wants, however, should not divert attention from the more important case, that in which the cost or restriction is owing not to the presence of some other want that must be frustrated in the pursuit of the first want but to the presence of a cost proper, i.e., a means that is not valued but is necessary to the realization of the end wanted.[2] If I want my paycheck at the end of the week I must go to work, no matter how intrinsically unpleasant or disvalued that work might be: on MacCallum's schema, I am thus not free from the restriction of work to enjoy my paycheck.[3]

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[1]These words are J. Roland Pennock's, stating Sorokin's argument (no citation given); "Coercion: An Overview," Coercion: Nomos XIV, ed. J. Roland Pennock and John W. Chapman (Chicago: Aldine-Atherton, 1972), p. 8. Pennock continues: "Many might object that, carried to its logical conclusion, the end result of the [process of limiting desires] would be death, the very negation of liberty. Yet we do seem to accept the idea that a multiplicity of wants, out of all proportion to the possibility of fulfilling them, is frustrating and that frequently the frustration can be better removed by eliminating the wants as a way of trying to satisfy them. We might thus think of limiting wants as a way of increasing freedom, since freedom is so closely linked with frustration." This approach to freedom (or peace) can be traced, of course, to at least the Stoics.

[2]These means will of course be related to restrictions in the world proper, i.e., to the way the world is, and not simply to the presence of incompatible wants (in the mind of the individual). But this will be discussed in the next section.

[3]The problem of want-descriptions is looming in the background. The case of incompatible wants has been distinguished from the case of wants for ends but not for means. In truth, they are both cases of incompatible wants: in the example cited, the want for the paycheck versus the want to not have to

In saying that the determination of freedom from the subjective side is entirely a matter of fact, what is meant, again, is that, given an agent (x), and given a want of that agent (z), the restrictions to the realization of that want (y) can be "totaled up," so to speak, merely by looking at the world. This is not to say that that total will not be affected by other wants of the agent, as has just been shown; but once these other wants are known, they too become facts of the world. Of course, given that an individual at any particular time not only has occurrent but numerous standing or dispositional wants as well, this model of freedom may be deceptively simple. But if these wants can be sorted out, a rough determination of the agent's state of freedom or unfreedom can be reached.

To tie the question of freedom up so closely with the wants of the agent is not, it should be noted, to make freedom any less a matter of fact. This point has been too little realized in discussions of the subject with the result that attempts to show that an agent "really" is or is not free inevitably fail insofar as they do not take this subjective element--viz., wants--into account. From this subjective side, in short, the freedom of the individual is determined as a matter of fact according as the agent thinks or believes he is free, i.e., according to his subjective wants. Thus a person who does something that is enjoyable for its own sake, and genuinely has no other want with which it conflicts (if this is in fact ever the case), does indeed engage in that act "freely," i.e., without cost (but again, he is not free simpliciter). Likewise, a person who does something that is instrumentally valuable may enjoy or come to enjoy that activity so much that it ceases to be the "cost" of the end for which it is done and becomes itself intrinsically enjoyable. A person who genuinely enjoys his work exemplifies such a fortunate state of affairs. A person who does not enjoy his work, however, one who has to do it but does not want to do it, will think it a restriction upon his freedom. And indeed, one of the grounds for distinguishing work from nonwork is that--as with most of the work of the world--it is not intrinsically enjoyable, and so it is by most seen as a restriction upon their freedom (to do the things they really want to do). Quite apart from whether people ought

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work. The latter is a species of the former, however, differentiated by the underlying means-end relationship.

to try to find their work enjoyable, the failure to recognize that most work is not enjoyable underlies much misunderstanding about the morality of the marketplace. It is because most people value their freedom that they place as high a price as they can upon that which has been produced by restrictions of that freedom.[1]

3.4. The objective approach

The analysis of freedom as a matter of fact along the lines of this subjective approach may be felt to be unsatisfactory on a number of grounds. For one, it does not seem to allow us to say what we often want to be able to say about situations in which the question of freedom arises: if a law forbids such-and-such an activity, for example, we would want to be able to say that a person is unfree to engage in that activity regardless of whether he may want to do so. Moreover, by tying freedom so closely to an individual's wants, we make it a very ethereal thing: with every change of a person's wants the degree of his freedom or unfreedom changes. What these objections suggest, however, is that a fuller account of freedom may require an additional perspective, one not proceeding from the subjective wants of the individual alone.

The subjective approach just considered served to make perspicuous the place of wants in the question of freedom by taking as given the individual (x) and his want (z); the individual's state of freedom or unfreedom could then be determined according to the restrictions (y) there were to the realization of his want. In the case of what I will call the "objective" approach, however, the individual (x) and the restriction (y) are given; the individual's state of freedom or unfreedom, using this approach, is determined then according to what he is left free to do or be (z), regardless of whether he might want to do or be anything. I call this the "objective" approach, but by this I mean only that the approach proceeds not from subjective wants but from objective restrictions in the world.

This last statement requires some elaboration, especially in light of what was said in the last section. In particular, how can a "restriction,"

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[1] See H. B. Acton, The Morals of Markets (London: Longman, 1971).

which depends for its being a restriction upon our knowing the relevant want of the agent, be objectively determined (i.e., be determined to be a restriction) in the absence of that knowledge? The answer involves noting first that "restrictions" are simply facts about the world until such time as people who have wants that are in some way frustrated by these facts turn them (the facts) into restrictions. This does not prevent us, however, from treating freedom hypothetically, from taking a particular fact about the world into consideration so that we might determine what it would serve to interfere with in the way of human activity.

Thus, given such-and-such a fact, if a person wanted to do such-and-such a thing, he would (or would not) be frustrated in doing it, i.e., this fact would (or would not) be a restriction upon his doing it. (The hypothetical want here serves the function of selecting an activity [z] for consideration from a potentially infinite number of possible activities; otherwise this approach would have to proceed by an impossible exhaustive enumeration.) A mountain, for example, is just a fact about the world until such time as someone wants to get to the other side, at which time it becomes a restriction to his doing so (unless he wants to climb the mountain every bit as much as he wants to get to the other side). Thus we can take an agent x, a fact about the world (a possible y), and say that if x wanted to do z, which would in some way be frustrated by that fact, it would be a restriction; in starting with an agent and a possible y, however, we are starting first with an objective fact of the world and not with a subjective want. The terms "objective" and "subjective" are thus meant to imply no more than this.[1] These two "approaches" will frequently, of course, come down to the same thing. But distinguishing them does serve to emphasize on one hand the subjective wants involved in questions about freedom, and on the other hand the objective facts of the world that may be restrictions upon those wants.

The objective approach is better appreciated, however, when the "restriction" is both more certainly a restriction and more clearly restrictive than in the above example. (This will become especially clear in section 6

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[1] It should be recalled, moreover, that even subjective wants are being treated here as objective facts of the world; these terms "objective" and "subjective" should therefore not be construed in any other ways, for I mean by them no more than I have indicated.

below.) If a person is bound and gagged there is usually little question about this fact of the world being a restriction; it thus makes sense, given the agent (x) and the restriction (y), to ask what he is left free to do or be (z)--in this case very little. Likewise, if a person suffers a stroke, or loses all his worldly possessions, or is conscripted into the army, it is well to look first at these objective facts so that it may be determined what their effect is upon the individual's freedom or unfreedom, i.e., what he is thereby free or unfree, should he so desire, to do or be.

It should be noted, moreover, that this objective approach makes the determination of questions of freedom no less a matter of fact than does the subjective approach. For indeed, both approaches ask the same question, the former starting from possible restrictions, the latter starting from particular wants. But again, to definitively determine an individual's freedom according to the number of "restrictions" there are in the world would be impossible, for there are an infinite number of possible restrictions. Nevertheless, we can make estimates of an individual's or a people's freedom or unfreedom simply by making assumptions about a "normal" range of wants and about what "normally" counts as restrictions upon the realization of those wants; indeed, we do this all the time. Thus if we assume that Americans and Russians have roughly the same range of wants, we can say that the former are more free than the latter simply by pointing to differences in the numbers and kinds of restrictions there are that serve to frustrate the realization of those wants. (The case of Communist China is interesting in this connection: for one would believe from the accounts of many recent visitors to that country that the Chinese people do not have this "normal" range of wants and are therefore more free than their American or Russian counterparts.[1] They do not have freedom of artistic expression, for example, but because they do not want to express themselves in other than the prescribed way--we are invited to believe--they are not unfree.)

There is no reason in principle, however, to limit the application of this objective approach in any material way; indeed, to do so would be to beg the question. Thus if we assume a normal range of wants, we can ask whether a poor man is less free than a rich man, whether there are facts about the

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[1]See, e.g., Alain Peyrefitte, The Chinese, trans. Graham Webb (Indianapolis: Bobbs-Merrill, 1977).

world that serve to frustrate the realization of his wants more than the wants of the rich man. Assuming this normal range of wants, there clearly are: the poor man is less free. Again, this is not to say that he will think or believe himself less free; for that will depend upon whether he has this normal range of wants and in what way he may have it. But if he does, and if we are not going to define "freedom" in some circular way such that we build normative or political factors into the concept, then we must allow that the poor man is indeed less free. Short of that circular route, the idea of freedom is simply not rich enough to generate the kinds of conclusions--in particular, the kinds of normative arguments--that the friends of "negative liberty" have traditionally wanted to secure.

Let me conclude this section by saying that I am not recommending that "freedom" be used in the broad way I have been using it here, this analysis notwithstanding. My concern, again, has been to press this concept to its limits, to determine how secure it is. But proper or preferred usage is to be distinguished from common and indeed from possible usage. If a term comes to be used rather loosely or if the idea behind it allows this kind of usage, it is wise not to build whole theories upon the term or the idea it signifies, especially important normative theories. There are other, more solid foundations, as we will see in the next chapter when we examine the logical features of the concept of a right, especially as this idea involves correlative obligations. Before taking up that analysis, however, I want to look at the relationship between obligations and freedom.

4. Obligations and Freedom

The question to be considered in this section is whether obligations--legal or moral--are to be seen as restrictions upon the freedom of individuals. But first the question of what it means to say that there are obligations for individuals or that individuals have obligations must be discussed, for I will want to say shortly that obligations can be treated as objective facts of the world and hence that the first of these questions can be pursued along the lines of the objective approach.[1]

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[1]The discussion that follows--as it concerns the distinction between legal and moral, what it means to say that obligations exist, and the notion

Taking legal obligations first, H. L. A. Hart distinguishes being "obliged" from having an obligation.[1] When people have a habit of obeying the law simply because of the coercive force behind it, Hart argues, we might say that they are obliged or compelled to obey the law.[2] In order to be able to say that we have a legal obligation, however, there must be recognition or acceptance of the law as constituting a standard of behavior. Taking even the simplest legal system, one in which a monarch (X) has unrestricted legislative authority, accepting X's decrees involves treating deviations as occasions for criticism; moreover,

> . . . reference to X's words are generally made as reasons for doing or having done what X says, as supporting demands that others should do what he says, and as rendering at least permissible the application of coercive repressive measures to persons who deviate from the standard constituted by X's words.[3]

Hart goes on to argue that if a group of persons behaves in this way, then they accept the rule that X is to be obeyed and "the rule that his word is law exists";[4] thus the laws he decrees and the obligations they set forth exist as well. Regarding the rule that X's word is law, Hart adds that

> the assertion that there is a legal system in England (or anywhere else) does entail that there is in fact general acceptance of a fundamental rule such as the rule that what the Queen in Parliament enacts is law. . . .[5]

And by "general acceptance" Hart means, in addition to obedience, the "use of, and attitude to, the enacted law" described above.[6]

There appears, however, to be an equivocal use of "acceptance" in

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of acceptance--is not intended to be definitive. A fuller exploration of these issues will be taken up below in chap. 2, sec. 8, and especially in chap. 3, secs. 1 and 2.

[1] H. L. A. Hart, "Legal and Moral Obligation," in Essays in Moral Philosophy, ed. A. I. Melden (Seattle and London: University of Washington Press, 1958), pp. 82-107. For a somewhat different treatment of these issues, cf. Hart's Concept of Law, pp. 59-60, 109-14, 247-48.

[2] Hart, "Legal and Moral Obligation," p. 89.

[3] Ibid., p. 90.

[4] Ibid., p. 91.

[5] Ibid., p. 92.

[6] Ibid.

this argument. As Hart is using that notion in the first passage above it implies that that which is accepted is in some sense or on some criterion justified. To give "reasons" that "support demands" or "render permissible" just is to purport to justify (whatever the justificatory criteria may be). Hart wants to use "acceptance" in the same sense in the second passage as well. But if he does, then this statement is false; for general acceptance is only a sufficient condition for the existence of a legal system (as in the first passage), it is not a necessary condition. Many a legal system exists (elsewhere than in England) where there is no general acceptance; nevertheless "acceptance" of such a system does occur in a weaker sense of that word, in the sense of "recognizing" or "being compelled to notice" that there is a rule that what is enacted by a legislator is law and hence that that law exists. The recognition of such a "rule," that is, implies that the enactments of the legislator are authoritative, though not necessarily justified (again, on some criterion)--i.e., accepted in the stronger sense suggested by the first passage. Thus there is no necessary connection between the existence of a legal system and the existence of legal obligations (in Hart's sense of the word); it is enough that people be "obliged" to obey the law--because it is coercive--for our being able to say that a legal system exists.

Now Hart has pursued this line of argument in part because he wants to be able to distinguish the case of legal obligation (as he has defined it) from that of being obliged, as one might be obliged, for example, to turn over one's purse to a gunman.[1] But in truth, a legal system may operate with precisely as much concern for the acceptance, in the stronger sense, of those it controls as does the gunman; it would nevertheless exist. Would we call the requirements of the laws of such a system "obligings"? Insofar as they are satisfied but not, in the stronger sense, accepted, we might. But we still want to be able to distinguish being obliged by a law from being obliged at the hands of a gunman. The grounds for such a distinction cannot be gone into here, though they no doubt involve the idea of "universality of application" as well as a further distinction between institutionalized and noninstitutionalized relationships.[2] To avoid this rather artificial "obligings," however, it is prob-

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[1] Ibid., p. 96.

[2] On these issues see Alan Gewirth, "Obligation: Political, Legal, and

ably better to let "obligation" denote the requirements of all the enactments of positive law, regardless of whether they do or do not derive from a legal system that is itself accepted in the stronger sense (or regardless of whether there may at times be a moral obligation to disobey a legal obligation). But if we do that, we will have to say, in the absence of acceptance in this stronger sense, that one is obliged, owing to the possibility of coercion, to fulfill one's obligations. And this is, I believe, the preferable usage, for it serves to bring out the compulsory aspect of "obligation" that Hart's usage obfuscates. In sum, then, if individuals accept their legal obligations--whether because they believe them to be in some sense justified or simply because they are compelled to do so--we can say that the obligations exist for these individuals, that they have these obligations.

Another reason Hart has pursued this line of argument, however, is for its obvious application, by analogy, to the case of moral obligations. He in fact lists three features he believes are common to both kinds of obligations: (1) dependence on the actual practice of a social group, (2) possible independence of content, and (3) coercion.[1] If coercion is to apply in the case of moral obligations, however, it must involve more than such measures of "social coercion" as avoidance or ostracism; for Hart wants to be able to show how we can say that moral obligations exist, not simply how we can say that we are "obliged" to act morally. Thus Hart needs something like the stronger sense of "acceptance." Accordingly, by coercion in this case Hart means exposure of the delinquent individual to reminders not only of his failure to comply with the rules of the group but, more importantly, of his own presumed respect for those rules as well.

Moral," in Political and Legal Obligation: Nomos XII, ed. J. Roland Pennock and John W. Chapman (Chicago: Atherton, 1970), pp. 58-59, 74ff.; also "Some Notes on Moral and Legal Obligation," in Human Rights, ed. E. H. Pollock (Buffalo, N.Y.: Jay-Stewart Publications, Inc., 1971), p. 291.

[1] Hart, "Legal and Moral Obligation," p. 100. The first and second of these features suggest the sense of "moral" Hart has in mind; if slavery is "the actual practice of a social group," for example, we must suppose that the obligations attendant to this practice are to be counted as moral obligations. This sense of "moral," which is closer to "social," is not the sense that will be developed in chap. 3, secs. 1 and 2, below.

> The fact that moral pressure is characteristically exerted through an appeal to the delinquent's assumed respect for the institution violated, together with the fact that the plea, "I could not help it," is, if substantiated, always an excuse, jointly constitute the "internality" of morals as compared with the "externality" of law.[1]

It is in this sense, then, that Hart believes that moral obligations can be said to exist.

The problem as to the existence of such obligations arises, of course, when the above mentioned presumption is unfounded, when the attempted exposure fails, owing to the delinquent's not respecting or accepting the authority of the rules of the group; for then the "coercive" element, as Hart has construed it, is missing, and so the existence of the obligation for that individual is called into question. To be sure, an individual may accept, in the weaker sense of the word, the existence of a moral obligation; i.e., he may conform to the behavior required by the obligation simply because of straightforward "social coercion," even though he does not "internalize" the obligation. Thus we could say that he is "obliged" to accept it, in which case it does exist for him. But a moral obligation cannot be said to exist for the genuine delinquent (or iconoclast?), for he does not accept it in even this weaker sense, i.e., he is not even "obliged" to accept it. Though he may notice that <u>others</u> accept the obligation--as in the case, for example, of a religious obligation of a sect to which he does not belong--it will in no way be seen as authoritative for him unless it is accepted in at least this weaker sense.[2]

There is, then, an intimate connection between "acceptance" and claims about the existence of obligations. For whatever the grounds for acceptance--prudential (because of coercion) in the case of "unaccepted" legal obligations, legal or political or moral in the case of accepted legal obligations or legal systems, or prudential or moral in the case of moral obligations--only if acceptance of <u>some</u> kind obtains can the obligation be said to exist. Later in this essay I will argue that moral obligations--in the sense of "moral" I will be using--must be accepted on <u>rational</u> grounds, not on the grounds of respect or belief ("internalization") or coercion (legal or social) as discussed here; they will thus be authoritative insofar as the power of reason is authorita-

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[1] Hart, "Legal and Moral Obligation," p. 103.

[2] Cf. Gewirth, "Obligation: Political, Legal, and Moral," p. 59.

tive. But regardless of the grounds for the acceptance, this notion is the sine qua non of an obligation's existing for an individual.

This conclusion returns us, then, to our original question: are obligations to be seen as restrictions upon the freedom of the individual? Given that those obligations that exist do so in virtue of some kind of acceptance, the answer would appear to be no. But surely, this is too hasty an answer; for it assumes that accepting an obligation--for whatever reason--is tantamount to wanting to fulfill it. Acceptance, as we have seen, may be for any number of reasons--prudential, moral, rational, and others (there are of course many ways to classify reasons). But to cite a reason for wanting to fulfill an obligation is not necessarily the same thing as saying that one wants to do what will fulfill that obligation. Accepting, on some criterion, my obligation to serve in the army is not to say that I want to serve in the army. Or again, I may genuinely feel and accept my obligation to visit my sick aunt on Sunday afternoon, but I really want to go to the ball game.

This raises an old problem, the answer to which no doubt lies in recognizing that there is a continuum between obligations that are in fact the realization of wants and obligations that are not wanted at all, that frustrate or restrict the realization of large numbers of wants, but are accepted all the same (for reasons often related to or generated by the obligations themselves). If we were all like Aristotle's virtuous man,[1] then Hegel would be right in saying that good law "compels" us to do what we would freely choose anyway. But the truth is that most of us are like Aristotle's continent man; and so obligations do, insofar as they frustrate the realization of our real wants, restrict our freedom. But again, the determination of this question in any particular case is a matter of fact; for depending upon whether one is a "virtuous" or only a "continent" man in that case, one will or will not be free in virtue of either wanting or having to meet one's obligation.

These last remarks can be brought out more fully by returning to our two approaches to questions of freedom. Using the subjective approach, if an individual (x) has a want (z) that is frustrated by some obligation that he has accepted, for reasons perhaps unrelated to this want, then clearly that obligation will serve as an instantiation of the y variable and he can be said

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[1]Aristotle Nicomachean Ethics 7.1ff.

to be unfree with regard to it. If he wants to drive his automobile at 70 miles per hour, for example, but he has a legal obligation to drive at 55, which he accepts only to avoid being arrested, then that obligation is a restriction of his freedom. But if, on the other hand, an individual (x) has a want (z) that happens to coincide exactly with some obligation he accepts, then from this subjective side he is not unfree with regard to that obligation. If he wants to drive under 55 because he believes doing so will insure his safety and he has a legal obligation to drive under 55, which he accepts for whatever reason, then that obligation, from this subjective side, is no restriction of his freedom, for he has no want that it serves to frustrate. Here he is free insofar as he thinks or believes he is.

Using the objective approach, however, the results are somewhat different. From this side we start with the individual (x) and some fact about the world, some possible y, and ask how that fact affects the freedom of the individual, what it leaves him free to do or be (z). We can treat obligations as objective facts of the world, as we have seen, insofar as we can determine behaviorally that people accept them, for whatever reason.[1] Thus if an individual fulfills his obligation and therefore, from our point of view, accepts it (from his point of view he accepts it and then fulfills it), we can ask how this obligation affects the realization of his wants. But here we have to pose the question hypothetically, we have to ask how the obligation would affect his freedom *if* he wanted to do such-and-such. Thus from this objective side the man who wants to drive under 55 *is* made unfree by the obligation not to exceed 55, even though he does not want to drive over 55, this because there is an obligation not to *should* he want to. Objectively, he is made unfree by this obligation. This approach requires, in short, that we make assumptions about human wants, as when we earlier spoke of the "normal" range of wants. I take it, however, that the assumption that the world is peopled by individuals who fall somewhat short of the Aristotelian virtuous

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[1] The behavioral determination of this acceptance need not be direct. A person who does not obey a legal obligation, for example, may be "obliged" to accept that obligation in the form of a legal sanction; thus the behavioral evidence will be delayed or indirect. This suggests why, during periods of lax enforcement, it is difficult to say whether legal obligations in fact exist, for the evidence is spotty. Cf. Hart, *Concept of Law*, pp. 114-16.

man is not controversial. If that is so, then it is safe to say that obligations, taken as objective facts of the world, do indeed restrict freedom. For obligations are requirements to do or to not do certain things, requirements that may conflict with, and therefore frustrate, our various wants.

5. Negative and Positive Obligations

In the next section we will take up again the question of the relationship between obligations and freedom, especially as it involves the distinction between negative and positive obligations. In order to do that, however, we have to be clear about this distinction. Roughly, a negative obligation is a proscription, a requirement that we not do something, whereas a positive obligation is a prescription, a requirement that we do something. Examples of the former might include obligations not to murder, steal, or trespass; examples of the latter might include obligations to pay taxes, feed one's children, or serve in the army. A negative obligation has as its content a "negative action," whereas the content of a positive obligation is a "positive action." Intuitive as this distinction appears, there are a number of difficulties surrounding it that I want to examine; for as we will see in chapter 3, it lies at the heart of this theory. I will argue later, in fact, that the distinction underpins the libertarian emphasis of the theory of classical liberalism, at least when that theory is made explicit, that it is central to the consistency requirement for a theory of rights, and that it is crucial to the causal foundations of the law of torts.

Let us consider first, however, the question of just what "negative" and "positive" are characterizing. A given obligation, like any given action, can be accurately described in an endless number of ways, involving both negative and positive formulations. These formulations ordinarily take the form of rules which set the obligations and hence the requisite negative or positive actions. It is important, however, not to confuse the character of the language in which the rule is couched with the character of the obligatory action proper. The positive rule to keep promises, for example, may require that one perform both negative and positive actions, as may the negative rule not to break promises. Or again, the positive (and very general) rule to obey the law might, in some society, require nothing but negative actions.

There are many difficult questions regarding the logical relationships between the "corresponding" negative and positive formulations of various rules;[1] but care should be taken that the character of the language in which a rule is couched not obscure what the rule requires in the world. The question whether the formulation of the rule is negative or positive, in short, is a different question than whether the obligatory action itself is negative or positive. It is the second question that will concern us here, for it is ultimately the important one.

5.1. Negative and positive actions

In order to be clear about the distinction between negative and positive obligations, then, it is necessary to be clear about the distinction between negative and positive actions; for when we fulfill a negative or positive obligation we "perform" the corresponding negative or positive action. Recent theories of action have treated this subject at some length and often with considerable sophistication;[2] notwithstanding this, the results in at least the area of negative action have been less than satisfactory, for reasons I will indicate somewhat later. Let me set out first, however, the distinctions and definitions with which I will be working throughout this essay. This will be anything but a thorough treatment of the subject of action, but it should be adequate both for the purposes of the essay and as background for the critical remarks that follow. (There will of necessity be a number of loose ends as we go along; they will come together only after the various parts of this explication have been set forth.)

The intuitive (and simplified) idea underlying the distinction between negative and positive action is just this: positive action involves a change

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[1] See, e.g., Marcus G. Singer, "Negative and Positive Duties," Philosophical Quarterly 15 (April 1965): 97-103; and Bernard Mayo, "Negative and Positive Duties: A Reply," Philosophical Quarterly 16 (April 1966): 159-64. There are difficulties in both of these essays (e.g., neither author seems aware of the basic distinction I am making here), but they will give a flavor of some of the logical problems involved in contrasting different formulations.

[2] See, e.g., the citations given by Myles Brand, "The Language of Not Doing," American Philosophical Quarterly 8 (January 1971): 46, n. 4.

in the world relevant to the action in question whereas negative action (e.g., refraining, omitting, "doing nothing at all") involves no change in the world relevant to the action in question. Notice first that the concept of "change in the world" is crucial to the distinction. Secondly, it is always with reference to some particular action that we can be said to be acting positively or negatively.

To explicate this intuition more fully we need first a primitive ontological sketch upon which to build. I follow G. H. von Wright in thinking that the world is constituted by states of affairs--described by state-descriptions--that these states may or may not change qualitatively, and that events are transitions from one state to a temporally succeeding one, which transitions may or may not involve a qualitative change.[1] (With the exception of the changes associated with mental acts, I mean change at the macro-, not at the microlevel, however difficult that distinction may be to draw.) Thus events and changes, just as actions and obligations, may be characterized as negative or positive: a positive event denotes a positive or qualitative change in the world, between succeeding states of affairs; a negative event denotes a negative change, or no qualitative change between succeeding states (N.B.: I did not say a regress, I said no change). To describe an event, then, we need (at least implicitly) two state-descriptions which themselves characterize two succeeding states of affairs.

Now all actions are events involving, to a greater or lesser degree, the mental or bodily behavior of human individuals between succeeding states. (I am not concerned here with the "acts" of animals, committees, or gods.) But of course not all human behavior is action; most breathing, sneezing, blinking, falling, dreaming, and so on is not something we do. Action, on the other hand, is behavior we perform (what this means will be discussed in a moment). A positive action, then, denotes a change in the world that we bring about; it corresponds to--or better, constitutes--a positive event that we cause. Negative action, however, is somewhat more complicated, for it includes--or at least I will take it to include--not only mere not doing

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[1] George Henrik von Wright, Norm and Action (London: Routledge & Kegan Paul, 1963), especially chap. 2. I do not follow von Wright in all respects, especially in the matter of his ontological and causal conclusions regarding forbearing, as will be brought out later.

or "doing nothing at all" but also refraining, forbearing, abstaining, and so on. (My reason for so classifying these last mentioned "inactions" will be made clear later.) Let us say for the moment, then, that a negative action denotes no change and hence nothing in the world that we bring about relevant to the action in question; a negative action corresponds to or constitutes a negative event, except that in the case of refraining, forbearing, etc. there is a positive aspect or change involved, though one not relevant to the action in question--hence it remains a negative event. The sense in which a negative action is even an action is thus the same sense in which a negative event is even an event: "negative" denotes "nothing" or "none." A negative event is what we would ordinarily call no event, or nothing happening; a negative action is what we would ordinarily call no action. This is a somewhat artificial way of putting the matter, but again, it is useful in coming to grips with the denotation of "negative obligation," the connotation of which does seem to make intuitive sense.

It should be noted here that while the performance of a positive action involves some change in the world, that action will be properly understood only if it is correlated to the correct event, the event it constitutes. This must be said because in looking at the world we can of course select our events, our transitions from one state of affairs to a succeeding one, arbitrarily, i.e., without reference to any actual changes in the world other than temporal changes. In particular, just because there is no change between succeeding states of affairs does not mean that no action is occurring. Take the act of standing at attention; let us say that A stands at attention from time t_1 to t_4. The event described by the transition from the state at t_2 to the state at t_3 would involve no change in the world (for that is just what standing at attention is); but this event does not correspond to the action in question, it is not the same event, it is a fragment of the event that corresponds to the action. We will see the importance of this point in a short while.

5.2. Positive actions

Let us turn now, however, to more substantive matters, concentrating for the moment on positive action. I am going to treat the class of positive actions very broadly, for its members are by no means of a single hue. Yet

all positive action can be reduced to what is often called a "behavior plus" model, with "behavior" referring to some bit of mental or bodily behavior (though not necessarily bodily movement, as will be brought out below), the description of which may include various of the consequences of the behavior, and "plus" referring to those elements of consciousness that serve, in different ways, to cause the behavior. Instantiations of this basic model are best thought of, I suggest, as ranging along a continuum: at one end are those actions minimally or perhaps only implicitly involving conscious elements (e.g., habitual actions, certain kinds of seemingly reflexive actions, etc.); at the other end are those actions maximally or perhaps explicitly involving conscious elements (e.g., deliberate or "reflective" actions).

There is much to be said and much controversy about these various elements, or even "acts," of consciousness--wanting, desiring, believing, knowing, deliberating, willing, choosing--how they are distinguished from and related to each other, how they work to cause behavior. Some have argued, for example, that we can explain human action as behavior caused by wants and beliefs alone.[1] While this account, in virtue of its appeal to elements of consciousness, is more satisfying to common sense than the stimulus-response accounts frequently found in the behavioral sciences, it nevertheless encounters difficulties when there are conflicting wants. Even if these difficulties can often be overcome by saying that the dominant want causes the behavior,[2] there will remain a large number of cases--including especially typical moral action--in which this device will be most implausible. Take as a paradigm case of a moral act (though this is not the only kind of such action), one performed out of duty and contrary to one's inclinations or wants. On one hand we could say that the want to perform the duty was <u>really</u> the dominant want--that is, after all, what the agent did. But that trivializes the explanatory account: wherever there is an act there is a want to explain it, no matter how this may fly in the face of even the <u>agent's</u> account of what he <u>really</u> wanted to do. On the other hand we could accept this explana-

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[1] See, e.g., Alvin I. Goldman, <u>A Theory of Human Action</u> (Englewood Cliffs, N.J.: Prentice-Hall, 1970), pp. 72-76.

[2] Cf. ibid., pp. 52-54.

tion of agent causation; but that would make agency a mere chimera. For our wants are not ordinarily anything that we cause--they most often "happen" to us, as a response to external or internal stimuli. How then can we be said to cause the behavior that they cause? Our being mere carriers of wants will not serve to adequately explicate "perform." In the end, this account collapses to nothing more than a stimulus-response explanatory model, with the wants as gratuitous posits between stimuli and responses.

A more satisfactory account, I suggest, would treat wants neither as gratuitous nor as causally determinative of the behavioral component of action but as one of the two basic elements of consciousness constitutive of all action. Wants function conatively; they serve to order our world according to what seems important or of value to us.[1] But action does not follow ineluctably from the occurrence of a want. (Behavior may, in which case it is mere behavior, i.e., a response to some stimulus; but see the next paragraph.) It follows, rather, from choice. We act insofar as choice is involved; otherwise we merely behave. Without the element of choice, typical moral action, as indicated above, would be quite inscrutable.[2]

To say that choice is necessary to an adequate account of action is not, however, to say that it is explicitly involved in all action. This be-

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[1]In this and the following paragraph I borrow from Alan Gewirth's "The Normative Structure of Action," Review of Metaphysics 25 (December 1971): 238-61.

[2]Moreover, one of the basic senses of "responsibility" would be all but meaningless, for we are responsible for our actions because we choose them, not because they follow determinatively from the wants that happen to us. This is not to say, however, that we may not be held responsible for our behavior, say for those behaviors that may follow directly from wants, as noted above, or those that may not be caused, even remotely, by choice. Suppose, for example, that without realizing it--i.e., during a momentary lapse--I drive past a stop sign and cause an accident. This is a case of mere behavior: I did not choose not to stop. Yet I am responsible for this behavior in two senses of "responsible": I am the author of the behavior; and I am liable for the consequences that flow from it. Here we might say that I am responsible--in both these senses--because I "allowed" myself to behave when I should have been acting (correctly); I was under a positive obligation, that is, to be attentive or diligent, to not allow this momentary lapse to occur--which is what carelessness is all about. This I take to be (at least part of) the force of the "could have acted otherwise" account of choice as brought out in the text that follows.

comes especially clear as we consider habitual or seemingly reflexive actions. Getting out of bed in the morning and getting dressed or hitting someone in response to his hitting you are not on a par, as they involve choosing, with buying a new suit or deciding to go to the play this evening rather than to the concert. Nevertheless, the element of choice is implicitly involved in these first two examples in the sense that the agent could have chosen otherwise, even in the seemingly reflexive case. (If he couldn't, then it is not an action.) In saying this I do not mean to deny that there are difficult or borderline cases, cases in which we may be unable to determine precisely whether we have before us an action or mere behavior. Rather, I mean simply to set forth the criteria for positive action as that notion will be used in this essay. In virtue then of these two elements--choosing and wanting--which are characteristics constitutive of all action, I will say that positive actions are voluntary, in the sense that the agent chooses to act as he does or could have chosen to act otherwise, and purposive or intentional, in the sense that there is, either explicitly or implicitly, some reason or motive or want that the agent has that serves to explain why he acted as he did rather than in some other way. At this stage, then, let us say simply that a positive action is a voluntary and purposive bit of mental or bodily behavior that in itself constitutes some change in the world relevant to the action in question and often causes other changes as well.

In order to further specify this definition we need first to amplify the notion "changes in the world," especially as it involves so-called mental acts, e.g., thinking about an issue, solving a problem, wanting to do something, forming an intention. These are events "in the world" in a somewhat special sense: they are changes, to be sure, from one mental state to another, and they often produce the behavioral changes that are themselves more clearly in the world. At the same time, they do not <u>necessarily</u> produce any other changes, changes of the kind we would more commonly call "in the world," as even such trivial bodily behavior as raising an arm, a finger, or an eyebrow will. We can perform mental acts, that is, and not affect the rest of the world in the least--thus the well-known problems of verification (and the futility of proscribing kinds of thought or belief). It would be a mistake, however, to allow these empirical difficulties to lead us to assume either

that mental events do not occur or that they do not, at least in this limited sense, constitute changes in the world. (Indeed, we need them to explicate "perform," to distinguish refraining from mere not doing, to distinguish criminal from civil wrongs, to mention just a few of their analytic functions.) Accordingly, I will treat mental acts as positive events, as changes in the world, though again, they are changes in a special sense, and they are not necessarily causally efficacious changes.

An important application of this conclusion involves a point noted above, that the "behavior" component of the "behavior plus" model of positive action need not refer to any overt change of bodily behavior, any bodily movement. To be sure, there must be some change associated with the event that corresponds to a positive action, and change of a relevant kind; otherwise it is not a positive action. But it is possible to locate that change in (thereby individuating positive actions in terms of changes in) the "plus" component alone.[1] Suppose, for example, that I raise my arm to signal a bus to stop. Here we have a typical positive action involving changes in both the "behavior" and the "plus" components of the model: there is a change in bodily behavior (the raising of the arm) and in intention (to signal the bus), and both changes are relevant to each other and to the action in question, signaling the bus. By "changes that are relevant," therefore, I mean changes that go to constitute the action in question: in this case, the concomitant behavioral and intentional changes together constitute the action of signaling the bus. But let us suppose that the bus driver fails to see my signal and drives on. I immediately change my mind and seek instead to signal the taxi that is following the bus--thus I keep my arm raised. Here we have a new action--signaling the taxi--but there is no new bodily movement, i.e., there is no change in the "behavior" component. Nevertheless, this new action is a positive action because the event it constitutes involves a change in the world, a change in the purpose or intention (the "plus" component) for which the ongoing bodily behavior is continued, and this change is relevant both to the concomitant behavior and to the action in question, signaling the taxi: the new intention and old behavior, as

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[1]The discussion of act individuation that follows is not intended to be thoroughgoing; I am concerned primarily to show how the notion of "change" may serve this function.

one might put it, together constitute that action.

The other side of this point--positive actions that involve changes in behavior but no change in intention--is brought out when descriptions become more general or when complex actions are performed, actions that have sub-actions as components. Suppose the taxi driver also fails to see my signal; this time I lower my arm, but raise it again when I see another taxi. This too is a new act--signaling a second taxi--but one like the first in that it involves both behavioral and intentional changes. Yet at a higher or more general level of description all three acts of signaling can be viewed as constituting (as sub-actions or components of) a single act--trying to obtain a ride. For they all involve the same intention--to obtain a ride--though one accompanied by more than one behavioral change. At this level of description, that is, the act of trying to obtain a ride involves only one change of intention (from whatever intention preceded the intention to obtain a ride), but more than one behavioral change, which means, in this example, that the third component act, when described at this level of generality, involves no change of intention but a change of behavior only. The intention, thus described, "carries over," as it were, to discrete act-tokens which behavioral changes alone serve to individuate.

This point becomes especially clear in the case of complex actions, e.g., driving to the beach, skiing down a mountain; the component or sub-actions, when described in terms of such general or overall intentions, will be individuated by behavioral changes alone and not by intentional changes. Thus if asked what I am doing at a particular moment I can correctly reply that I am skiing down the mountain, though more specifically I am making a right turn, or still more specifically I am planting my right ski pole, unweighting my right ski, and so on. These various discrete act-tokens are all describable as "skiing down the mountain"; thus described, however, i.e., described in terms of this more general intention, they cannot be individuated by the ongoing intention--which is unchanging--but must instead be individuated with reference to changes in behavior. Here too the behavioral change is relevant to the action in question--thus generally described--in that along with the concomitant intention it goes to constitute the action "skiing down the mountain." This would not be the case if the behavioral change were, say, reaching up to scratch my head; for together with the ongoing intention

to ski down the mountain this behavioral change would not serve to individuate the act-token implied by the intention and hence would not, along with that intention, constitute the act of skiing down the mountain; the relevancy requirement, that is, would not be satisfied.

Individuating broadly described actions by referring to behavioral changes alone (as in the above two paragraphs) does result in a certain discomfort, to be sure. It is less than precise, for example, to describe the many discrete acts that go to constitute skiing down the mountain as themselves acts of skiing down the mountain. While these descriptions may not be "appropriate," however, they are not incorrect or otherwise mistaken. The man who puts one brick upon another is, after all, building a cathedral, making a living, feeding his family, and so on, however imprecise these descriptions.

Let us conclude, then, by defining a positive action as a voluntary and purposive bit of mental or bodily behavior that in itself constitutes some change in the world--a change in either bodily behavior or intention or both, which change is relevant to the action in question in that it contributes to constituting that action--and often causes other changes as well.

5.3. Negative actions

At last, then, let us look at the class of negative actions. These often present special difficulties, raising normative, causal, and ontological questions which, if not resolved, can lead to considerable confusion in the normative analyses of which they are part, as we will see in chapter 3, section 4.4. There we will treat the normative and certain of the causal questions; here we will treat the ontological and other of the causal questions, for these are the logically prior issues upon which the later questions will depend.

The language of not doing includes such terms as "refrain," "forbear," "abstain," "omit," "fail to do," as well as just "doing nothing at all." Though there may be subtle differences between these (and other) not-doing locutions, it is common to distinguish broadly between what might be called not doing proper (mere not doing, "doing nothing at all") and refraining (forbearing, abstaining). Refraining, it is felt, is somehow different from doing nothing, and yet it is not the same as the doing or acting we have just

discussed; it seems, in fact, to hover uncertainly between the two. P. J. Fitzgerald argues that "refraining is not co-extensive with not doing; it is a species of it."[1] Myles Brand, on the other hand, seems to take the same view: "A first distinction to be made among not doings is between refraining and doing nothing at all"; but he then goes on to say that

> the difference between refraining from performing an action and doing nothing at all with respect to performing an action is that, basically, refraining is itself a kind of action, but doing nothing at all is just doing nothing at all.[2]

Somewhat later, in fact, Brand claims that "refraining . . . is a type of action."[3] The importance of being clear about the ontological status of refraining has to do, of course, with the question of its causal efficacy; if refraining is construed as a kind of action then its status as a causal factor is very much enhanced (I will expand upon this below); indeed, Brand argues that "refraining is a species of causal prevention."[4] The policeman who refrains from shooting the fleeing youth, he believes, prevents the youth's death.

This causal claim, and the more basic ontological question about refraining, will be returned to shortly; we should clarify first, however, the primary or fundamental kind of not doing--"doing nothing at all." Ordinary language is ambiguous here (as these scare-quotes suggest): if asked what I am doing I can reply "Nothing" (a negative action) or "Just sitting here" (a positive action) with apparently equal accuracy. In truth, of course, we are very rarely doing nothing at all; at almost every moment, that is, we are doing many things--standing, sitting, walking, looking, talking, and so on--which may be described in an endless number of ways. Each of these is an action in that it is connected to some degree with the elements of consciousness--voluntariness and purposiveness--that go to make it an action and not mere behavior. Even when we sleep we most often "go to bed" or "put ourselves to sleep," as it were, idioms that capture well the point that sleeping is it-

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[1] P. J. Fitzgerald, "Acting and Refraining," Analysis 27 (March 1967): 138.

[2] Brand, "The Language of Not Doing," pp. 45-46.

[3] Ibid., p. 49.

[4] Ibid., p. 47.

self an action, something we do. It is only rarely, in fact, that we do not act at all, that we merely behave in toto: viz., on those occasions when we involuntarily lose consciousness and hence stop acting, as when we pass out, say; or when our consciousness is altered in such a way that it is unconnected with our behavior, as when we hallucinate. In a very real sense, then, we voluntarily lose consciousness when we put ourselves to sleep: thus the act of sleeping is to be distinguished from the behavior of passing out.[1] At the same time, while performing the many acts we ordinarily perform when conscious there is also much actual or possible mere behavior that occurs concomitantly; thus while standing, walking, and so on (actions) I breathe, blink, and perhaps sneeze, cough, and so on (behavior). Given that we are almost always acting, then, it is well to ask just what sense can be made of this basic kind of not doing--"doing nothing at all."

Now Brand argues that "the man asleep on the couch does nothing at all with respect to answering the telephone ringing in the bedroom."[2] But he then adds: "The patrolman does something, namely, not shooting the fleeing youth; but there is no action that the sleeper performs."[3] This last claim, I have just argued, should be rejected; for the sleeping man is, to be sure, sleeping. There is, however, a difficulty here--only implicit at this stage--concerning Brand's understanding of "perform," though a later remark brings the root of the difficulty out more clearly:

> I can, however, perform positive actions in which no overt change of behavior occurs, for example, holding the flag in place for a period of time or keeping my arm at my side for a period of time.[4]

Brand's claim that positive actions need not involve any overt change of behavior is correct, as was shown above; but the question arises just why these are positive actions. What is there about these actions that enables Brand to call them "positive actions"; and in what sense do these agents perform these positive actions?

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[1] I ignore here the complications posed for this account (for any account) by various mental disorders. The basic difficulty in this regard would seem to be with determining the connection between the individual's state(s) of consciousness and his behavior; we do not know, that is, whether to call his movements actions or mere behavior, whether voluntariness or choice and purposiveness or intentionality are to be understood as we normally understand them.

[2] Ibid., p. 46. [3] Ibid. [4] Ibid., p. 50.

What is missing in these holding and keeping examples--and, by implication, in the sleeping example as well--is a feel for what it means to say that a person performs (or does not perform) an action.[1] This is missing not because the criteria for individuating actions are not made explicit in Brand's essay,[2] but because the criterion that is mentioned in the above citations is a very misleading one--"for a period of time," or by implication in the sleeping example, at a point in time. That criterion is misleading because it bears no integral relation to the action itself. Recall that we individuated actions above along realistic lines, in terms of or with reference to the changes in the world the actions themselves involved, changes in behavior or intention or both. In this way we could be sure that the action corresponded to the event it constituted, which event was delineated not by arbitrary changes in time but by the changes in the world integral to the action. Thus we avoided the difficulty mentioned earlier, that an arbitrarily selected event--delineated in terms of succeeding states of affairs only--might not correspond exactly to an action-event, from which distortion would likely ensue. That distortion ordinarily takes the form of an unclear picture of what is involved in performing an action, as in the examples at hand. The sleeping, holding, and keeping began at a point in time with some change in the world of a relevant kind, and they will continue until some other and appropriate change enables us to say that they have ceased to be. Actions, in short, are historical events; they have beginnings, middles, and ends; their histories are delineated by integral or constitutive changes; and those histories can be understood--and hence the actions--only in terms of these changes.

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[1] In fact, Brand only assumes that we know what it is to say that a person performs an action: "I am, rather, attempting to determine what can be said truly about not doings, in particular refrainings, on the assumption that it is clear what it is to perform an action; . . . to explicate the notion of performing an action is to solve one of the central and currently most pressing problems in action theory." Ibid., p. 47.

[2] In truth, Brand only mentions certain criteria in passing: "No one just raises a hand: rather, persons raise a particular hand on a particular occasion in a particular manner." Ibid. Notice that there is no mention here of a purposive or intentional aspect, as one would expect were "perform" to have been explicated; thus on these criteria we could not individuate, as in our earlier example, the signaling of the taxi from the signaling of the bus.

To say that actions have histories that must be depicted correctly if they are to be properly understood is not, of course, to say that every action will satisfy with perfect clarity all the criteria for being an action at every moment in its course. It is unclear, for example, how we would treat the intentional element at any particular moment in the act of sleeping; or again, as we saw with complex actions, there may be many discrete actions that go to constitute what we can describe as a single action. But these and other possible variations do not preclude our ordering the world in terms of single actions. Brand's "time-slice" approach to act individuation, however, rooted perhaps in an unduly nominalistic view of the world, leads to distortions that a more realistic, historical approach would avoid. Thus the positive actions of which Brand speaks--and I include here the sleeping example--do involve changes, which mark the beginnings and endings of these actions, the contrary appearance produced by the time-slice approach notwithstanding. Were this not so, what sense could be made of the fundamental claim that at almost all times--i.e., at any particular time-slice--we are performing countless positive actions? "Performance," in short, is an historical word; it becomes distorted if all it entails is not included in a particular time-slice account--and indeed, if an element central to it, viz., change of a relevant kind, is explicitly excluded from the account.

If the sleeping man, then, is to be seen as doing something, we cannot say that he is "doing nothing at all." On the basis of our earlier analysis of "perform," in fact, we can conclude that the idiom "doing nothing at all" is correctly applied only on those rare occasions when we involuntarily lose consciousness or when our consciousness is altered in the requisite way. At the same time we do know that there are an infinite number of conceivable actions regarding which it can be said, without misunderstanding, that we are doing nothing at all. We can say this, of course, because "doing nothing at all with respect to some action or some class of actions" is a different idiom than "doing nothing at all," a point mentioned at the beginning of this section. Just as "freedom," as we have seen, is best understood not as a dyadic but as a triadic relation, so this basic kind of not doing requires a relatively richer idiom to be properly appreciated. For again, it is (almost always) with regard to some action or some class of actions that we are doing

nothing at all--or, for that matter, that we are refraining or acting. Thus Brand's first formulation of the sleeping example (in the text on page 51 above at note 2) would have been correct had he not added "there is no action that the sleeper performs" (in the text on page 51 above at note 3).

These difficulties in Brand's approach notwithstanding, he goes on to define this more correct idiom using the term "inactive" for "doing nothing at all":[1]

> S is inactive with respect to performing a if and only if:
> (i) it is not the case that S performs a; and
> (ii) it is not the case that S refrains from performing a.[2]

On this analysis, performing a, refraining from performing a, and being inactive with respect to a exhaust the most general ways in which S can behave with respect to a. Notice again that each of these modes of behavior is understood with reference to or in relation to some specific action (a). This approach seems right; at the same time, Brand's analysis of this basic kind of not doing is informative only insofar as we are clear about "refrain" (as well as "perform"), to which we now turn.

5.4. Refraining

Refraining is frequently characterized by one or all of three elements--expectations, ability, and knowledge or intentions. Let us take these in order. Fitzgerald argues that refraining takes place in contexts in which the agent has some "business or concern": "In general, I suggest, we should say that X refrains from doing something if we should normally expect X to do it."[3] But surely this is too loose; we can define "refrain" without bringing in this normative element--"normal expectations." Do not-doings become refrainings simply in virtue of changing expectations, or on the basis of whose expectations are taken into account? In that case we would never be able to pin the notion down, for it would always be laden with subjective expectations.

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[1] This choice of "inactive" is somewhat unfortunate since "inaction" is sometimes used as the generic term for refraining, forbearing, etc.

[2] Ibid., p. 46.

[3] Fitzgerald, "Acting and Refraining," p. 134.

A more common element in the explication of "refrain" is ability. Thus von Wright claims that "an agent, on a given occasion, forbears the doing of a certain thing if, and only if, he can do this thing, but does in fact not do it."[1] (Von Wright uses "forbear" instead of "refrain.") But this too cannot be right; for as Brand has observed, it is false to say that at any moment a person is forbearing from performing the infinite number of acts he has the ability to perform at that moment, say pointing to any of an infinite number of points in space.[2] This is simply not what the notion "forbear" (or "refrain") means. Nevertheless, von Wright goes on to say that this is

> the logically weakest member of a series of progressively stronger notions of forbearing. . . . In a stronger sense of "forbear," an agent forbears only such action as he knows he can perform on the occasion in question.[3]

Here we have the element of knowledge, though knowledge of one's own ability. Yet unless we understand this knowledge to be selecting one particular action for consideration, Brand's objection still stands; for on any given occasion I know or believe I can perform an infinite number of acts, which is not to say that I forbear performing each of those acts.

Even if we do understand knowledge to be selecting one particular action for consideration, however, I want to argue that ability does not have the place in refraining that von Wright and many others believe it has. It is common to say, for example, that if an individual knows that a child is drowning and he can rescue the child but does not do so, he refrains from rescuing the child; whereas if he knows that someone is starving in India, say, and he does not feed that person he is not refraining from doing so--he is simply doing nothing at all with respect to that action. The inability of the individual to feed the person starving in India is ordinarily given as the ground for saying that this is not a case of refraining. I want to argue, however, that this is a case of refraining, that ability has no place in the

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[1]Von Wright, Norm and Action, p. 45.

[2]Myles Brand, ed., The Nature of Human Action (Glenview, Ill.: Scott, Foresman & Co., 1970), pp. 234-35.

[3]Von Wright, Norm and Action, pp. 45-46.

explication of refraining. In the first place, just as with expectations, there is no place to draw the line. Do I refrain from feeding the starving person next door but not the starving person in the next town, assuming I know about both? Where does refraining end and doing nothing at all with respect to feeding the starving person begin? It is by no means clear, in fact, that I cannot feed the starving person in India. If I sell my worldly possessions and get on a plane I can do it. Is it inability, then, or inconvenience that on this view distinguishes not doing from refraining? But take a clear case of ability: A cannot swim, B can; both are at the scene where a child is drowning; no other means of rescue but swimming is available. Does A do nothing at all with respect to rescuing the drowning child whereas B refrains from rescuing? This is odd. Ability, moreover, is usually a matter of degree. Insofar as refraining is tied up with ability it too will be a matter of degree and not a distinct kind of behavior.

The point at bottom, however, is just this: when we refrain it is not, strictly speaking, an action we refrain from but a possible, or better (for "possible" may connote ability), a conceivable action; for there is no guarantee, in the absence of the action, that its attempt would have been successful. Certain kinds of examples bring this point out better than others: we would say, for instance, that an individual refrains from trying to rescue someone from a burning building; but it would be odd, and probably incorrect, to say that that same person (say a fireman) never refrains from rescuing people from burning buildings--odd and incorrect not because there may be occasions on which he will not attempt it (though there may be) but because there will probably be occasions when he will be unsuccessful. Such an occasion as this last brings out nicely the logical behavior of "refrain": it would be false to say he refrained from rescuing, false to say he did not refrain from rescuing, false to say he refrained from trying to rescue, and true to say he did not refrain from trying to rescue. Thus it is an attempt at something that one refrains from, even in relatively unproblematic cases, and not the action itself, our ordinary idiom notwithstanding. Hence ability is irrelevant to refraining, for if in fact we refrain from attempting something it does not matter for the question whether or not a particular event is a refraining that that something is possible or impossible for the prospective agent to do. Inability may be a reason for refraining, but it is neither

a necessary nor a sufficient condition for a given event's being a mere not doing rather than a refraining.

If neither expectations nor ability is crucial to the concept "refrain," that leaves knowledge or intentions. The definition Brand sets forth reflects this emphasis. He argues that "a person refrains from performing an action when he does something else to prevent his performing it":[1]

> S refrains from performing a if and only if:
> (i) it is not the case that S performs a; and
> (ii) there is some action that S performs, b, such that S performs b in order that S's performing b prevents S's performing a.[2]

Brand continues:

> Thus, for example, the patrolman refrains from shooting the fleeing youth when he keeps his hand by his side in order that his keeping his hand by his side prevents his shooting the fleeing youth. Idiomatically, we would simply say that he refrains from shooting the fleeing youth by keeping his hand by his side. Refraining, then, is one type of action.[3]

This account reflects the emphasis on knowledge or intentions in the sense that refraining is construed simply as a bit of voluntary and purposive behavior--an action by our earlier definition--which can be distinguished and defined without reference to either expectations or ability.

But this analysis cannot be right either. In refraining we do not do something--i.e., we do not perform some positive action--in order to prevent our doing some other act; we simply don't do the other act! (This final claim will be amplified below.) It is not a little episodic, that is, to suppose that the patrolman, in refraining, goes through anything like the scenario Brand has depicted, even implicitly. Are we to imagine him saying to himself: "I don't want to shoot the fleeing youth. How shall I not do it? Keeping my hand by my side will prevent me from doing it. Therefore I shall keep my hand by my side in order that I not shoot the fleeing youth"? This account is not only unnecessarily convoluted, but undoubtedly wrong. For it conceives refraining to be something like restraining oneself: there are actions one would perform, perhaps automatically or impulsively, if one did not perform some other action to restrain oneself. The picture of one part of the self pitted against another looms large here: indeed, Brand says, "I can refrain

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[1] Brand, "The Language of Not Doing," p. 49.

[2] Ibid.

[3] Ibid.

from raising my hand by putting it in my pocket, by sitting on it, or by keeping it at my side."[1] This account is simply too tortuous to be plausible.

Given this explication, however, it is easy to see why Brand concludes that refraining is a species of causal prevention. For if we refrain by acting, every event for which the act refrained from would have been a necessary and sometimes a sufficient condition can be seen as having been prevented by the act ostensibly performed (in order to prevent the refrained from act): the act ostensibly performed, that is, prevents not only the refrained from act but the effects that would have been caused by the refrained from act. Thus in refraining, Brand believes, the patrolman performs an action that prevents the action that would have caused the youth's death. Turned around, one can as well imagine the patrolman, in refraining, to be performing an action that prevents the action (his action) that would have saved the youth's life--he thereby is guilty of causing the youth's death.

This is an interesting extension of causation, to be sure, one replete with profound implications for moral and legal philosophy. But it is also an unwarranted extension. For not only does it rest upon an incorrect account of "refrain," as we will see in a moment, but Brand's use of "prevent" is itself rather unusual. We do not ordinarily say that in refraining from shooting the fleeing youth the patrolman prevents the youth's death (if we said this we would be wrong if it turned out, say, that the patrolman refrained and the youth died anyway, from some other cause); we say simply that the patrolman does not shoot the youth or that he refrains from shooting the youth. He would prevent the youth's death if he interfered with some other imminent cause of the death--say, some other gunman. For "prevent" signifies some positive or active intervention in an ongoing or immanent causal sequence, a sequence distinct from or originating outside of the source of prevention. Again, we have here a picture of a preventive agent in conflict with a causal agent, though both forces are located in the same agent. At bottom, however, this causal account is made to seem plausible only because Brand has construed refraining as "one kind of action" and not as a negative event. Hence its perceived causal efficacy.

I suggest instead that refraining is rather less complicated than

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[1] Ibid., pp. 49-50.

Brand or Fitzgerald or von Wright have supposed. We refrain, quite simply, whenever we choose or decide not to attempt a given action. (Refraining, just like acting, need not immediately follow the choosing or deciding: I can decide today to go or to refrain from going to the ball game tomorrow.) Thus refraining makes reference only to knowledge and intentions: we know (roughly) what it is we are not going to attempt to do, and we form the intention not to attempt it. We do not need any special contexts or any special abilities in order to refrain, though refraining probably takes place most often in such contexts and with regard to such abilities, for it is in just such circumstances that the idea of acting or refraining usually arises. (We don't ordinarily sit in our studies, that is, forming intentions ad infinitum to not attempt the innumerable actions we might attempt, though this is logically all that is necessary for refrainings to occur.)

Thus refraining differs from mere not doing by virtue of these mental elements: if we forget or if it never occurs to us to do something it is a mere not doing; but if it does occur to us that we might (or perhaps ought to) do a particular thing and we don't do it, then we refrain. But refraining is similar to mere not doing in being a negative action. Both mere not doing and refraining correspond to negative events and hence as such constitute no changes in the world of a relevant sort; i.e., neither involves a change relevant to the action in question, the action either not done or refrained from. When a mere not doing "occurs," either the relevant behavior or the relevant intention or both are missing; thus we can say that the action in question does not occur. The same is true of refraining;[1] here, however, the intention

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[1]Notice that I could not say that these negative actions necessarily entail the nonoccurrence of both (i) the behavior and (ii) the intention that together go to constitute the action in question (though they usually do). For (i) it may happen that the relevant behavior does occur and yet the act for which the behavior is a necessary condition does not occur. Suppose that A kills B but does not, because the mens rea is missing, murder B. The same behavior may occur in either case; but A is inactive (in Brand's sense) with respect to murdering B: A's murdering B is a mere not doing, for the requisite intention is absent. Or again, (ii) suppose that A attempts to murder B but unbeknownst to him (A) the gun is unloaded. Here also A's murdering B is a mere not doing; for the relevant intention is present but not the relevant behavior, appropriately defined. In short, in both cases not all of the changes in the world that would together constitute the event in question occur, though some do; thus the event--and therefore the action that constitutes it--does not occur.

that does occur--and this mental act is the positive aspect or change mentioned earlier--is not relevant to the action in question. It is not relevant in the sense that it will not, together with whatever physical behavior may be concurrent, go to constitute the action in question. Moreover, and more important for the present discussion, the intention will not go toward constituting a different action, as Brand suggests, because the content of the intention is negative: it is an intention not to perform some action, not an intention to perform some other action. In refraining the patrolman decides not to shoot the fleeing youth; he does not decide to keep his hand by his side (which would indeed be a positive action). Thus although the forming of the intention not to do something is, as such, a positive mental act, because its content is negative there is no concomitant physical behavior such that together they would constitute anything other than this mental act. What, after all, would be the behavior relevant to a negative intention--except negative or no behavior? Whatever other behavior may be concurrent with this intention is relevant to some other, perhaps dispositional intention; it is not relevant to the intention to refrain such that the relevancy requirement--together they go to constitute a positive action--can be satisfied.

Now an objection of the following sort may be raised here. I have argued that refraining constitutes a negative event in that it involves no change in the world relevant to the action in question. This is true, the objection continues, insofar as my account of what it is to refrain is correct. But the real question is whether the "act" of refraining as such is a positive event, not whether in relation to the act in question it is. In that refraining involves at least the mental act of choosing or deciding not to attempt the act in question it involves a change in the world and hence is a positive event. It is, the objection concludes, a voluntary and purposive bit of mental, if not physical behavior.

In reply let me say that this objection is correct as far as it goes (it raises, in fact, the difficulty that has seemed always, if only implicitly, to lie at the heart of the ontological controversy surrounding "refrain"). But we have to distinguish first between what refraining is and what refraining is often claimed to be. Brand and many others have claimed that refraining is more than a mere mental act (so doing, they have gone on to attribute all kinds

of causal efficacy to it). It is this claim that I am seeking to undermine by showing that refraining is merely a mental act. More directly, however, it would be useful to recur to a second distinction, one raised earlier when the status of mental acts was under discussion: there we spoke of changes in the world proper and changes in the world in a special sense, as in the case of mental acts. If that distinction is sound, and if refraining involves only a mental act, then it involves a change in the world only in this special sense. In particular, it is not accompanied by any physical behavior that together with the mental act would go to constitute a positive action proper, a positive event, a change in the world proper. The most that can be said is that refraining is a positive event only in this special sense.

Clearly, then, if the formation of a negative intention is the only positive event that occurs when someone refrains, refraining cannot be causally efficacious. Recalling the earlier discussion, mental acts need not constitute or produce any other changes, changes more properly "in the world." They do so only by way of their causal connection with physical behavior; it is these behavioral changes that constitute changes in the world proper (and perhaps cause other changes as well). But in the case of intentions with negative contents, no behavioral change--a change in the world proper--relevant to that intention is possible; for again, the only behavior relevant to a negative intention is negative behavior, i.e., no behavior. Thus if refraining constitutes no change in the world proper it cannot be causally efficacious, for there is no event or change of the kind that can serve as a cause. Indeed, if the only difference between mere not doing and refraining is the presence, in the latter case, of this mental act, what is there about this simple intention that would make the causal argument go through in this case and not in the other? Is causality here a mere mental phenomenon--we cause when we are in the requisite mental state, otherwise we do not? I conclude, then, that refraining, in that it is not accompanied by a relevant bit of physical behavior, is no more causally efficacious than any other mere mental act unaccompanied by the relevant bit of behavior. If we cannot say, that is, or indeed if we do not want to say, that such mental acts as harboring thoughts against the state or holding religious or political beliefs are not as such causally efficacious, then by parity of reasoning we cannot do so in the case of refraining either.

Now I recognize that this analysis--perhaps in its ontological but more surely in its causal conclusions--does not conform in every respect with ordinary usage. We often construe refraining more narrowly than I have here, for example; and ordinary language quite readily allows causal upshots of negative events. At the same time, ordinary language is often ambiguous, especially in the more difficult cases, as witness the example of the patrolman. Accordingly I have sought to begin at the beginning, to have normative issues turn upon causal conclusions, and causal issues upon ontological conclusions; thus the idea of qualitative change in the world, or change in the states of affairs that constitute the world, is basic to this analysis, as is the distinction between mere mental changes and behavioral or physical changes. From these foundations I hope to generate a theory of rights that will be both plausible and consistent, if not always in keeping with our sometimes confused and often unordered everyday perceptions. In particular, I want the theory to discover and reflect the actual lines in the world: thus refraining is not, as Brand suggests, one kind of action, but is rather, as Fitzgerald suggests, a species of not doing, the definitive lines of which fall not in the vague areas of expectations and abilities but in the relatively more crisp--though to be sure, less public--areas of knowledge and intentions (each of us knows when he has refrained, even if others may not, but we are less sure about abilities and "normal" expectations--their lines, that is, are less clear).

5.5. Descriptions and starting points

Much of the analysis we have just completed will find application only in later parts of the essay. But a distinction at the heart of the essay--and hence underlying it throughout--is the one with which we began this section, between negative and positive obligations, to which we should now return. Recall that caution was advised regarding the possibility of confusion arising from the character (whether negative or positive) of the language used in the formulation of rules setting particular obligations: the character of this language is to be distinguished from the character of the obligatory actions proper. In truth, of course, this same confusion can arise in the descriptions of the obligatory actions themselves (for those descriptions find their way, often directly, into the language of the rules): thus A's not stealing B's

property can be described as A's respecting B's property; or again, C's murdering D can be described (at the expense of not a little obfuscation) as C's refraining from respecting D's life. It is for this reason that I have sought to couch the argument in terms of the relatively basic, objective, and invariable notion of "changes in the world"--or changes in the states of affairs that constitute the world--and have urged that we ask always what a particular obligation requires at bottom in the way of changes in the world. For purposes of clarity this approach presupposes some starting point; it presupposes starting out from some change-free or at least change-neutral world (this point will be developed in chapter 3, section 4.2 in the form of what I will call a "status quo"). From such a starting point certain kinds of changes might be forbidden, in which case we have negative obligations; other kinds of changes might be required, in which case we have positive obligations; still other kinds of changes might be made optional (or not mentioned at all), in which case we have changes that are permitted, i.e., neither forbidden nor required.

It would be well, however, to say a bit more here about this idea that clarity will be enhanced if we start with a change-free world. Suppose, for example, that we started with a world peopled only by warriors who were continuously plying their trade (ignore what in fact that would mean): were a lawgiver, in such a world, to impose an obligation forbidding the kinds of changes (the kinds of actions) that in some direct way kill others, it is conceivable that that obligation might then be seen not as negative but as positive; for such an obligation requires a change under these circumstances--from the extant world of warring to the prescribed, the new world of peace. Ordinarily, however, we would say that this obligation is negative in that ("in reality") it forbids certain changes (which suggests that in applications such as this our ordinary language itself presupposes something like a change-free world as a starting point). Yet if changes are already occurring, the advent of obligations forbidding them, or requiring certain other changes, will likely produce a situation in which we have changes of changes, with the result that the whole idea of negative and positive obligations will quickly become obfuscated. Thus an account of obligations that attempts to speak of negative and positive kinds, of prohibitions and requirements--and ordinary language clearly allows for this--must presuppose some kind of status quo. Only so

will the historical implications of those obligations be free of distortion.

Now at the outset I claimed that a negative obligation has as its content a negative action, a positive obligation a positive action. It should be clear by now that it is irrelevant for fulfilling one's negative obligation whether one does nothing at all with respect to the action in question or whether one refrains, for both are negative actions: it is irrelevant, that is, whether or not it occurs to me to steal your property just so long as I do not steal it. If refraining were construed as a positive action, however, it is unclear just what the effect upon the distinction between negative and positive obligations would be. For whenever a person fulfilled his negative obligation by refraining, as in the example at hand, we would have to say that he did so by acting. This is counterintuitive at least.

Let me note finally that I have used a number of nonidiomatic expressions in this section in order to get to the bottom of an important distinction. In the rest of the essay, however, I will usually speak more normally. Because negative action is not really action at all, when I speak of action hereafter I should be understood, unless I indicate otherwise, as meaning positive action. Moreover, I will often speak of "doing nothing" or of "not acting"; by this I do not mean to deny the point developed here, that we are at almost all times performing numerous actions. Rather, I will simply be speaking in the ordinary idiom. The analysis developed here was for the purpose of plumbing the foundations of a distinction at the heart of this theory to insure that it is sound; for many would argue otherwise, as we have already seen and will see again later.

6. Obligations and Freedom Again

We are now in a position to take up again the question of the relationship between obligations and freedom. Obligations, it will be recalled, can be treated as objective facts of the world; thus we can pursue the question of their effect upon the freedom of the individual along the lines of the objective approach, which takes an individual (x) and a restriction (y) (in this case an obligation) as given and asks what this restriction leaves the agent free to do or be should he want to (z). Now it may at first appear indifferent for the question of the individual's freedom whether the obliga-

tion instantiating the y variable proscribes or prescribes, whether a negative or a positive action is required. But a moment's reflection will show that there is in fact a very real difference here. A negative obligation requires that the individual not do a particular kind of action; he is free, however, to do whatever else he wants to do that is not similarly proscribed. But in the case of positive obligations the individual is required to do something; he is required to direct his attention and activity toward doing what is prescribed; during the time he is performing this action, therefore, he is unable to do anything else that is not compatible with it. Thus unlike negative obligations, positive obligations leave an individual effectively unfree during the time they are being performed; they prevent him from doing or being virtually anything else that he might want to do or be.

Some of the implications of this little-noted point will be brought out in a moment.[1] I want first, however, to add two qualifications. As was mentioned at the beginning of the last section, the distinction between negative and positive obligations is not without any number of difficult cases. This becomes especially clear when a negative obligation is very broad in its scope, i.e., when its effect is particularly severe due to the nature of the act proscribed. During a time of martial law, for example, a person may be forbidden to leave his house. To say that he is free to do anything else because only negatively obligated will be of little comfort, for the obligation already excludes a great deal in the way of normal human activity. Moreover, it is practically equivalent to the positive obligation to stay in one's house, though this is somewhat problematic.[2] The other side of this qualification arises when a positive obligation is trivial: the requirement to pay one dollar a year in taxes or to sign a form every ten years is hardly a significant restriction of freedom.

A second qualification arises when a negative obligation, for reasons peculiar to the agent, is burdensome or restrictive of freedom quite beyond

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[1] Fitzgerald makes this observation explicitly, though not emphatically, in "Acting and Refraining," p. 138. Oppenheim only mentions it in passing: Dimensions of Freedom, pp. 19-20. But for an example of someone who argues that the distinction is irrelevant for freedom see Singer, "Negative and Positive Duties," p. 97.

[2] See the text on p. 41 above at n. 1.

the apparent proscription itself. A Roman Catholic will find little solace in being told that although he cannot practice his religion he is free to practice any of nearly three hundred others. Similarly, the individual who has forbidden to him the only kind of sexual activity he finds enjoyable will hardly think himself free on the argument that this negative obligation leaves him free to do everything else not similarly proscribed. Granting these difficulties, however, there are nevertheless a sufficiently large and sufficiently important number of cases in which the distinction between negative and positive obligations presents no or few problems such that the general point I am making here should be clear. We recognize, for example, the difference between obligations on one hand not to murder, steal, interfere with another's religious practices, and so on, and on the other hand to pay taxes, serve in the army, serve on jury duty, and so on. The effect of these last named positive obligations upon our freedom is generally of an entirely different order than the aforementioned negative obligations.

Now the importance of this point for the larger aims of the essay is considerable. For the rights falling under the rubric "welfare rights"--including, in the political sphere, most of the so-called social and economic rights--have correlative positive obligations, obligations requiring their holders to <u>do</u> something, not simply to <u>not</u> do something as with the negative obligations correlative to the more traditional rights to liberty. The obligation-holder is thus rendered effectively unfree while he is meeting these obligations, unfree to an immensely greater degree than he is unfree when fulfilling the obligations correlative to the traditional rights.[1] In the modern state the chief form of this kind of obligation is of course taxation. By that I do not mean simply or even primarily that the individual is required to sit down once a year to fill out forms and write a check (though that in itself is a considerable burden); rather, I mean that the individual who works for his living, in the case of the income tax, is in effect required

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[1]Notice that this point involves not a difference in kind but a difference in degree (though for all <u>practical</u> purposes--the above-mentioned qualifications aside--this difference amounts to one of kind). This is so for reasons brought out in sec. 3.2 above: although the two kinds of obligation--negative and positive--do indeed amount to a difference in kind, the <u>effect</u> of this imposition upon the freedom of the individual can be described only in terms of degree, however great those differences of degree may be.

to work an additional amount in order to satisfy this obligation. Unless he wants (or is able) to not work at all, that is, he is effectively unfree during a certain percentage of the total time he works;[1] he is unfree to do anything that is not able to be done while he is working. But there are other forms of positive obligation as well, ranging from military conscription to affirmative action to compulsory education. All share one thing in common. They limit freedom, during the period when they are required, to a degree that approaches total. I leave the reader to reflect upon my choice of "total."

Let me conclude by noting once again that I have aimed throughout this chapter at setting forth an entirely descriptive account of freedom. I have said nothing (except by way of comment) about what ought to be the case or what value we should place upon freedom or what wants we should or should not have--much less how we should act toward others. I have said simply that if individuals are of such and such a kind, if their wants take on a particular configuration, then this is how their situation can be described with respect to the idea of freedom. Not until chapter 3, after we have considered the logical issues surrounding the concept of a right, will we take up normative issues proper. There we will put the two ideas of freedom and rights together in the form of a theory of rights.

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[1]Milton Friedman estimates that figure in the United States to be, on average, over 40 percent at the present time, up from around 10 percent in 1929. See his "A New Holiday," Newsweek, 5 August 1974, p. 56.

CHAPTER II

RIGHTS

1. Formal Considerations

The discussion of rights that has taken place over the last three hundred years and more--from Hobbes and Locke, to Bentham and Austin, to Hohfeld, Hart, and others--has become increasingly sophisticated and subtle. Claims once thought to be "self-evident" have been subjected to repeated scrutiny with the result that more and more rigorous arguments in support of rights have had to be forthcoming. At the same time, these arguments have not been carried far enough, as is evidenced by the fact that rights that cannot possibly coexist continue to be asserted, not only in popular but in legal and philosophical literature as well.[1] In particular, no systematic theory of rights--one addressed to, among other things, these so-called "conflicts of rights"--has yet to appear. (Thus Nozick had simply to assume a theory of rights as he developed his theory of the state.) Notwithstanding the lack of an overall theory, the actual adjudication of conflicting right-claims is a regular occurrence, of course. All too often, however, these settlements have been very much short of principled, especially as they have taken place at the judicial and, even more, the legislative levels. At best they have amounted to attempts to "weigh" the conflicting claims, distinguishing "fundamental" from "nonfundamental" rights; at worst these adjudications have amounted to little more than attempts to weigh the consequences involved in deciding one way or the other.

My purpose in this chapter, then, will be to consider some of the more fundamental logical issues underpinning any discussion of rights, especially as these issues relate to the problem of conflicting right-claims. Regardless

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[1] See, e.g., the exchanges between Maurice Cranston and D. D. Raphael in Raphael, Political Theory and the Rights of Man.

of what normative considerations one brings to bear upon the subject of rights, these formal matters will necessarily be involved and so should be dealt with first. In particular, it is important to know what a right is, what formal points are being made, if only implicitly, when an individual claims he has "a right." Toward that end I will begin by setting forth a schema useful in sorting out the elements of such rights-talk. Each of these elements will then be looked at and problems relating to them will be raised and discussed. We will not settle the problems here, however, for that requires the normative analysis taken up only in chapter 3; rather, I want simply to get them out in the open. Finally, the issue of consistency--or the problem of conflicting rights--will be considered. If a theory of rights is to be adequate it must be consistent and hence cannot allow for the existence of rights that conflict with each other. (Throughout this chapter I will be assuming, of course, that there are such things as rights; in chapter 3 that assumption will be examined and defended.)

2. A Schema for Rights

In the last chapter we saw how questions about freedom could be made more perspicuous by analyzing the concept with the aid of a three-place schema. The notion of "a right," however, is more complex. Jurists speak of rights as being not only "relations" but also "claims."[1] Thus to have a right is to stand in some relation not simply to the outside world, as in the case of freedom, but to some other person or persons, to have a claim against that person or those persons, whether or not it is necessary or desirable or even possible to invoke the claim explicitly. Moreover, for this right to be said to exist it must on some criterion be justified. Hence rights, insofar as they exist, are justified claims against others.

These points will be brought out more clearly, however, with the following five-place schema:

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[1]See, e.g., Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, ed. Walter Wheeler Cook (New Haven and London: Yale University Press, 1946), pp. 30, 38, 71. Originally appeared in Yale Law Journal 23 (1913): 16 and Yale Law Journal 26 (1917): 710.

A has a k right against B to x in virtue of j.[1]

The lettered variables in this schema range over A, right-holders, k, kinds of rights, B, obligation-holders, x, right-objects, and j, justifications. As in the case of the three-place schema used to explicate freedom, this formal device is not a definition but only a tool of analysis, an aid in explication. All talk of rights can and should, for the sake of clarity, be reduced to this pattern, for all such talk logically involves each of these elements, at least implicitly.[2] Very briefly, that there are right-holders if there are rights is evident; rights, being claims, are not disembodied entities but owe their existence to those who claim and therefore claim to hold them. That rights can be classified according to kind--e.g., moral, legal, procedural--is likewise plain enough. The importance and relation of this point to a right's justification will be discussed below; it should be noted here, however, that it is necessary to make explicit the kind of right being talked about in order that confusion over the kind of justification appropriate to that kind of right be avoided. That there are obligations (and hence obligation-holders) correlative to all rights does need defending--it will be argued for below. That rights entail right-objects should be clear: rights are claims to something. Finally, that there is a justification implicitly attached to every right-claim is a necessary (though not a sufficient) condition for the existence of that right; for again, rights are, on some criterion, justified claims. Assuming that the justificatory argument corresponds in kind to the right it purports to justify, that right will exist only if the argument is sufficient to establish its existence. Thus when we say that A has a legal but not a moral right to x, we mean that A's right to x is justified legally (and so that legal right exists), but not morally (it does not exist as a moral right): i.e., the legal justificatory criteria have been met, but not the moral justificatory criteria. Hence the connection between the kind of right and its justificatory criteria (about which more will be said below).

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[1] This schema is taken from unpublished lectures of Alan Gewirth.

[2] When illustrating particular issues it is often not necessary to invoke each of these elements, as will be seen in the discussion that follows.

These five elements, then, constitute the essential features of rights. Once again, the issues that surround these variables will best be appreciated only after the arguments--and in particular the normative arguments--are more fully developed. Nevertheless, it would be well to raise at least some of those issues here, before we turn, in chapter 3, to the difficult normative matters.

3. The Right-Holder

Can anyone be a right-holder? Anything? Children? Animals? Society? Ancestry? Posterity? Associations?[1] Objects?[2] Hart speaks of rights as belonging to "adult human beings capable of choice,"[3] explicitly excluding animals and babies from the class of right-holders.[4] His use of "babies," rather than "children," is suggestive: is there a continuum--turning on "capable of choice"--running from babies (or fetuses) to adults? How strictly, that is, is "capable of choice" to be interpreted? Rights are claims; but people may or may not be able--or even choose--to exercise their claims at any particular time. Surely Hart cannot mean, however, that the occurrent exercise of choice, or even the ability to do so, is a necessary condition for having rights: unconscious or otherwise incapacitated individuals could then be said to be without rights. If we allow the dispositional claiming of rights, however, it is but a short step to saying that babies can have rights; indeed it is the same thing, for in the case of both unconscious adults and babies we are saying that they are potentially "capable of choice."

It seems, however, that Hart has two grounds for so limiting the class of right-holders (in truth, his argument is less than clear on the point): (a) the moral situation with regard to babies and animals, including

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[1]On the rights of corporations see Roger Pilon, "Corporations and Rights: On Treating Corporate People Justly," Georgia Law Review, vol. 13 (Summer 1979), forthcoming.

[2]See, e.g., Christopher D. Stone, Should Trees Have Standing? rev. ed. (New York: Discus Books-Avon, 1975).

[3]Hart, "Are There Any Natural Rights?" p. 175. [4]Ibid., p. 181.

our "duties" toward them, can better be described by other terms in our moral vocabulary, terms such as "ought"; (b) "the person who has a right (to whom performance is owed or due) is discovered by examining the transaction or antecedent situation or relations of the parties out of which the 'duty' arises."[1]

The first of these grounds, the linguistic one, is less than persuasive. That we (some of us?) talk in a given way does not mean that our talk adequately mirrors the situation talked about, or a fortiori that it should be determinative of the situation. Our language should guide us, to be sure; but it is not the final arbiter. Nevertheless, there is a more important issue here than one of mere convention; for the distinction to which Hart points--between what we only "ought" to do and what we have a "duty" to do--reflects a basic feature of our moral landscape, as I will bring out below (in chapter 3, section 4.4). This feature takes us, in fact, to the second of Hart's points, which is interesting precisely because it suggests a ground supporting the contention that babies (and perhaps even animals) may have rights--at least our babies (and animals). For if by our antecedent actions we have begotten babies (or acquired animals), we have ipso facto, on at least one line of argument, taken upon ourselves things that we not only ought to do but are obligated to do, correlative to which are rights. And those rights are held not by unrelated third parties but by the other party directly involved in the antecedent action, viz., the baby (or animal). Rights, that is, have been "created" by that action. (This case is different from the case of a promise to a second party--creating a right in that party--which redounds to the benefit of a third party--which party has no right in the matter; Hart draws this analogy in support of his argument.) Whether obligations always have rights correlative to them (and conversely) will be discussed below; but if they do, and if there are obligation- (and therefore right-) creating actions such as mentioned above, then those rights would have to logically reside somewhere, and where better in this case than with the baby (and perhaps the animal). All of this pertains to special relationships such as parent to child, of course; if mutatis mutandis the same or similar points can be made regarding general relationships (to individuals not spe-

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[1] Ibid.

cially related), then there seems to be no reason in principle for not broadening the class of potential right-holders to include (at least) babies. But the question of who--or what--may be properly said to hold rights is intimately bound up with what it means to say that there are rights (and what warrant there is for these claims); accordingly, it will be developed more fully when that subject is broached in chapter 3. It is enough to have shown that certain of the arguments purporting to limit the class of right-holders to "adult human beings capable of choice" are inconclusive.

4. The Kind of Right

Rights exist, if they exist at all, only insofar as their justifications show them to exist. But those justificatory arguments are directed, at least implicitly, to a certain class or kind of rights, as mentioned above, however broadly that class may be defined. Hence the importance of being clear about the kind of rights at issue in any discussion. At a very general level, for example, distinctions are often drawn between legal, moral, and natural rights; since each class of rights will usually have a justificatory argument peculiar to it, confusion will likely result when one set of arguments is used in support of a different set of rights. At the same time, there is no necessary incongruity between these broadly based rights: a right to the same object--say, the right to life--may be at once a legal, a moral, and a natural right, though again, qua that kind of right, there will usually be differences in the justificatory arguments purporting to support its existence.

Rights may be classified in many ways, however, for taxonomies are limited only by the imagination. Thus, for example, we have women's rights, children's rights, prisoner's rights, minority rights, and congressional rights, all of which focus upon the right-holders. Again, there is the traditional distinction between rights in personam and rights in rem, which seems to rest upon a distinction between right-objects; Hohfeld draws a parallel distinction between what he calls "paucital" and "multital" rights, but here the distinction appears to rest upon a distinction between correla-

tive obligation-holders.[1] A distinction between general and special rights is drawn by Hart, which has the virtue of focusing directly upon the justificatory arguments; we will develop his insight at some length in chapter 3. Still further, there are procedural rights, political rights, property rights, contractual rights, welfare rights, remedial rights, and so forth, all of which focus primarily upon the objects claimed. Finally, there is often a need to distinguish kinds of rights according as they fit within a larger theory, much as obligations were distinguished as negative and positive in chapter 1.

In each of these cases, however, it is important to scrutinize the classification in order to connect the right claimed with the justificatory argument purporting to show that the right exists and that it is indeed a distinct kind of right. For even if the right is in fact justified and hence exists as a right entailed by those criteria (see section 8 below), it may turn out that it is not a distinct kind of right. Consider, for example, the case of so-called "women's rights." Here, one might suppose, a special class of rights is being called for, which would entail a special justificatory argument relating to those rights. In fact, however, it is being argued that women should have the same rights as men, i.e., that special "women's rights" --embodied in legislation and judicial decisions designed frequently to "protect" women--be eliminated. Far from being claims to a special kind of right, then, in reality these are claims to the rights that everyone, it is believed, should have. The use of "women's rights" is thus misleading, at least insofar as the name is understood not as a mere symbolic label but as distinguishing a special class of rights. In general, then, it is important to distinguish those kinds of rights that exist in virtue of some special justification--including rights that obtain in special contexts, such as procedural rights--from other "kinds" of rights whose distinction may be largely (though not always exclusively) symbolic, rights that are mistakenly treated as distinct when in fact they are members of a much broader class of rights.

Notwithstanding the many "kinds" of rights that have arisen over the past three hundred years and more, our concern in this essay is with basic moral issues and hence with a very general classificatory scheme. Accordingly,

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[1] Hohfeld's discussion of these matters is less than clear; see Fundamental Legal Conceptions, pp. 67ff.

the focus will be upon moral rights, especially as these may serve as a model for legal rights. These moral rights will in turn be divided into general and special rights, the former more or less equivalent to traditional natural rights. But all of this remains to be developed in chapter 3.

5. The Obligation-Holder

As in the earlier discussion of right-holders, the question arises, who may be said to hold obligations? Can children, animals, society, ancestry, posterity, associations, or objects? While the ability to make claims does not enter here as it did above, putting the matter this way does serve to focus upon the issue of ability itself. Does the "ought" of "obligation" imply "can"? Perhaps this question presents itself most strikingly in cases where obligations are taken on--intentionally or otherwise--that cannot possibly be met. The implications of this problem for tort law will be discussed later in this essay, but here we should at least draw a rough distinction between logical and physical possibility (an intuitive version of this often difficult distinction will be adequate for our purposes). If obligations take the form of actions (omissions or commissions), and action is distinguished from mere behavior along the usual intentional lines,[1] then it is of little point to speak of obligations attaching to things for which action is logically impossible--e.g., objects, animals, children below a certain age, ancestry, and so forth. But it does make sense to argue, say, that an indigent individual has incurred obligations he cannot in fact meet--there is at any rate no contradiction in saying this. Thus whether Mrs. O'Leary's cow damages her neighbor's garden or starts the great Chicago Fire, Mrs. O'Leary may be said to be obligated to compensate those harmed in either case, quite apart from the fact that she is not likely ever to be able to meet the latter obligation. This example serves to bring out a further point as well: as in traditional discussions of both agency and vicarious liability, even in cases in which the placing of obligations would produce a logical absurdity (e.g., placing it upon Mrs. O'Leary's cow), there may be others appropriately related upon whom

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[1] Perhaps "usual" is too strong and "not uncommon" would be better, for the distinction is by no means without controversy. See, e.g., various of the essays in Brand, The Nature of Human Action.

obligations could and should fall--e.g., parents, owners of animals, executors of estates, agents of organizations (including society), guarantors of things, and so forth. It may be necessary, that is, to cast about for the appropriate obligation-holder, where "appropriate" turns upon various kinds of relationships. But the whole question of who may hold obligations, like the question who may hold rights, is bound up with the question of when we are justified in saying that rights--and therefore correlative obligations--exist, which awaits further elaboration in chapter 3. The issue of correlativity, however, should be broached here.

6. Correlativity

Correlativity is the notion that ties rights to obligations and right-holders to obligation-holders. The importance of this notion to a theory of rights cannot be overestimated;[1] indeed, it is the item most often missed or misunderstood in less careful discussions of rights.[2] As a result, only half of the picture emerges: rights are claimed apparently without realizing that the obligations correlative to those rights conflict with other rights being claimed--hence the theory is internally inconsistent. This aspect will be developed more fully, however, in section 9 below.

The link between rights and obligations--that which correlates them--is the object of the right-claim. The object claimed, that is, will serve to show what is owed to the right-holder and what is owing from the obligation-holder. Thus if A has agreed to pay B twenty dollars, "the paying of twenty dollars by A to B" describes the object of the right--which is to say, describes the right held by B and the obligation held by A. Similarly, if A has a right to enter into a contract with B without interference (suitably spelled out) from anyone else, this object serves to link A's right and everyone else's obligation.

These two examples illustrate what have traditionally been called, respectively, rights *in personam* and rights *in rem* (Hohfeld uses "paucital"

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[1] We may thank Hohfeld in particular for directing attention to the subject with his theory of "jural correlatives."

[2] For an example, see the essays by Raphael in *Political Theory and the Rights of Man*.

and "multital," Hart uses "special" and "general") whereby rights against a particular person or persons are distinguished from rights against all persons in general.[1] But the points I want to emphasize here are two: (a) the importance of locating the correct right-object, and (b) the importance of describing that object correctly. A failure in either of these will result in confusion, often manifesting itself in the form of a belief that there is no obligation correlative to a given right, or that the obligation (or obligation-holder) is other than in fact is the case. If A has been the innocent victim in an accident, for example, his right to sue for the recovery of his losses is a different right than his right to recover his losses. The latter right is held against the person who caused his losses, whose obligation it is to pay for those losses; the former right, on the other hand, is a procedural right--in service of the latter right--held against the state (assuming we are not in a state of nature), whose agents have the correlative obligation to provide the machinery necessary to the realization of this right.[2]

These points can be developed more fully in considering the following questions: do all rights have obligations correlative to them? And conversely, is there a right correlative to every obligation? The negative answer to the first of these questions usually involves citing two kinds of cases--competition and powers or immunities. Thus Hart gives the example of two people walking along a road, both of whom see a ten-dollar bill ahead, there being no clue as to the owner: "Neither of the two is under a 'duty' to allow the other to pick it up; each has in this sense a right to pick it up."[3] He adds, however, that there are other things each has a "duty" not to do--such as kill or wound the other--and correlative to these "duties" there are rights to forbearances. But there is no obligation correlative to

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[1]But again, these distinctions have been less than clearly drawn in the literature; see Hohfeld, Fundamental Legal Conceptions, pp. 67ff.

[2]For a fuller development of these points see Roger Pilon, "Justice and No-Fault Insurance," The Personalist, Winter 1976, especially n. 8. It should be noted here that adequately describing a right-object will result often in a certain artificiality of expression. To avoid confusion, however, it is sometimes necessary to go beyond the shorthands with which we commonly describe right-objects.

[3]Hart, "Are There Any Natural Rights?" p. 179.

the right to pick the bill up, Hart believes; this is an example, he notes, of what some jurists have called "liberties," as that term applies in competitive situations. A similar argument has been put forward by S. I. Benn, who explicitly cites Hohfeld's use of "liberty" in this context.[1] Benn goes on, however, to argue that we can speak of powers and immunities as being without correlative obligations: "If powers and immunities can be treated as rights at all (and both the power to offer for sale and the immunity of parliamentarians from libel proceedings are commonly referred to as rights), then some rights are neither correlative to sanctioned duties nor expressive of the absence of such duties."[2]

It should be noted that the impetus for these arguments by Hart and Benn comes from Hohfeld's important work in distinguishing four kinds of "jural correlatives": rights and duties, privileges (or liberties) and "no-rights," powers and liabilities, and immunities and disabilities.[3] Hohfeld was especially concerned to address the misunderstandings that arise from the attempt to reduce all legal relations to "rights" and "duties"; while he recognized that the generic usage of these terms was pervasive, the resulting confusion, he believed, could be eliminated only by the use of a more rigorously defined set of terms--hence these jural correlatives. As regards the more particular analyses appropriate to legal criticism, Hohfeld may have been correct, though his demanding system has never caught the attention of a wide body of legal scholars. For a broader philosophical inquiry, however, these narrower distinctions will likely not be necessary, and so will not be used here. This is not to say that they are insignificant,[4] but only that the broader "generic" senses of "right" and "duty" (or "obligation")--the usage of which Hohfeld recognized--will be better suited to the purposes of this essay.

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[1] S. I. Benn, "Rights," The Encyclopedia of Philosophy (New York and London: Collier Macmillan, 1967), 7:196.

[2] Ibid.

[3] Hohfeld, Fundamental Legal Conceptions, p. 36.

[4] They often do, however, produce "distinctions without a difference"; for an example see Hart's use of Hohfeld's terminology, "Are There Any Natural Rights?" p. 188, n. 14.

If there is this generic sense of "obligation," then, there is no reason to believe that the correlatives to Hart's "liberty" or Benn's "powers" and "immunities" are any less obligations, despite our wish, in certain contexts, to characterize them more precisely. Recalling our remarks above regarding the importance of correctly locating and describing the right-object, the bearing of these recommendations upon the arguments of Hart and Benn should be clear. Hart believes that his right-object can be adequately described as "to pick up the bill." But surely this is not what the parties in this situation have a right to; rather, it is a right "to _try_ to pick up the bill," or "to _compete_ to pick up the bill." More generally, this is a particular example of the right to engage in competition, as Hart himself points out. As he has defined the right-object, however, it is understandable that no correlative obligation is readily forthcoming. How could there be an obligation correlative to the right "to pick up the bill" given that this is clearly a context in which competition is permitted? (Indeed, as Hart has drawn it, this example appears to be a classic case of "conflicting rights." Both individuals have this putative right "to pick up the bill." But since both cannot exercise that right--there being only one bill--these "rights" appear to be in conflict.) When the right-object is better defined, however, the correlative obligation is apparent: in the case at hand, each man is obligated to not interfere (which itself must be spelled out) with the other's _competing_ to pick up the bill, which is quite different from interfering with the other's _picking up_ of the bill. Thus racing to the bill would not be interfering with the other's competing--as it would be interfering with his picking up--whereas killing or wounding the other would be interfering with his competing.[1]

If Hart's example is thought infelicitous on the point, however, consider a more typical example of a competitive context: _A_ makes an offer to _B_; _C_ makes a lower offer to _B_--indeed, one below cost (for whatever reason). Here

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[1]None of this will eliminate the burden of more precisely defining other terms, of course: "interference," for example, remains to be specified (and will be done in chapter 3). The purpose of better defining the right-object, however, is not to answer all questions but to establish the existence and location, respectively, of the obligation and obligation-holder. Once that is done it will be discovered that these other terms can more easily be spelled out as well.

the question seems to be whether there is an obligation upon C (which he is not meeting) without a correlative right. In particular, does C have an obligation, as much antitrust law requires, to make only "competitive offers" (assuming we know what that means)?[1] If so, that would suggest that A has a right to demand "fair competition," perhaps even to be able to compete at a profit. I will argue later in this essay that no such right exists; but the point to be noticed is that even here there is correlativity--otherwise neither the right nor the obligation, assuming one but not the other to exist, makes any sense. If on the other hand we say that C has no such obligation as this, if we say instead that along with A he has the right simply to compete for business, we still have correlativity. For then both A and C are correlatively obligated not to interfere with the right to compete as held by the other; and making offers (of whatever sort) is clearly not interfering with competition, it is the very essence of competition.[2]

The same points can be made, mutatis mutandis, against Benn's arguments about powers and immunities, though here construing the correlative liabilities and disabilities as obligations will sometimes be a little strained (which undoubtedly encouraged Hohfeld to his refinements). If a parliamentarian has immunity from libel proceedings, for example, then he has the right not to be sued for libel, correlative to which is the obligation of others not to sue. That the obligation is not "sanctioned," as Benn notes, is simply in the nature of this particular obligation: in that it is impossible not to meet the obligation--a court will not entertain the suit--no sanction is required. Similarly, the power or right to offer for sale, say, has correlative to it the obligation of others not to interfere (again, properly specified) with the making of such offers. None of this argues, in short, for there being no correlative obligation; it shows only that the obligation will at times appear anomalous, or will be difficult to locate or describe.

It may be objected, however, that this way of handling the question

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[1] See, e.g., D. T. Armentano, The Myths of Antitrust (New Rochelle, N.Y.: Arlington House, 1972).

[2] On these issues generally, see Richard A. Epstein, "Intentional Harms," Journal of Legal Studies 4 (1975): 391, and especially pp. 423ff.

of correlativity places a heavy burden upon defining that to which an individual can be said to have a right. Indeed it does, and correctly so. For if rights at the most general level are claims to freedom (as will be shown later in the essay), and if obligations are best understood as restrictions upon freedom (see chapter 1, section 4),[1] how better to come to grips with questions about the distribution of rights and obligations--and therefore freedom--than by more rigorously defining those objects to which we claim rights, the better to get at the correlative obligations? Only so can we come to appreciate what is fully entailed when we claim to have a right.

Let us turn then to the converse question: is there a right correlative to every obligation? Here too the negative answer usually involves citing two kinds of cases--so-called duties of beneficence and systems of prescriptions or commands. The first of these lines of reasoning has a mixed and interesting heritage; it derives from the liberal tradition that emerged from an earlier theocratic ethics, the "rights" of the former fitting uncomfortably with the "duties" of the latter. In particular, liberal theorists felt uneasy in saying that our duties of beneficence, which they implicitly accepted, implied correlative rights of recipience--an idiom not only foreign to the theocratic tradition but inimical to the freedoms the liberals sought to secure. And so they retained the duty while abandoning the correlative right, thus seeming to have the best of both worlds. This "resolution," though it persists to the present, has been an uneasy one, as is evidenced by the fact that the tendency in this century has been to restore correlativity and so the right as well. That tendency will be resisted here; later in the essay, in fact, it will be argued that there are no duties of beneficence and hence no rights of recipience (thus correlativity will be preserved). Indeed, this is an example of a kind of right, the correlative obligation of which, were it to exist, would conflict with other kinds of rights claimed by even the recipient himself. In place of this "duty of beneficence" I will argue for certain "responsibilities," though these will be grounded differently than the traditional obligations. In sum, then, if there are no duties of benefi-

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[1] See also the text accompanying n. 1, p. 85, below.

cence, this line of argument will not serve to show that there are obligations without correlative rights.[1]

The argument from duties of beneficence is not unconnected with the second line of argument, from systems of prescriptions or commands. For insofar as such systems could be seen as failing to confer rights, the liberal theorists were able to fit the duties derived from these systems--such as the duty of beneficence--within their own theories of rights, and the correlative right could be avoided. But do such systems indeed fail to confer rights? Hart has argued that it would be a "surprising interpretation" of, say, the Decalogue that treated it as doing so. For

> . . . obedience would have to be conceived as due to or owed to individuals, not merely to God, and disobedience not merely as wrong but as a wrong to (as well as harm to) individuals. The Commandments would cease to read like penal statutes designed only to rule out certain types of behavior and would have to be thought of as rules placed at the disposal of individuals and regulating the extent to which they may demand certain behavior from others.[2]

To thus interpret the Decalogue would be surprising, to be sure, if only because it is seldom given this interpretation. At the same time, it would not be contradictory or otherwise absurd to so interpret it: on the contrary, to say that the duty to honor one's parents, for example, implies that they have a right to be honored is altogether plausible.

There are, however, two questions here: the first concerns how such systems are interpreted, the second how they can be interpreted. As regards the first question, Hart is surely right in pointing out that these systems have most often been interpreted as he claims they have, both from within and

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[1] I speak here of moral rights, of course, not of the legal rights that might be posited in some legal positivist regime. But even in such a regime, correlativity would obtain, for reasons I will sketch in the next two paragraphs above. Suppose, that is, that a duty of beneficence were proclaimed, but there were no correlative right to beneficence, i.e., individuals could not press charges that their "rights" of beneficence had been violated, no such rights ever having been declared. Still, if those duties are not to be meaningless, someone must be able to press charges for failure to perform; perhaps that someone would be the lawgiver, in which case the correlative right "to the performance of acts of beneficence" rests with him, even though the duty redounds to the benefit of third parties.

[2] Hart, "Are There Any Natural Rights?" p. 182.

from without the systems themselves. But as was suggested above, they can be interpreted differently. It would seem, in fact, that the only way such a system could be understood as not possibly conferring rights would be for it to explicitly proscribe them; only if, for example, the system contained a rule expressly forbidding any individual--including the prescription-giver--from "demanding certain behavior from others" could we say for certain that it did not confer rights. For as long as even one individual could make such claims concerning the obedience of others, there would be a right residing in that individual. Such a system as is suggested by this observation would clearly not distribute rights as we (or Hart) imagine them distributed--among all individuals affected by the rules--nor would it ground them as we imagine them grounded; but it would nevertheless confer rights correlative to the duties contained in the prescription. (Here too correlativity turns upon the object--i.e., that which is owed--even though, as with rights, the person to whom the duty is owed may not be the person to benefit from its exercise.)[1] It appears, in fact, that Hart has been misled by egalitarian distributive considerations into believing that for a system of prescriptions to confer rights, those rights must be distributed as are the duties.

In sum, I have attempted to give positive answers to the two questions about whether correlativity always obtains by showing that certain common arguments on the negative side are mistaken. This does not finally settle the matter, of course, for there may be other negative arguments that will succeed. In particular, I have not presented a conclusive logical proof, for I know of none; but in addition to analyzing the notion itself, I have raised a number

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[1]This is an occasion (though perhaps not the easiest one) to again illustrate the importance of properly locating and describing the right- (and obligation-) object. If a system of prescriptions is interpreted in this narrower way as conferring rights only upon those who can (or do) make claims to the obedience of others--say, the prescription-giver--then the right-object, in the earlier example, would be inadequately described as "to being honored by one's children." For that description implies that the parents hold the right. Rather, a better description of the right-object--on this narrower interpretation--is "to the obedience by x of the prescription to honor one's parents." (Indeed, all right-objects in such a system begin with "to the obedience by x of the prescription to.") Only so will the duty be owing to the appropriate party, much as in cases of promises to second parties redounding to the benefit of third parties where the right-object properly begins "to the keeping of the promise by x to."

of logical arguments which strongly suggest that correlativity always obtains. If these arguments are correct, they have served at least to establish a presumption, and accordingly the burden of proof has shifted.

7. The Right-Object

The heart of every right is the object claimed: this is the element of the right-statement that ordinarily characterizes the right, the element upon which the right-holder's claim is focused, the element that determines the obligation-holder's behavior, the element whose possession must be justified. Hence the importance of locating and describing this object correctly. In addition to the remarks above on this subject, it should be noted that problems familiar in the theory of action--especially those relating to the issue of action descriptions--are to be found here as well; for just as there will be numerous ways to describe a given action, so too can any right-object be variously described. Accordingly, there will usually be no one "correct" description, though there will be many incorrect ones. Much of the difficulty in this connection revolves around the indefinite terms in which rights are couched--freedom, interference, coercion, force, harm, fraud, fear, expectations, and so on. But as legal scholars have long recognized, confusion will be avoided only if proper care is taken in describing the object.

It may appear, however, in light of the endless variety of objects to which people can and have claimed to have a right, that no order can be given to this subject. But that appearance is deceptive. What we want in a description is something that captures the essence not only of the particular claim at hand but of all right-claims in general, for unless the particular claim has the character of a right-claim it will serve that function less than adequately. Recalling that rights are both relations and claims, then, we want a description that captures the relation to which the right-holder's claim refers. By depicting a relation, the description will serve to tie the right-holder with the obligation-holder.

Now in looking over the diverse items that are claimed as right-objects, it will be noticed that they tend to fall into three broad categories: freedoms or liberties, physical objects or various kinds of tangible and in-

tangible property, and various actions or behavior on the part of others (e.g., the keeping of a promise). But a closer look will show that the first two of these categories can and should be reduced to the third. For when we claim a liberty or an object, there is nothing in this description of the right-object per se that would denote a relation between ourselves and anyone else--as such, the description does not capture the essence of a right-claim. Yet this relation is implicitly contained in the claim: the right to liberty is implicitly the right not to be interfered with by others in our action or inaction, i.e., the right to a certain kind of behavior on their part; the right to property is implicitly the right to own and use property without being interfered with by others (say, by their trespassing) --again, the right to a certain kind of behavior on their part. Of course other kinds of claims to property--say, the right to welfare--will tend to fall more readily into the third category; for in reality such claims are to something from someone else, i.e., the relational aspect of this property claim, by virtue of the object claimed, is less "imbedded" than are the relational aspects of the more traditional property claims. If it is to be adequate, then, the description of the right-object should make explicit this relational aspect by characterizing the right as a claim upon the actions or behavior of another. Thus it is that Hart argues that " . . . to have a right entails having a moral justification for limiting the freedom of another person and for determining how he should act."[1]

It is a surprising result that so apparently diverse a group of right-objects as we find in the world can be thus reduced to a single aspect. It is a useful and important result as well, as will be seen when the problems of consistency are treated.

8. The Justification

If the object claimed is the heart of every right-statement, it may not be amiss to say that the justification is the soul; for as the one pertains to a material relation in the world, the other is the very raison d'être of the right. Without a justification that is sufficient, there can be no right.

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[1] Hart, "Are There Any Natural Rights?" p. 183.

The connection between the justification and the kind of right to be justified has already been drawn. At the same time, I have argued (very briefly) that for a right to be said to exist it must be justified on some criterion. The connection between these three items--kind, justification, and existence--should perhaps be developed more fully if a clearer understanding of how justification works--or at least how this notion is being used here--is to be obtained. In particular, it may be asked whether a right's existence does depend upon its putative justification. Can we not say that some rights exist that are not justified? And conversely, can we not say that other rights do not exist that are justified? The confusion here, as was suggested earlier, arises over there being no mention of the kind of right--and hence of the kind of justification--under consideration. As long as the justificatory criteria are of the same kind as the right in question, the existence of that right will depend only upon whether those criteria are sufficient and are satisfied.

To expand upon these issues, when we consider questions of justification--insofar, that is, as those questions involve justification qua that kind of right--we are interested to know whether a statement of the form "A has a k right to x" is true. We determine this by a two-step process: first we have to know what conditions would be sufficient to make the statement true; second we have to determine whether those conditions are in fact satisfied. The first of these steps is the more difficult, involving as it does the determination of just what the justificatory criteria are for A's having a k right to x. Once that is known, however, we can then attempt to establish whether those conditions sufficient for the truth of the statement obtain. (This is tantamount to saying that the expanded statement "A has a k right to x in virtue of j"--where "in virtue of" has the force of sufficient reason--is true if and only if j is instantiated by a condition sufficient to make "A has a k right to x" true and j is true.) Ultimately, then, questions of justification are questions of fact, i.e., questions about whether there in fact obtain conditions sufficient to make "A has a k right to x" true. Before this final question can be asked, however, it must be known just what those sufficient conditions are, just what would justify the right in question, and this is by no means a question of fact but one of rational inquiry.

It may be objected, however, that the criteria for existence of a particular right can be different from its justification. A legal right, for example, might be justified on any number of grounds--e.g., the public interest--while its existence would be determined, or "explained," by such considerations as whether a legal system exists of which this right is a part, whether the right is enforced, and so on.[1] Or again, it may be objected that this sense of "justification" is less than satisfactory because it is a relative sense: a right is "justified" and can therefore be said to exist if conditions sufficient to justify it--determined by the kind of right in question--are satisfied. But this is justification relative to a criterion, it is not justification tout court; a further justification of the criterion itself is required if the right is to be justified in this latter sense. Thus if a legal right is said to exist because factors such as the above obtain, only if these other factors were justified--e.g., if the legal system itself were justified--could we say that the right was justified.

What these objections bring out, however, is a certain variability about the word "justification." Indeed, the setting forth of the material conditions of justification, which again is the necessary first step in any justificatory process, soon involves one in the perplexing issue of justification itself, about which I propose to say only a few things here. To justify something is to show that it is correct--hence, justifications are normative. They do not apply to everything, therefore, but only to human acts or institutions (and "institution" should be understood broadly to include, for example, human constructions, such as rights). But "justification" may be used in different ways in different contexts and at different levels. In certain contexts, in fact, a justification may appear, for all practical purposes, to be no more than an explanation. For in the case of both explanations and justifications we are giving reasons, we are pointing, respectively, either to laws (in the case of scientific explanations) or to standards that, if they obtain and they entail the explanandum or justifi-

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[1] In giving examples (here and below) of what might count as material conditions of justification I do not mean to be understood as arguing that these are such conditions.

candum, will serve to explain or justify the latter.[1] But in the case of justifications, unlike is ordinarily the case with explanations, the justificandum may not be known to be true: we may not know, for example, whether A has a right to x, much less why he does.[2] The justification may thus be playing a dual role: if we say, for example, that A has a legal right to x in virtue of, say, there being a legal system that applies to A that gives him this right, we may be saying both that "A has a legal right to x" is true and that it is true for the reasons cited.

The question arises, however, whether we have given a justification in this last example or merely an explanation. For this is one of those cases in which a justification appears, for all practical purposes, to be an explanation, much as is suggested by the first of the above objections. Nevertheless, I want to argue that there are compelling reasons for saying, even in this case, that we have given a justification. First, the justificandum involves a normative notion, a right, the existence of which it is more appropriate to justify than to explain. Rights are claims, and claims require justification. Second, in justifying the right we are not pointing to any "law," in the scientific sense, or regularity in nature; rather, we are pointing to a standard of legal correctness. Showing that something is correct or right is different from showing that something follows from a natural regularity. Third, to show that something is correct or right is not necessarily to show that it is morally correct or right, but only that it conforms to a certain standard of correctness, such as a legal standard. What is thereby obtained is of course a legal justification, and no more. But to give a legal justification of a legal right just is to show that conditions sufficient to make the statement "A has a legal right to x" true obtain; it is not to give a moral justification.

A fourth consideration will bring together several of these points as

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[1] In a more detailed discussion "obtain" and "entail" would of course have to be tightened up; but they will do for here.

[2] This is especially true in the case of moral rights, where there is often disagreement over their existence. That there is usually little disagreement over whether at least a large number of legal rights exist suggests one reason why their legal justification often appears to be an explanation.

well as the first of the above objections. That objection, it will be recalled, sought to point out that a right's "justification"--e.g., that it is in the public interest--may be different from the "explanation" of its existence. But insofar as a justification involves showing not only why something is the case but that it is the case as well, it must pick out reasons sufficient to those ends--and in particular, in the example before us, sufficient to show that "A has a legal right to x" is true. If we make the relatively safe assumption, however, that a legal right's being in the public interest is neither a necessary nor a sufficient condition of its existence, we discover that the statement "A has a legal right to x in virtue of that right's being in the public interest" tells us nothing whatever about whether A has a legal right to x. This "justification" of the right, that is, is irrelevant to the question of whether "A has a legal right to x" is true. But in addition, it does not even justify the right qua legal right. What it does do is point to a different criterion, a moral or political one. There is of course nothing exceptional in bringing, say, a moral criterion to bear upon a legal right; we do it all the time. But in doing so we should not see ourselves as attempting to justify the right qua legal right, but qua moral right; we are more correctly saying "This legal right is moral." Nor should we believe ourselves to be saying anything about the right's existence qua legal right; for again, we are more correctly saying "This legal right is a moral right as well." Finally, such justifications as "its being in the public interest" may indeed have entered into the initial adoption of the right as a legal right; but again, this is simply the bringing of moral or political considerations to bear upon whether there should be such a legal right. These and perhaps other justificatory considerations based upon nonlegal criteria are irrelevant to the question "Does A have a legal right to x and why?"

These remarks suggest the appropriate response to the second of the objections above, concerning justification tout court. It is true that legal justification, say, is justification relative to a criterion; and thus it may seem less than satisfactory. For legal justification is neither a sufficient nor a necessary condition of justification in this deeper sense. Nevertheless, it is justification, within a context. What the objection asks, however, as above, is that other justificatory criteria be brought to bear upon the right--though here indirectly, by being brought to bear upon the right's justificatory

criteria. But again, doing so will answer different questions, questions about the justification and existence of the kind of criteria to which these further criteria apply.

This second objection points, however, to the well-known problem of infinite regress in justifications. For no justification will be felt satisfactory unless a justificatory criterion which does not itself require further justification can be found. Such an "ultimate" criterion, one recently developed by Gewirth, will be set forth in chapter 3. As a moral criterion it will serve both to justify certain moral rights and to criticize other criteria and the rights that flow from them, for moral criteria are ordinarily taken to be the ultimate justificatory criteria. The sense of "moral" this implies will be discussed there as well, for the appreciation of that sense depends upon certain material features of justification--upon just what serves as a criterion to justify a given kind of right--not upon some of the more formal issues of justification discussed here.

9. Consistency

A theory of rights must be consistent. It cannot, that is, allow for the existence of conflicting rights; for if two rights conflict they cannot, by definition, coexist. When two rights do conflict, then, either they are justified on different criteria, or if they purport to be justified on the same criteria, either one of them is not in fact justified and hence does not exist, or the justificatory theory itself is internally inconsistent. In order that these difficulties be avoided, it would be well to inquire how rights might conflict: can we, with the help of the schema developed in the preceding sections, arrive at a few basic kinds of conflict? After some preliminary considerations, two such paradigms for conflicting rights will be set forth along with suggestions for avoiding them.

In general, rights conflict because there are too many of them. If we lived in a world with few rights, narrowly defined, we would have few such conflicts. Hence, conflicts can be avoided most generally by applying a kind of Ockham's razor to the world of rights. This is not to be construed, however, as an argument for few rights, in deference to consistency: indeed, as will be seen shortly, in a world of consistent rights there will be as many rights

at any given time as is possible. But having more rights than is possible is useless, for again, a conflict between two rights just means that one of them cannot be realized. (More precisely, when two rights conflict, both cannot be realized at the same time or in the same respect.)

What would it mean, then, were we to live in a world in which individuals had rights that did not conflict? Briefly, it would mean, negatively, that no individual, having violated no one else's rights, would ever have to sacrifice one of his rights in order that someone else be able to enjoy one of his rights; affirmatively, it would mean that every individual could at all times enjoy whichever of his rights he chose to enjoy, subject only to the right substitutions necessitated when his rights are violated, or to the restrictions incurred as a result of his own actions. A world in which rights do not conflict, then, is not a world in which there could or would be no violations of rights--either intentional or accidental; rather, it is a world in which right violations would bring into play other rights of the victim such that he would be compensated by the violator sufficiently to amount to there having been no violation. (Quite apart from what in particular this would entail or whether it would even be possible, I mean to suggest only that there are ways, in theory at least, in which a status quo of right enjoyment can be preserved.) Neither is it a world in which the individual would be likely at all times to be in a position to enjoy whichever of his rights he chose to enjoy; by the second proviso above, that is, I mean to allow for the kinds of actions--e.g., entering into contracts, or violating the right(s) of others--that have the effect for the individual performing them of foreclosing the future enjoyment of certain of his rights, at least for a period of time. Subject only to substitutions necessitated by right violations, then, or the restrictions he himself incurs, an individual's enjoyment of his rights in this world is limited only by his enjoyment of other of his rights. In particular, it is not limited by the enjoyment by others of their rights. Thus claims between individuals do not conflict.

Does it make sense though to speak of this as a world of few rights? For every "nonright," that is, is there not a correlative right? If A has no right to do x, he has an obligation to not do x, correlative to which is the right of others to his not doing x. There is always, in short, a certain

equilibrium of rights (and obligations), even an apparent paradox--for the fewer the rights, the more the rights by correlativity, and conversely, the more the rights, the fewer the rights by correlativity. The paradox is of course only apparent, for the rights on each side of the correlativity are different rights. If A has the right to smoke, for example, then B does not have the right to breathe smokeless air (assuming no further principles of adjudication), and conversely, if B has the right to breathe smokeless air, A does not have the right to smoke. But in either case, the number of rights (and obligations) remains the same. This ought not then to be called a world of few rights but one of as many and only as many rights as can be consistently claimed. Thus a world of consistent rights will have as many and only as many rights as will achieve equilibrium. More than that will produce inconsistency, for the correlative obligations will be inconsistent with other rights in the system.

How then might this optimal world be turned into one with conflicting rights? What kinds of additional claims would produce conflicts? This amounts to asking how, if A has a right to x, the claims of others might conflict with A's right. Recalling the discussion in section 7, all rights can be reduced to claims upon the behavior of others. Thus if B has a right that conflicts with A's right, B's claim upon A's behavior is tantamount to a claim that A must behave in such a way that he (A) cannot enjoy his right to x. The simplest form of this occurs when B claims a right to x where x is instantiated by the same thing for both A and B: here the right-object for both is described as "the exclusive possession and use of whatever the object is," say a piece of property. (A variation of this kind of conflict occurs when the object claimed by both is an action of the same kind, say "the picking up of the bill," as in the example in section 6 above.) By way of resolution, the first thing to do is to determine whether the right-object is defined adequately: claims to the same right-object are often merely claims to compete for that object, which are not real conflicts of rights. If the context is not a competitive one, however, then perhaps one of the claims is unjustified, or perhaps the claims are justified by different and conflicting criteria. If the latter is the case, then one or the other of the criteria, or perhaps a third set of criteria, will have to determine the conflict. But again, if both are

justified by the same criteria, then the theory is internally inconsistent.

A second kind of conflict is much more common, no doubt because it is less obvious than the one just discussed. It occurs not when two (or more) individuals claim the same right-object but when they claim different though mutually exclusive right-objects. Take the smoking example above: the right to smoke and the right to breathe smokeless air, thus described (as ordinarily they would be), have different right-objects; but these right-claims conflict because the enjoyment of one excludes the enjoyment of the other, this because one right-object logically excludes the other. Again, if A has a right to print what he wants in his newspaper, B does not have a right to be free from libel, and conversely; or if C has a right to run his business as he chooses, e.g., to hire and fire whomever he chooses for whatever reasons he chooses, D does not have a right to be free from discrimination (as that term is ordinarily understood). In these and other such cases, if one of the right-claimants enjoys his right, the other cannot enjoy his; or, what comes to the same thing, if one performs the obligation correlative to the other's right, he cannot enjoy the right he claims to have. Thus the conflict does not involve mutually exclusive right-holders, as with the first paradigm above, but mutually exclusive right-objects. Nevertheless, the steps listed above for resolution apply here too; in these cases, however, the error is ordinarily one of logic: rights are asserted or recognized or declared without a full appreciation of what they entail by way of conflict with other rights that have been asserted or recognized or declared on the basis of the same kind of justificatory criteria. Hence the criteria, and the justificatory theory itself, lead to inconsistency.

These issues of consistency, however, like the other issues raised in this chapter, will be understood better only when the normative foundations of the theory are more clearly in view. Let us turn then to that basic task.

CHAPTER III

FREEDOM AND RIGHTS

1. Are There Rights?

The ontological status of rights has long been a vexing problem. They do not exist in the way tables and chairs do; yet we want to say that rights do exist, and we do say it, often with little misunderstanding. A theory of rights has got to come to grips in the end, then, with what it means to say that there are rights. Short of that we may be left with Bentham's famous remark about natural rights, that they are "simple nonsense; natural imprescriptible rights of man are rhetorical nonsense; nonsense upon stilts!"[1]

At the same time Bentham had little difficulty understanding what it meant to say that a legal right exists: "Power and right and the whole tribe of ficticious entities of this stamp, are all of them, in the sense which belongs to them in a book of jurisprudence, the results of some manifestation or other of the legislator's will with respect to such and such an act."[2] Whatever the problems with this view, we are reminded again of the importance, stressed in the last chapter, of being clear about the kind of right whose existence is at issue. In that this essay is concerned at bottom with moral rights, with showing that moral rights exist, it is important as well to be clear about the word "moral." To aid in elucidating both the sense in which this word will be used and some of the issues material to existence claims in general (as they involve rights), it may be best to first have a brief look at what it means to say that a legal right exists, for this is ordinarily thought to be a more tractable question.

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[1]Jeremy Bentham, "Anarchical Fallacies," in Collected Works, ed. John Bowring (Edinburgh: William Tait, 1843), 2:501.

[2]Jeremy Bentham, Introduction to the Principles of Morals and Legislation (Oxford: Clarendon Press, 1876), p. 24.

Recalling the discussion in chapter 2, section 8, for a right to be said to exist it must be justified on some criterion. Justification, in turn, is a two-step process: (1) we have to determine what conditions would be sufficient to make the statement "A has a k right to x" true, which is a rational inquiry; and (2) we have to determine whether those conditions are satisfied, which is an empirical inquiry. What then are the conditions sufficient for our being able to say that a legal right exists?

However simple that question may at first appear, the difficulties in answering it are well indicated by the variations in the replies philosophers and jurists have given through the years. Bentham (above) emphasized the legislator's will (but see below as well). D. G. Ritchie, on the other hand, held that "a legal right is the claim of an individual upon others recognized by the state."[1] Again, Hohfeld cites Mr. Justice Stayton who argued that rights, other than natural rights, "are essentially the creatures of municipal law, . . . and it must necessarily be held that a right, in a legal sense, exists, when in consequence of given facts the law declares that one person is entitled to enforce against another a claim. . . ."[2] More recently, Hart has tied the existence of a legal right, as that notion is used in the complex modern state, to the existence of a legal system:

> There are therefore two minimal conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.[3]

Hart summarizes this as follows: "Crudely put, the facts are that the rules recognized as valid at the official level are generally obeyed."[4] Thus if these "facts" are true (these criteria are satisfied), the legal system, with its legal rights, can be said to exist.

It will not be my concern here to inquire into the adequacy of these

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[1] D. G. Ritchie, Natural Rights (London: George Allen and Unwin, 1952), p. 78.

[2] Hohfeld, Fundamental Legal Conceptions, pp. 71-72, n. 16.

[3] Hart, Concept of Law, p. 113.

[4] Ibid., p. 114.

various criteria.[1] Rather, I want simply to observe that running more or less explicitly through each is the notion of "acceptance." Indeed, a look at virtually any attempt to set forth the criteria sufficient for a legal right's existence will show that some sense of "acceptance" (or "recognition") is centrally involved. (What sense needn't concern us for the moment.) Questions about the truth of existence claims typically arise, in fact, when acceptance of an appropriate kind can be shown not to obtain--as in periods of widespread disobedience, or lax enforcement, or during revolutions, or enemy occupation, or at times when there is simple breakdown of legal order.[2] It should not be surprising, however, that "acceptance" finds so crucial a place in the justificatory criteria. For a right, being not only a claim but a relation, requires some evidence indicating that the relation claimed exists; and what better evidence than that the obligation, which completes the relation, is accepted. If the obligation <u>is</u> accepted (indeed, if some obligations <u>must</u> be accepted, as will be shown later), then the relation--the right--exists. (In the case, for example, of a promise--the simplest model of a right's being "created"--the acceptance by the promisor of an obligation <u>just is</u> the justification of and evidence for the right of the promisee.) Thus Bentham found evidence for the existence of a legal right in the correlative obligation: "To know then how to expound a right, turn your eyes to the act which, in the circumstances in question, would be a violation of that right. The law creates the right by prohibiting the act."[3]

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[1]Criticism would run along the following lines: There are (at least) two kinds of cases an adequate criterion must handle: (1) those in which there is some behavioral sign--obedience or enforcement--of the existence of a law creating a right; (2) those with no such signs of acceptance, as with an antiquated statute, or better, a law relating to behavior that is rare or that has never occurred. While this second kind of case is anomalous, it must nevertheless be dealt with (in some games, e.g., there are rules for situations that never have occurred but are still possible). Hence, an adequate criterion would have to treat both the behavior that enters into the creation of legal rights and that which gives evidence of already existing rights, and these two conditions must be disjunctive. Insofar as they are conjunctive, as in Hart's criterion, they will not handle the second kind of case, for the latter kind of behavior need not be a necessary condition.

[2]See Hart, <u>Concept of Law</u>, pp. 60ff. and 113ff.

[3]Bentham, <u>Principles of Morals</u>, p. 224.

So central is this notion of acceptance, in fact, that many have simply argued by analogy from it and its place in the criteria for legal rights to the case of moral rights. We saw Hart do this, for example, in chapter 1, section 4. Similarly, Ritchie observes:

> On the analogy of the definition of legal right, moral right may be defined as a capacity residing in one man of controlling the acts of another with the assent and assistance, or at least without the opposition of public opinion; or as the claim of an individual upon others recognized by society irrespective of its recognition by the state. The only sanction of a moral right as such is the approbation and disapprobation of private persons.[1]

On this not uncommon view, then, moral rights are rather like legal rights except in being more loosely enjoyed and enforced--signs of acceptance. (Avoidance or "shunning"--forms of "social coercion"--come to mind here as methods of such enforcement.) If acceptance can be shown to obtain, the relevant moral rights can be said to exist.

A difficulty arises at this point, however; for while the existence of a right--legal or moral--can be shown by pointing to some kind of acceptance, this notion has many senses (some of which were brought out in chapter 1, section 4). Acceptance is always by some individual or individuals (e.g., a promisor, legal officials, a majority or an important part of society); and it usually is offered not capriciously but rather for some reason or reasons, which may range from prudential, to aesthetic, to moral, to rational, and so forth. But the distinction raised here--between the fact of acceptance and the subjective or motivating reasons behind it--has to be kept clear. For at a certain level of analysis--e.g., in determining whether there exists a particular legal system or, in the sense indicated above, a particular moral right--we may need to know only <u>that</u> acceptance of the requisite sort obtains, not <u>why</u> it does. Whatever subjective reasons lie behind particular instances of this acceptance may be quite irrelevant to the issue of justification and existence.

The question I want to focus upon, however, is whether we ought to treat the existence of a <u>moral</u> right in this way. Do we want the word "moral" to have so positivist, so empirical a ring as it does in Ritchie's analysis (or in Hart's in chapter 1, section 4)? Is this what we ordinarily mean when we claim to have a moral right? Do we mean to refer simply to a right recognized

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[1] Ritchie, <u>Natural Rights</u>, p. 78.

by society (though perhaps not by law), one which depends for its existence only upon whether or not it happens in fact to be generally accepted (for whatever reasons) by a particular society? If the practice of slavery were generally accepted (except by the slaves), though perhaps not codified in positive law, would we point to this acceptance as justifying the moral rights of slaveowners over their slaves? Surely there is a deeper sense of "moral" that we ordinarily have in mind when we speak of having a moral right. The existence of a moral right, we want to argue, is not contingent upon a given society's will or preferences as manifested by what the society does or does not choose to accept. Rather, we believe that individuals have moral rights simply in virtue of being human (regardless of what that may mean), whether or not the obligations correlative to those rights are in fact accepted. Indeed, Jefferson did not write that men are endowed with certain unalienable rights--provided those rights are recognized, if not by the King then by public opinion.

This essay will be concerned, then, with this deeper sense of "moral," as adumbrated above (and expanded upon below). It is a conception not unlike that found in traditional discussions of natural rights and natural law. By using "moral" instead of "natural," however, I wish to avoid some of the difficulties associated with that tradition. In his arguments against natural rights, for example, Ritchie spoke of the law of nature as representing "the consent of the human race."[1] Quite apart from whether that view was ever widely held, I will not be grounding moral rights in such a notion, at least insofar as this consent is contingent upon the collective will or preferences (however determined) of the human race. For in addition to introducing an element of dubious authenticity, this would serve only to raise the contingency a step higher. Rather, the contingent element must be either eliminated altogether or, as in the case of promises or similar right-creating activities, put in its proper place within the larger moral picture. Nor will I be grounding moral rights ultimately in any uniquely moral justificatory reasons, for this would introduce either a circularity or a need in turn to justify these moral reasons. Moral rights must instead be shown ultimately to exist simply in virtue of certain rational or logical features of the world, features that

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[1] Ibid., p. 88.

entail moral principles and moral rights (making them in this sense "natural"). This I understand to be the aim of traditional theories of natural rights, whatever their methods or conclusions. Thus it is that Locke speaks of the Law of Nature as known not by sentiment but by Reason.[1]

Eliminating the contingent element will not, however, eliminate the idea of acceptance. For acceptance is still the sine qua non of a right's existence.[2] If the reasons urging acceptance are of a rational sort, however, necessary to the subject of morality and sufficient to compel assent on pain of self-contradiction, that acceptance will not be contingent or arbitrary or dependent upon the will or preferences of those to whom the reasons are put. It is not open to us, for example, to accept or reject the truths of logic: for in order to attempt to do either we must accept them.[3] Indeed, the kind of acceptance these truths necessitate is the kind of acceptance in which rights must be grounded, an acceptance necessitated by rationally compelling reasons. Only so can we demonstrate or prove that moral rights exist. Of course saying that a rational individual must agree that certain rights and obligations exist on pain of self-contradiction is not the same as saying that he must consent to perform those obligations: rational justification is not necessarily hortatory. It is, however, the subject of this essay. Moral rights will be shown to exist, then, for reasons both necessary and sufficient to compel rational acceptance of their existence.

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[1]John Locke, Second Treatise of Government, par. 6, in Peter Laslett, ed., John Locke: Two Treatises of Government, rev. ed. (New York: Mentor, 1965), p. 311. A recent attempt to give a rational argument for the existence of "at least one natural right, the equal right of all men to be free," was that of Hart, "Are There Any Natural Rights?" A reply (successful in my judgment) to this part of Hart's argument has been provided by Lawrence Haworth, "Utility and Rights," in Studies in Moral Philosophy, ed. Nicholas Rescher, American Philosophical Quarterly Monograph Series, no. 1 (Oxford: Basil Blackwell, 1968), pp. 68-70.

[2]Thus Ritchie's "moral rights," insofar as they are grounded in a general acceptance of whatever kind (as in the case, e.g., of accepted slavery), must be said to exist. To call them moral rights, however, is altogether misleading, reflecting the primitive understanding of that term common to positivist doctrines. The term "social rights" might better be used here, for mere acceptance (or "public opinion") ordinarily confers no moral quality per se.

[3]Aristotle's is still the best demonstration of this: Metaphysics 4.4.

2. The Principle of Generic Consistency

In a series of recent articles Alan Gewirth has set forth arguments satisfying the above constraints.[1] These arguments develop the Principle of Generic Consistency (PGC), which Gewirth has called "the supreme principle of morality."[2] From it flow the moral rights necessarily held by every individual.

It will be possible here to do no more than sketch the core of Gewirth's arguments. The reader is encouraged to turn to the originals for a detailed account and for answers to the many objections to which the following outline may give rise.[3] It will be enough for my purposes to indicate how moral rights can be shown to exist. These rights will be characterized, however, in broad, generic language, very much in need of interpretation. It is with this interpretation that I will be concerned for the better part of the

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[1] See especially Alan Gewirth, "Categorial Consistency in Ethics," Philosophical Quarterly 17 (October 1967): 289-99 (hereafter cited as "CCE"); "The Justification of Egalitarian Justice," American Philosophical Quarterly 8 (October 1971): 331-41 (hereafter cited as "JEJ"); "The Normative Structure of Action," pp. 238-61 (hereafter cited as "NSA"); "Moral Rationality," The Lindley Lecture, University of Kansas, [Lawrence], 1972 (hereafter cited as "MR"); and "The 'Is-Ought' Problem Resolved," Proceedings and Addresses of the American Philosophical Association, 1973-74 47 (November 1974): 34-61 (hereafter cited as "IOPR"); see also "The Generalization Principle," Philosophical Review 72 (April 1964): 229-42 (hereafter cited as "GP"); "The Non-Trivializability of Universalizability," Australasian Journal of Philosophy 47 (August 1969): 123-31 (hereafter cited as "NTU"); "Must One Play the Moral Language Game?" American Philosophical Quarterly 7 (April 1970): 107-18 (hereafter cited as "MLG"); "Some Comments on Categorial Consistency," Philosophical Quarterly 20 (October 1970): 380-84 (hereafter cited as "CCC"); "Obligation: Political, Legal, and Moral," pp. 55-88 (hereafter cited as "OPLM"); "Some Notes on Moral and Legal Obligation," pp. 291-96 (hereafter cited as "NMLO"). In endorsing and arguing from (i.e., constructing my own theory upon) the main line of Gewirth's argument I do not of course mean to be understood as supporting its every detail.

[2] "CCE," p. 292; see "MR," p. 7. In all but the most recent of the cited papers ("IOPR") Gewirth speaks of the Principle of Categorial Consistency. In my discussion of his arguments I will follow this recent change and use "generic" where "categorial" was earlier used.

[3] My outline will be taken largely from the two most recent papers, "MR" and "IOPR," which are probably the best places to look to find the argument concisely developed.

chapter, about which Gewirth has thus far provided only very general, and I believe mistaken, suggestions. Nevertheless, the basic parts of his argument, establishing the existence of these generically described rights, are not only compelling but provide answers to many of the most fundamental issues of moral philosophy.

Let me begin, then, by quoting a brief summary Gewirth himself has given of his argument presenting a rational justification of the PGC, after which I will develop some of these points more fully:

> The main point is that the voluntariness and purposiveness which every agent necessarily has in acting, and which he necessarily claims as rights for himself on the ground that he is a prospective agent who wants to fulfill his purposes, he must also, on pain of self-contradiction, admit to be rights of his recipients. For they are similar to him in being prospective agents who want to fulfill their purposes. Therefore every agent logically must admit that his recipients have certain basic rights equal to his own rights of voluntary and purposive participation in transactions, which are equivalent, respectively, to rights of freedom and of well-being. The statement of these rights constitutes an egalitarian-universalist moral principle. My argument hence largely takes the form of what I shall call dialectical necessities: dialectical, in that it proceeds through certain claims made by agents; necessities, in that these claims logically must be made by the agents and they also logically must accept the corresponding obligations.[1]

This egalitarian-universalist moral principle (the PGC), which is the general principle of these rights and obligations, is addressed to every agent as follows: Apply to your recipient the same generic features of action that you apply to yourself.[2] Combining the formal consideration of consistency with the material consideration of the generic features of action, the PGC

> . . . requires an equal distribution of the most basic rights of action. It says to every agent that just as, in acting, he necessarily applies to

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[1] "MR," p. 20. Strictly speaking, the first sentence of this passage is not correct: it moves too quickly, from claims for oneself to rights of others, i.e., from claiming rights for oneself to everyone's having rights. The argument should go in two steps, making the "acceptance" phenomenon explicit: it should move from claiming for oneself, which must be universalized (those grounds that generate my necessary claims apply also to everyone else), to the acceptance of these claims, both mine and others' (again by universalization), and then to the rights, which just are what the accepted claims are about; for universalized claiming, absent the acceptance (by others) of those claims, does not alone establish the existence of the rights claimed. (See my summary at the end of the paragraph.)

[2] "MR," p. 25; "IOPR," p. 57; "CCE," p. 292; "JEJ," p. 339; "OPLM," p. 68.

> himself and claims as rights for himself the generic features of action, voluntariness or freedom and purposiveness at least in the sense of basic well-being, so he ought to apply these same generic features to all the recipients of his actions by allowing them also to have freedom and basic well-being and hence by refraining from coercing them or inflicting basic harm on them.[1]

In sum, and very succinctly, every agent must accept on pain of self-contradiction that the rights he necessarily claims for himself, every other prospective agent necessarily claims as well; by virtue of mutual acceptance of these claims--generated by the necessary acceptance of one's own generic claims, which must be universalized--the corresponding rights can be said to exist.

Now for a more detailed look. Since moral principles are addressed to agents, the aim is to show that the truth of (at least some of) these principles is entailed by claims that agents themselves must make:[2] by virtue of this dual necessity, the principles will thus be ineluctable. Gewirth's "dialectically necessary method" proceeds then from claims necessarily made by agents.[3] It is in this sense that the argument's foundations are "natural": they involve certain rational or logical features of human action. (Indeed, in so locating and explicating the source of moral rights, Gewirth may be understood as having given substance to the traditional foundation of natural rights, "the nature of man."[4])

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[1]"IOPR," p. 57. Gewirth's descriptions of the basic rights to flow from the PGC--in particular, his descriptions of the right-objects--have varied from paper to paper, which is a matter of no small importance, as we saw in the last chapter. Whereas in "CCE," for example, he speaks throughout of "categorial rules," in "JEJ" he speaks of rights to non-coercion (or freedom) and non-maleficence (or welfare) (p. 339), in "MR" of the right to participate voluntarily and purposively in transactions (p. 25), and in "IOPR" of rights to freedom and basic well-being. Although there is a rough equivalence between each of these formulations, the differences are not unimportant, as will be seen when we attempt to interpret them. For the present, however, I will simply ignore these differences.

[2]On the truth-value of moral judgments cf. "MR," pp. 29ff. and "IOPR," pp. 39, 60.

[3]For reasons for proceeding from claims cf. "NMLO," pp. 291-92 and "NSA."

[4]On the natural foundations of morality cf. "CCC," p. 383; "JEJ," pp. 332, 336, 340; "MR," pp. 19, 31; and "IOPR," pp. 46, 50. Of course, the world

In addressing his argument to agents and their actions, then, Gewirth has directed his concern to the most basic, the most general subject matter of ethics. He is dealing with human action, what it involves, what it implies.[1] Moreover, the context of action is so basic as to be inescapable; even if the agent attempted to escape this context--say, by committing suicide--that attempt would itself be an action. Likewise, all actions are invariable at the generic level; i.e., all actions exhibit certain generic features by which they may be characterized, regardless of whatever more specific features they may have.[2] In grounding his argument in these generic features of action and the claims that necessarily relate to them, Gewirth has thus located a foundation free of any arbitrary or contingent elements, such as the particular goals or values agents may have when they act.

As these remarks suggest, action is being used here in a strict sense, as opposed to behavior. Gewirth means to exclude in particular those behaviors that result from (a) direct external compulsion, (b) direct internal compulsion beyond the agent's control, and (c) indirect external compulsion whereby the agent's choice is forced by someone else's coercion.[3] Thus the agents to whom

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could have been different. Human action might not, for example, have exhibited the generic features it does; i.e., human beings might not have behaved conatively. Were the world thus different, however, it is difficult to imagine what morality would be like, whether there would even be such a thing. Gewirth seems, that is, to have located the generic, constitutive elements of the subject, without which there would be no morality.

[1]On the distinction between "act morality" and "agent morality" see "OPLM," pp. 69-70.

[2]"IOPR," pp. 46-47.

[3]"CCE," pp. 291-92; "NSA," p. 239; "IOPR," pp. 47-48. In excluding these "behaviors" the presumption is that agents are not to be held responsible or liable for the consequences that may result from such behavior, for it is to agents who perform actions that moral principles are addressed. It is not clear how Gewirth would deal with this point as it might relate, e.g., to a theory of strict civil liability (though he does include as voluntary the case in which choice, though lacking at the time of the immediate act, was present at an earlier stage; "JEJ," p. 332; "MR," p. 20). Moreover, the third criterion raises serious questions of criminal liability; for we do want to hold agents responsible for some things they do under duress (cf. Aristotle Nicomachean Ethics 1110a26-28). For the present, however, we should probably view these restrictions in the context of Gewirth's larger purpose: he is trying to show how the claims integral to an agent's ordinary actions generate moral rights, which

moral principles are directed are those whose actions exhibit the generic features of voluntariness and purposiveness: voluntariness in that the agent occurrently or dispositionally initiates and controls his behavior, purposiveness in that he intends to do what he does in order to realize some goal or purpose.[1] These generic features "characterize the whole category of morally relevant action, as against the features of more particular kinds of action within this category. Since agents are persons who perform actions in the sense just specified, it is necessarily true of every agent that he acts voluntarily and purposively."[2] These generic features thus impose themselves upon agents when they act, unlike the more particular and variable features of actions, such as the particular purposes for which an agent may act.

What then are the claims that agents necessarily make regarding their actions? (It should be noted that these claims need not be made explicitly--it is enough that they be implicitly involved in all action.[3]) To begin, all action, by virtue of its being purposive, has an evaluative element about it. In choosing among alternatives the agent acts for some end--either the act itself or some outcome of the act--which seems to him to be good. Regardless of what criterion of value this judgment may involve (and it need not be a moral criterion), this purpose provides the rationale that gives the action its point, appropriateness, or correctness for the agent. The agent's positive evaluation extends as well to the generic features that characterize his action--the

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attempt might become overly complicated if action under every possible circumstance were included. These complexities can be dealt with later, after the existence of rights has been established.

[1] Cf. "IOPR," p. 50. Gewirth reminds those who have difficulty with the idea that there are purposes, intentions, or other such mental phenomena that at least one warrant for his disregard of these difficulties involves his dialectical method: he is considering actions as they are viewed and referred to by the agent himself. (It should probably be noted as well that, unlike many theories of natural rights, Gewirth's argument grounds rights in nothing more "metaphysical" than the agent's stated purposes: men have rights, they are not "endowed" with them. The source of rights, that is, is rationally and empirically discernible in human action.)

[2] "MR," p. 21; cf. "CCE," p. 292; "OPLM," pp. 67-68; "JEJ," pp. 332-33; "IOPR," p. 48.

[3] "IOPR," pp. 49-50; "NSA."

voluntariness or freedom essential to his acting, and the purposiveness or well-being for which he acts--for these are necessary conditions of his acting.[1] Moreover, this good constitutes for the agent his justification for performing the action, so that he regards the action as justified. And by virtue of these evaluative and justificatory processes, the agent "regards himself as having a right to perform the action, and he makes the corresponding right-claim."[2] In particular, the agent claims that he has a right to act voluntarily and purposively (which amounts to claiming that he has a right to act, for qua agent he must act in this way[3]); and he claims especially that he has a right to participate voluntarily and purposively in transactions with others in which he may be involved.[4] Thus from the standpoint of the agent, actions are not only evaluative but normative as well: "rights are necessarily rather than contingently connected with being human, for . . . the basis of rights must be sought in the conviction necessarily held by every human agent that he has a right to perform his actions by virtue of his having purposes and pursuing goods."[5]

It must be stressed that Gewirth's argument at this stage has treated rights only from the internal standpoint of the agent. It is no small accomplishment, however, to have shown that rights are integral to human action (that they do not arise ab extra as in many positivist doctrines), and that a moral theory, and in particular a theory of rights, can arise from certain empirically discernible features of the world, features that figure prominently in the foundations of many classical (e.g., Manchester) theories of economic behavior. We need not, that is, appeal to moral sentiments that may or may not be there in order to show that men have rights; it is enough that men act, for the (self-interested) sentiments implicit in that action will be sufficient to allow a demonstration of the existence of rights to proceed.

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[1] Cf. "IOPR," pp. 51-52.

[2] "MR," p. 21; "NSA," p. 239.

[3] Cf. "MR," pp. 21-22.

[4] Ibid., p. 21.

[5] "NSA," p. 260. The part of the argument thus far outlined will be found most fully discussed in "NSA."

That demonstration moves to the external standpoint and to the existence of rights proper through the generalization involved in the principle of universalizability. Let me quote Gewirth at some length here:

> . . . given the agent's claim that he has a right to freedom and basic well-being, he is logically committed to a generalization of this right-claim to all prospective agents and hence to all persons. To see this we must note that every right-claim is made on behalf of some person or group with an at least implicit recognition of the description or sufficient reason which is held to ground the right. This description or sufficient reason may be quite general or quite particular, but in any case the person who claims some right must admit, on pain of contradiction, that this right also belongs to any other person to whom that description or reason applies. This necessity is an exemplification of the logical principle of universalizability,[1]

which principle Gewirth goes on to spell out.[2] The crucial question at this point, however, concerns the description or sufficient reason which the agent adduces as decisively relevant to his claim. Is he free to choose whatever description he likes, however narrow or arbitrary? If so, then the introduction of universalizability amounts simply to the introduction of a principle of formal justice (e.g., "treat similar cases similarly"), with no indication as to what particulars (including perhaps immoral ones) to universalize over.[3]

Gewirth has addressed a number of arguments to this point, all aimed at eliminating the arbitrary or contingent. They amount to showing that the substantive element of universalization is provided by the earlier parts of the argument relating to the generic features of action. Let me briefly cite but one of these arguments:

> . . . the agent logically must adduce only a certain description or sufficient reason as the ground of his claim that he has a right to freedom and basic well-being. This description or sufficient reason is that he is a

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[1] "IOPR," p. 54.

[2] "If some predicate P belongs to some subject S because S has the property Q (where the 'because' is that of sufficient reason or condition), then P must also belong to all other subjects S_1, S_2, ... S_n which have Q. If one denies this implication in the case of some individual, such as S_1, which has Q, then one contradicts oneself, for in saying that P belongs to S because S has Q one implies that all Q is P, but in denying this in the case of S_1, which has Q, one says that some Q is not P."

[3] Cf. "GP" where Gewirth discusses Marcus G. Singer's Generalization in Ethics (New York: Knopf, 1961); also "NTU," "CCE," "CCC," "JEJ," and "MR," each of which has lengthy discussions of universalization.

> prospective agent who has purposes he wants to fulfill. If the agent adduces anything less general than this as his exclusive justifying description, then, by the preceding argument, he can be shown to contradict himself.[1]

For the question can be put to him whether, if he did not fall under this narrower description, he would still claim these rights. If he answers yes, then the justificatory reason is broader than he has claimed. But if he answers no, then he can be shown to contradict himself with regard to the generic features of action, for as has been demonstrated, these generic claims are necessarily involved in all action. Thus "the description or sufficient reason for which he claims these rights is not anything less general than that he is a prospective agent who has purposes he wants to fulfill."[2]

From this application of the principle of universalizability to the description that necessarily applies to every agent we get the generalization that "all prospective agents who have purposes they want to fulfill, and hence all persons, have the rights of freedom and basic well-being."[3] If the agent denies this generalization then he contradicts himself, for he denies the implications of his own claims. Thus

> . . . by virtue of accepting the statement "I have a right to freedom and basic well-being" [and this acceptance is logically implied in purposive action], the rational agent must also accept "I have these rights for the sufficient reason that I am a prospective purposive agent," and hence that "All prospective purposive agents have a right to freedom and basic well-being."[4]

In virtue of the inescapability of the realm of action, then, and the logical implications of that action, every rational agent must accept the existence of the most basic equal rights of action as implied by the PGC. If he denies this, he contradicts himself.

This completes, then, the outline of Gewirth's argument. Although only the barest sketch has been set forth here, I hope to have included enough to indicate how moral rights can be shown to exist. In particular, I hope it is clear that Gewirth's arguments satisfy the formal constraints developed in chapter 2, section 8 and in section 1 above. First, these rights are justified by criteria of the same kind: i.e., the justificatory criteria are

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[1] "IOPR," p. 55.

[2] Ibid.

[3] Ibid., p. 56.

[4] Ibid.

themselves moral insofar as they treat the most basic subject matter of morality--human action--and insofar as the judgments they entail (to be spelled out shortly) are moral judgments in exhibiting the interrelated characteristics of being moral (in the sense of taking positive account of the interests of other persons as well as the agent), prescriptive, egalitarian, determinate, and categorical.[1] At the same time these justificatory criteria do not depend ultimately upon some contingent or arbitrary value-system or some "moral point of view" which need not be accepted; rather, they proceed from certain features of the world, features integral to the subject matter of morality itself--human action. Thus the acceptance compelled depends ultimately not upon such moral foundations--e.g., particular value systems--as would beg the question, but upon rational foundations, and in particular upon the rational requirement of consistency. Second, the justificatory criteria satisfy the two conditions earlier set for such criteria: the arguments in their entirety are sufficient to imply the truth of the justificandum, "A has a moral right to freedom and basic well-being"--the rational requirement; and these criteria obtain in the sense that the justificatory reason at the bottom of the argument, "I am a prospective purposive agent," is true--the empirical requirement. Finally, just as the argument is not circular, neither is there an infinite regress in justifications; i.e., the criterion (taking the entire argument as a single criterion) is an "ultimate" one. It is ultimate in the sense noted above, viz., it does not depend for its justification upon appeal to a further moral criterion but instead upon an appeal to general principles of reason, and in particular the requirement of consistency.[2] Moreover, it is ultimate in the sense that it serves to justify the more specific moral, legal, and other principles and rights to flow from it. It is this issue, the interpretation of the PGC, to which we now turn.

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[1] Ibid., pp. 35-36, 59-61. (For further discussions of "moral" cf. "MLG," p. 109; "OPLM," pp. 64-65; "MR," p. 6.)

[2] "IOPR," p. 56. On the place of reason in ethics cf. generally "MR." For further a priori (formal and material) and a posteriori justifications of the PGC see "CCE," pp. 294ff.; "JEJ," p. 340; "MR," pp. 26ff.

3. Rights for Whom?

Two questions from the last chapter awaited the above arguments before they could be more fully developed: who may be said to hold rights, and who may be said to hold obligations? The second of these will be addressed throughout the remainder of this chapter; certain issues peculiar to the first question will be discussed here.

Gewirth has shown that moral rights exist, but apart from having argued that the PGC is an egalitarian principle, he has said rather little about the extension of the class of right-holders. Yet the conclusion that rights belong to "all prospective purposive agents" invites many questions of interpretation. Immediately following this conclusion Gewirth adds: "The rational agent must therefore advocate or endorse these rights for all other persons [emphasis added]. . . ."[1] Is "all prospective purposive agents" to be understood as coextensive with "all other persons"? (Gewirth says very little about the force of "prospective."[2]) Elsewhere, in his most explicit discussion of the question, he argues:

> To be a prospective agent it is necessary and sufficient that one be able to operate voluntarily and purposively, choosing or initiating and controlling one's conduct in the light of one's purposes, and deciding on or making for oneself the various specific rules on which one acts in the many circumstances of life. Hence, animals, children, and feeble-minded persons are in varying degrees and on different grounds excluded from the class of prospective agents. But any more restrictive qualifications would go beyond the general criteria marked out by the generic features of agency.[3]

We can appreciate Gewirth's concern, evidenced in this last sentence, to show that rights are broadly based and hence that various elitist doctrines are untenable. But to ground rights in agency and to explicitly exclude animals, children, and feeble-minded persons from the class of even prospective agents raises immediately the question, do they have rights? Now to be sure, Gewirth

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[1] "IOPR," p. 56.

[2] Cf. ibid.; also "MR," pp. 24-25. What he does say, in fact, has nothing to do with the question at hand; rather, the term is used to ensure, among other things, that purposes are described generically and not specifically. (But see p. 112, n. 1 below.)

[3] "JEJ," p. 338; cf. "CCE," p. 291 and "MR," p. 30.

has not claimed that only prospective agents have rights; but by deriving rights from agency, the necessary conditions of which are voluntariness and purposiveness, he has significantly limited the class of prospective agents, suggesting either that animals, children, and feeble-minded persons do not have rights or that those rights they might have are grounded in something other than agency (which argument has not been forthcoming). His category of right-holders, in short, resembles Hart's "adult human beings capable of choice."

The difficulty Gewirth is facing here, of course, involves an apparent inverse relation between the strength and the breadth of arguments for rights. He is understandably concerned to ground rights in something more solid than positive laws, social convention, or even the "human dignity" of many traditional doctrines;[1] for the justificatory force of such arguments is vitiated by well-known objections.[2] Moreover, he does not want to undermine those rights the existence of which he can prove (it is difficult enough to prove the existence of any rights) by weakening their foundation in order to expand the class of right-holders. But in finding a more solid, empirically discernible basis for rights--"the conviction necessarily held by every human agent that he has a right to perform his actions by virtue of his having purposes and pursuing goods"[3]--he seems to suggest that those not possessing this attribute have no rights.

Others have been less reluctant to extend the class of right-holders. Rawls, for example, grounds equal rights in the natural capacity for being a moral personality, by which he means a capacity for both a conception of one's good and a sense of justice.[4] In treating this quality as a sufficient, though

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[1] "NSA," p. 260; cf. "OPLM," p. 65.

[2] "NSA," p. 260; "OPLM," p. 65; cf. generally "MR."

[3] "NSA," p. 260.

[4] John Rawls, A Theory of Justice (Cambridge: Harvard University Press, 1971), p. 505. The possibility that an unequal natural distribution of this capacity might lead to an unequal distribution of rights is handled by a "range property" device (cf. p. 508).

perhaps not a necessary condition,[1] he leaves open the question of our duties toward (and possibly the correlative rights of) animals and the rest of nature.[2] But he is clear in construing this quality as a capacity, "whether or not it is yet developed"; thus "infants and children are thought to have basic rights."[3] In the end, however, Rawls admits that "none of this is literally argument," that he has "not set out the premises from which this conclusion follows."[4]

Nozick has pressed these issues even further, raising subtle and disturbing questions about the foundations of moral rights as these may carry implications for our behavior toward nonhuman animals.[5] But while his considerations are many and diverse, he too sets forth no final argument. Instead, he conjectures that the answer to the question, what are rights based upon,

> . . . is connected with the elusive and difficult notion: the meaning of life. A person's shaping his life in accordance with some overall plan is his way of giving meaning to his life; only a being with the capacity to so shape his life can have or strive for meaningful life.[6]

But as Nozick is the first to grant, this conjecture gets us very little ways in answering the difficult questions.

I want now to draw some of this together in my own attempt to clarify the issue. The conclusions to be forthcoming will not, however, be advanced with anything like the surety that gives comfort. Questions about the rights of the mentally or physically defective, the dying, fetuses, animals, and all of the rest of nature are among the most profoundly difficult we have to face; even the terms in which we couch them--voluntariness, intention, meaning--are used uncertainly. Perhaps science will one day help us to better phrase these questions; at present we all too often have difficulty in even the ordinary cases.

Two preliminary points should be made. First, given that the theory being developed here aims at consistency it cannot, again, allow for the existence of conflicting rights. But the question before us--how far (in the

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[1] Ibid., pp. 505-6.

[2] Ibid., p. 512.

[3] Ibid., p. 509.

[4] Ibid.

[5] Nozick, Anarchy, State, and Utopia, pp. 35-51.

[6] Ibid., p. 50.

world) do the characteristics which give rise to rights extend--does not really involve the issue of consistency, as is often thought. Once the extension of the basis of rights is determined, that is, many "conflicts of rights" (e.g., between a mother and a fetus) can be shown to be spurious, for one of the claims will be unwarranted and hence the corresponding right will not exist. (Indeed, it is important to be clear on the question just because we want to avoid--or be able to work our way through--such apparent conflicts.) This point will be expanded upon when the rest of the theory is worked out. Which leads to the second preliminary remark: it should be remembered that at this stage we are still talking only about the generically described rights to flow from the PGC. What particular rights these may entail and what further rights their exercise may give rise to will be left for later.

Each of the above mentioned views locates important aspects of the question, to be sure. Only Gewirth, however, has given anything like a reasoned argument for settling upon the class of right-holders he appears to have settled upon (for again, his conclusion on the matter is less than certain.) But the intuitive difficulty with his argument is its disquieting limitation upon the extension of the class. Is it necessary for being a prospective purposive agent that one be able to act voluntarily and purposively, thereby (implicitly) making the claims that give rise to rights? What force should be given to the term "prospective"? (And don't some animals act purposively--I leave aside intentionally and voluntarily--in a way some humans do not? Indeed, at a certain stage of development or under certain circumstances human behavior appears to exhibit these qualities much less than the behavior of some animals.)

Now of course we can stipulate the limitations upon these central terms, and in the end we may have to; but we want them as much as possible to reflect the actual world, drawing lines where the lines of the world in fact are. (Only so will the picture drawn be "natural.") "Prospective" is a word with some factual content (so too with "voluntary" and "purposive"): it signifies a future possibility.[1] We have no difficulty understanding

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[1]The only warrant for this interpretation that I have been able to locate in Gewirth's works is in "CCE," p. 292, where he speaks of recipients as "potential" agents.

that a sleeping man is a prospective purposive agent. Is it any different with an infant, or a fetus? Or even with an apparently permanently incapacitated individual (they do on occasion recover)?

The question arises, however, just what the force of "prospective" is in these cases, just how this quality works. We can understand how it is that occurrent claims, by virtue of their grounds and the implications of those grounds, give rise to rights. And we can understand how even the implicit claims that Gewirth has shown to be integral to action do the same. But what is there about this "future possibility" that enables it to produce the same result? How is it that "prospective" can be fleshed out within the context of Gewirth's theory to give us something more substantive than the "capacity" that Rawls and Nozick invoke? Why, for example, can't we kill someone in his sleep (when presumably he isn't claiming) or take the property of a rich man that he'll never know has been taken (and hence never make a claim to)? What is the basis of the right that infanticide and abortion violate? Why are there rights, that is, in the apparent absence of at least implicit claims to that effect?

The answer, I expect, turns upon some complex notion of what it is to be a person, about which I want to say only a little. It is an unduly primitive conception of the person that has our rights depend upon our continually making claims, terminating with the termination of every discrete act of claiming. "Personality" exists over time and over different mental states. Moreover, our claims themselves range over time. I suggest, in fact, that the notion of implicitly claiming is much richer than may at first appear. Isn't the sleeping man, by his action of sleeping, implicitly claiming the right to be left alone? And doesn't the act of owning (which surely ranges over time) imply the continuous claim that others respect that ownership, whether or not the claim is occurrently being made? Perhaps this is what Nozick is getting at in conjecturing that at the bottom of rights is some such idea as "the meaning of life," or "a person's shaping his life in accordance with some overall plan." For only if the claiming that underpins rights is understood broadly enough will a person be able to achieve that continuity which is the very essence of shaping, of planning, of giving meaning. It is surely not inconsistent, indeed there is every reason to believe that it is required that claiming be understood as beginning from the beginning and as extending even

beyond the time that occurrent claiming is no longer possible.[1] Thus whether the claiming is explicit, or implicit in action, or even implicit by virtue of the latent ability of infants or fetuses or incapacitated individuals to act voluntarily or purposively, it is sufficient, I submit, to generate rights. The alternative is a conception of the person too primitive to be accurate--or interesting.

Now I am not unmindful that the conclusions I am here advancing would be better supported by a much fuller discussion of what it is to be a person, which is quite beyond my present scope. I do believe, however, that the above outline is in the right direction (and let us remember that the difficulties pertain to only a small class of "prospective" right-holders). All the same, it would be well to consider briefly a somewhat different resolution of the problem, one that appears to be consistent with the nonconsequentialist approach being taken here. It might be urged that the factual basis of rights be treated not absolutely but as a matter of degree. (Gewirth's mention of "varying degrees and different grounds" suggests this approach.) Thus while infants and fetuses have rights on this view, they are "weaker," owing to the relatively weaker grounds from which they are generated. If we get rights for infants and fetuses only by broadly understanding the claiming that is their base, perhaps we should treat that base as a continuum. There would thus be times when the relatively stronger claims of ordinary adults could override these weaker latent or even implicit claims. This resolution would of course allow for conflicting rights, except that here the adjudication of the conflict would turn not upon consequences but upon the relative strengths of the claims, as grounded in fact.

This approach raises a number of problems. Quite apart from its allowing for the generation of conflicts--albeit, soluble without reference to consequences--it sneaks in, through the <u>front</u> door as it were, a central difficulty of consequentialism: the problem of interpersonal comparisons of utility is now the problem of interpersonal comparisons of claiming-capacity. While this may appear to be a less recalcitrant basis for comparison, I suggest it is fraught with difficulties. (Is the capacity of a child to make claims greater than that of a sleeping adult? Surely the mother's mature

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[1] "Moderate lamentation is the right of the dead." Shakespeare <u>All's Well That Ends Well</u> 1.1.64.

claiming ability generates a stronger right than the immature ability of the fetus. But is this disparity offset by the differences in the objects claimed--life versus convenience?) Moreover, this approach tends to undermine the very idea of a right; for the conception of a right as a principled constraint on behavior, overridable only in extreme cases and then in ways that give recognition to the right (e.g., by providing compensation for the infringement), is now reduced to a matter of degree, not of kind. We could as well carry this approach all the way, allowing differences in the capacity for making even explicit claims to determine the ordering and existence of rights. I suggest, in short, that the realization that the grounds which generate rights may vary (along some dimensions) from person to person and from time to time within each person's life is not an argument for a conception of rights (as "weaker" and "stronger") that would tend to undermine the root idea itself. Rights are generated by minimally sufficient factors in the world which, when they are present, change the moral world by imposing constraints on the way people may behave.

The last kind of case mentioned earlier--the apparently permanently incapacitated individual (i.e., one who is altogether unable to act, either voluntarily or purposively)--is without question the most difficult. For if we take the need for a factual basis for rights seriously, and agree that Gewirth has located it, this kind of case stretches that basis to the limit. It is here, I believe, where the force of "prospective" is weakest, that we have to defer to a presumption: in the absence of the appropriate kind of certainty (the details of which may have to be determined ultimately on a case-by-case basis), the benefit of doubt rests with the incapacitated individual and against any would-be rights violator. And even when the presumption is overridden, we are not then free to do whatever we want with the individual: it may be that we are allowed only to "pull the plug." It is difficult, however, to press these issues in a general way, for cases of this sort vary greatly, turning heavily upon the particular circumstances surrounding them.[1]

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[1]These remarks suggest a possible solution to one of the excruciatingly difficult problems in medical ethics--what to do with fetuses (and perhaps newborns) known to be severely defective. Abortion (and perhaps even infanticide) would seem to be permissible if it is clearly known that the fetus (or newborn)

The examples in which "prospective" is determinative serve too to raise the point that there are occasions when the content of claims has to be gotten at "constructively," owing to the inability of the right-holder to himself make the claim explicitly. Thus in attempting to determine what the individual would claim were he able to do so, we construct the claim, much as implicit relationships are sometimes constructed in law:[1] not unexpectedly, this is one of the most difficult issues with which a theory of rights must contend. Further elaboration of the problem should therefore await a general discussion of interpretation. It should be noted here, however, that the need to so construct these claims is no objection to their existence, anymore than the need to flesh out a legal relationship is any objection to its existence. Thus two senses of "construct" must be distinguished: in one a relationship (or right) is "found," where none existed before; in the other the relationship (or right) is merely made explicit, or fleshed out. It is the second sense that is being noted here, for the content of the claim is to be distinguished from the grounds that give rise to it.

Turning now to the case of animals, the emphasis of the question seems to shift somewhat, from "prospective" to "voluntary" and "purposive." Whereas with humans the (at least prospective) existence of voluntariness and purposiveness is little in doubt (i.e., the force of "prospective" is determinative), with animals the question is whether these terms can be used at all in characterizing their behavior. I leave aside "voluntary" because the problems surrounding the use of this notion, even in the case of humans, are often not clear. That animal behavior is purposive, however, seems little in doubt. At the same time, we have to ask in this context what the nature of this purposiveness is. Is it the kind from which right-claims are implicitly generated, by the process of choosing among alternatives, for justifying reasons? Our present

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will never be a right-claiming and hence a right-bearing individual. There are cases, that is, in which the term "person" is dubiously applied. But again, the slippery slope must be avoided by a very strong presumption.

This is an example of how a theory based upon the way the world is may differ in its conclusions from one based upon more metaphysical doctrines.

[1] My use of "construct" here and following is not intended to reflect exactly its use in legal contexts.

understanding of the behavior of even the higher animals suggests not. It is almost certain, moreover, that the further steps of universalization and generalization are beyond the capacities of animals. Nor is it likely that "prospective" will be useful here, except in the context of evolution, which is too remote for the question at hand. The absence of these capacities, in short, does not seem to allow for anything like right-claims to be generated, and these claims are necessary for there being rights.[1]

No doubt all of this is implied in Rawls' criterion of having a capacity for being a moral personality. But whereas Rawls speaks simply of equal justice being "owed to those who have the capacity," of their being thereby "entitled to" equal justice, Gewirth has plumbed the depths of this quality, determining both its constitutive features and the manner in which these give rise to equal rights. In binding morality up with reason and working out the details of this relationship he appears to have given substance to this traditional ground for distinguishing moral creatures from nonmoral ones.

None of this is to argue, of course, that we may do anything we like to animals. Perhaps the constraints upon our behavior derive from the rights of others to be free from certain painful experiences, such as those that commonly occur when animals are tortured. But suppose these other sensitive individuals were simply isolated (in both mind and body) from those experiences, taken out of the laboratory, say: would we then be free to proceed with the torture? Don't the constraints have to arise, that is, from certain features of the animals themselves? Certainly animals have qualities that <u>simulate</u> the qualities in humans that give rise to rights. Is that simulation adequate to generate constraints in <u>us</u>? Suppose we were devoid of the appropriate sentiments: can it be shown <u>rationally</u> that we must act in certain ways toward animals, on pain of self-contradiction? Although these disturbing issues are beyond the scope of this essay, they are hardly beyond the concern of moral philosophy.

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[1] It would be tempting to add here that the behavior of animals toward other animals, both inter- and intraspecific, seldom exhibits qualities we would call moral ("altruistic" behavior toward offspring or social groupings is probably better explained as procreative or defensive and hence as "egoistic") and thus it is unlikely that animals have any conception of morality. ("Why respect the rights of animals if they can't respect the rights of each other?") The same could of course be said of humans.

4. Rights to What?

We move now from these preliminary interpretations to the central ones, to tracing out the world of rights and obligations the PGC implies. Gewirth's forthcoming book will undoubtedly treat this subject in considerable detail; the extant works, however, suggest only the general lines interpretation will follow.[1] In these writings Gewirth sketches the problem at two levels: the interpersonal, at which the most general rights and obligations directly implied by the PGC are discussed; and the sociopolitical, treating the rights, obligations, and differential roles defined by the rules constitutive of the institutions regulating social and political behavior. More specifically, Gewirth speaks of the PGC as directly implying two interpersonal generic rules prohibiting coercing and harming; and he argues that at the sociopolitical level the PGC prescribes second-order generic rules for making the first-order specific rules that determine institutional rights, obligations, and roles--thus at this level the PGC is "a *prima facie* rather than an absolute requirement for particular acts, in that any particular act must be in accord with the PGC unless the act is in accord with a specific rule which is itself in accord with the PGC."[2] The accord these specific or institutional rules must have with the PGC is of two main kinds, Gewirth adds:

> One kind is procedural: the process of making the rules must itself fulfill the PGC's requirements of mutual voluntariness and purposiveness. That is, the rules must be made with the consent of the persons subject to them, or must at least be agreed to by such persons; and they must be in the interests of these persons *qua* participants in the kind of system or institution regulated by these specific rules. The other kind of conformity of the specific rules to the PGC is instrumental: the rules must

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[1] For the fullest accounts see "CCE," pp. 292-93, 297ff., and "OPLM" generally. Cf. also "JEJ," pp. 338-41; "NMLO," pp. 294-95; "MR," pp. 6, 25-26; "IOPR," pp. 56-58.

[2] "CCE," p. 298. Cf. "OPLM," p. 74; "JEJ," p. 341. There is room for misunderstanding here. It may be asked: how can a particular act be in accord with a specific rule, itself in accord with the PGC, and not be in accord with the PGC? As is made clear in what follows above, the "accord" of specific rules with the PGC is not one of direct implication from PGC to specific rule (such that if A implies B and B implies C, C must be "in accord with" A); rather, the PGC prescribes second-order generic rules for making first-order specific rules. Thus the content of these specific rules--and hence the acts and rights they serve to justify--need not be directly implied by the PGC.

> be means toward fostering the kind of characteristics in persons and in associations or in society as a whole that the PGC itself directly involves, namely, freedom and beneficence. Insofar as specific rules are justified in either of these two ways, the different roles that the rules assign to different persons are themselves justified. . . .[1]

At least two formal questions are raised by this outline: why interpretation at two levels, and why through the medium of rules? Taking the second question first, the conception of interpretation that emerges from this account is one of (at least) two steps between three levels (principle, rule, and act or right): thus particular rights and actions are justified by appealing to rules, which are in turn justified by the PGC. In a somewhat different context, discussing the structure of rational moral argument, Gewirth has stated this explicitly:

> . . . the sequence one follows is highly important. For the whole idea of a rational morality is to evaluate the protagonists' contingent claims by reference to non-arbitrary, rationally justified criteria. Hence, the PGC must first be established on the basis of the necessary contents involved in the argument; secondly, in many cases at least, one must ascertain some specific moral rule which is justified by that principle. Once these steps have been taken, the particular contingent content of the agent's claim can be considered and evaluated in the light of the non-arbitrary principle and relevant rule. Adherence to this sequence, I suggest, permits a rational solution of moral disputes. . . .[2]

Nowhere, however, has Gewirth discussed just why this deductive model of interpretation proceeds through rules, rather than directly from principle to particular instance. I take it then that the reasons are practical, there being no reason in principle to preclude direct interpretation; in particular, rules seem to lend themselves better to specificity than principles (they have more that ring about them), they are more appropriately addressed to agents, and as such, they set the world of obligations, from which the world of correlative rights may be inferred.[3] (This is not to say, however, that interpretation need always specify the obligation first.) Again, at the sociopolitical level rules would seem to convert more easily into laws; at that level, moreover, where interpretation largely involves institutions, it would likely be quite cumbersome to proceed directly from principle to particular instance. When appropriate, then, I will follow Gewirth in this respect (though often

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[1] "CCE," p. 298.

[2] "CCC," p. 382.

[3] See Bentham's view on p. 96, n. 3 above.

with different substantive interpretations), trying thereby not to import any foreign elements into the system.

Concerning the first question above, it is less than clear why Gewirth treats interpretation at two levels, especially in view of his understanding of "institution": he uses this notion to refer to everything from pervasive social phenomena such as morality, law, and religion, to education, marriage, games, corporations, and even to such "practices" as buying and selling, slavery, and promising.[1] The common denominator here is that each is "a standardized arrangement whereby persons jointly pursue or participate in some purposive activity which is socially approved on the ground of its value for society."[2] Quite apart from the questions raised by this final proviso (how do we count prostitution? or gambling? or dueling?), this use of "institution" in conjunction with "sociopolitical" tends to blur the important differences (for both moral and political philosophy) between the merely social and the political realms, at least insofar as the latter is understood as coextensive with the public realm, strictly speaking.[3] On Gewirth's account, in fact, most of what we would want to call private interaction seems to be pushed into the public--or at least "institutional"--realm, for there appears to be very little in the way of human interaction that cannot in some way or other be fit under the rubric "institutional activity." (As examples of non-institutional behavior Gewirth gives the relationship between a gunman and his victim as well as the "circumstantial" interpersonal relationships directly implied by the PGC.) We should imagine then that the scope of application of the PGC at the interpersonal level is rather limited, that the PGC at this level serves more to regulate interpersonal "encounters," that most of its

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[1] See "OPLM" generally. Cf. in this regard John Rawls' discussion of "practices" in "Two Concepts of Rules," Philosophical Review 64 (January 1955): 3-32; also "Justice as Fairness," Philosophical Review 67 (April 1958): 164, n. 2, and 168, n. 5. I am unable to determine exactly the connection (if any) between Rawls' treatment of "practices" and Gewirth's discussion of institutions in "OPLM," though the differences in emphasis and purpose are clear.

[2] "OPLM," p. 56.

[3] The distinction between private and public is touched in n. 2, pp. 123-24 below, and discussed again in chapter 4.

applications take place indirectly, through institutions, at the sociopolitical level.

This is undoubtedly a fair picture of how the moral world actually works. In particular, most of our disputes are adjudicated and enforced through some institution or other. Gewirth's concern with conflicts, in fact, seems especially to underlie the two-level route he has taken to interpretation. For he wants in particular to show that the many forms of human association that inevitably involve the coercion and harming directly prohibited by the PGC (as, e.g., when judges sentence criminals, employers fire employees, umpires call batters out, or teachers give failing grades) can in fact be justified. By showing that the institutions regulating these conflicts are themselves justified by the PGC, he hopes to be able to do this. Thus for example the voluntariness criterion of the PGC is satisfied insofar as the rules of a particular institution are "at least agreed to" by those subject to them. This is an intriguing approach to the problem of interpretation, one we will look at more closely in the next chapter when we treat political institutions proper.

There are dangers in this approach, however, especially if the move to the sociopolitical level is made prematurely. For as I understand Gewirth's theory--and of course in traditional state-of-nature theory--the rights and obligations set forth by the rules implied by the PGC are held first and fundamentally by individuals tout court, not by individuals through institutions. No rights can arise institutionally, that is, except as they are grounded individually, for institutional legitimacy rests ultimately upon what individuals may do. As Nozick has put it with regard to the institution of the state:

> Moral philosophy sets the background for, and boundaries of, political philosophy. What persons may and may not do to one another limits what they may do through the apparatus of a state, or do to establish such an apparatus. The moral prohibitions it is permissible to enforce are the source of whatever legitimacy the state's fundamental coercive power has.[1]

Thus the importance of being quite clear as to the rights and obligations of individuals, even and especially in situations of conflict.

One might add that there are practical reasons as well for beginning interpretation from a state of nature.[2] In the first place, the "state of

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[1] Nozick, Anarchy, State, and Utopia, p. 6.

[2] For explanatory reasons see ibid., pp. 6-9.

nature" has often been more than a mere philosopher's posit. In all parts of the world at one time (we suppose) and in many parts at different times it has been the extant state of affairs, there being not even rudimentary institutions to which to turn to settle differences. (Of course, a moral settlement has not always been of paramount concern in these contexts.) Even today, in fact, there occasionally occur "lifeboat" or other such state-of-nature situations. And of course the world of international affairs has frequently been compared to a state of nature, with its nonexistent or often primitive "institutions" of adjudication and enforcement. If nations can be viewed as individuals in a state of nature, it is useful to know what their rights and obligations are, especially at the occasion of conflict. Moreover, even in a world of civilized institutions we can find ourselves faced with the problem of self-defense, a context similar in important respects to a state of nature; it is well to know here too just what our rights and obligations are, especially as we may be held accountable later for what we have done (or failed to do!) on such an occasion. Again, some disputes are too trivial to be settled through institutions, or they are disqualified on other grounds; yet they involve moral issues and require that we know what our rights and obligations are. Finally, proceeding prematurely to the institutional level may cause us to lose sight of the rights and obligations that define relationships at the interpersonal level. I shall argue somewhat later, in fact, that the institution of criminal punishment provides a good historical example of this, that the interposing of this social institution between criminal and victim contributed toward our having forgotten the rectificatory obligation present in the state of nature. Again, rights and obligations are grounded ultimately at the interpersonal, not the sociopolitical level.

Now strictly speaking there is nothing in Gewirth's outline of interpretation that would contradict any of this (nor is there anything to suggest that the developed theory will explicate the interpersonal level in great detail). But he has given us only a sketch, with passages which, for lack of detail, can be understood as allowing institutional rights and obligations to arise independently of the rights and obligations we all have at the interpersonal level.[1] Whether this will occur in the developed theory I cannot of

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[1]See, e.g., Gewirth's discussion of the application of his justice criterion in "OPLM," p. 73. But perhaps I am being too generous in the text; consider the possible implications of the instrumental conformity requirement in

course say; let the foregoing remarks be understood, then, less in the way of criticism than explanation of the reasons behind the discussion that follows.

This chapter will proceed, then, in the tradition of state-of-nature theory. We will be interested in determining, at least in broad outline, just what our rights and obligations are, not at the political but at the interpersonal level, as they would obtain in a state of nature, absent any political institutions. What discussion of social institutions there will be will take place in this chapter as well, for I will be treating these as the private associations or phenomena that they properly are, not as elements of whatever public realm there may come to be. This does not mean that examples will not be taken from law, and in particular from case law, for our ultimate goal is the ordinary world, especially as the disputes of that world might lend themselves to the (ideally) rational adjudication of the courts (as distinct from the often "willful" adjudication of the legislature).[1] Before we get to that world, however, we should know something about the moral order in an entirely private world, the world in which our rights first (theoretically) arise, a world in which relations and disputes are determined and enforced through private means, notwithstanding the considerable difficulties associated at times with such private adjudication and enforcement.[2] (Not unexpectedly, these difficulties will lead to the discussion of chapter 4.)

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the passage cited on pp. 118-19 above (especially as satisfaction of this requirement will be sufficient to justify the relevant institution, it being one of a disjunctive pair of requirements): do we have an instance of the application of this requirement in the egalitarian economic institutions mentioned in "IOPR," p. 58?

[1]Judicial reasoning as it might be is to be distinguished, of course, from judicial reasoning as it is. When I speak of "the (ideally) rational adjudication of the courts" I have in mind something like the process set forth in the passage cited on p. 119 above. For an apologia of judicial reasoning as it is--with good examples--see Edward H. Levi, An Introduction to Legal Reasoning (Chicago and London: University of Chicago Press, 1949).

[2]These distinctions between private and public, nonpolitical and political are of course themselves not without difficulty. For the purposes at hand let us just say that political (or state) powers of enforcement, if not of adjudication or arbitration, unlike similar nonpolitical powers, are those performed under a "generally recognized" claim to have a monopoly on their exercise within a given geographical area. See Nozick, Anarchy, State, and Utopia, pp. 22-25.

A measure of the difficulties involved in getting these distinctions clear can be gathered from the case of political parties: are these to be seen

4.1. Interpretation

How then do we go about ordering the vast array of issues with which a theory of rights must contend, from liberties, to land use, contracts, familial relations, rectification, punishment, procedural guarantees, and on and on? Given that rights are integral to human action, there is no human activity about which an adequate theory can have nothing to say, at least in principle, and often in fact. (Hence those who complain about the numbers and kinds of cases that make their way to the courts cannot base their objections upon there being no rights at issue, however justified their objections to the particular rights judicial interpretation often "discovers.") Clearly, however, it would be quite impossible here--or anywhere--to spell out every such detail; nor should we expect it to be the task of a philosophical or even a legal treatise to do so. At the same time we ought to try to develop a picture of some resolution of the kind of world an adequate theory would describe, one more comprehensive, integrated, and useful for further interpretation than would be provided by a mere catalogue of rights--e.g., life, liberty, assembly, speech. Particular rights such as these may be helpful from time to time by way of illustration, but they tend not to get at the generic issues with which interpretation must work, issues such as action, interference, harm, cause, initiation, consent, and so forth. It is in these terms that the broad picture must be drawn, for they will be involved in its every corner, unlike most of the rights named in typical lists.

Our aim at bottom, then, will be to show that the PGC, as the supreme principle of morality, contains the generic elements both necessary and sufficient to generate the more particular rights and obligations that constitute the picture. More specifically, interpretation will involve showing (a) what

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as public or private associations? If the latter (and I tend to think this the correct classification), then "private" and "nonpolitical" cannot be coextensive. In our ordinary world, in fact, there are numerous private organizations engaged in political activity. The purposes or functions of such organizations notwithstanding, they are correctly to be seen as private associations, I believe, because their formation and continuance (ordinarily) involves no state coercion. It is due to there being a public realm, however, that such activity (to affect that realm) by private persons or associations even arises; were there no such realm, that is, these taxonomic difficulties would not arise. In removing the public realm, then, our undertaking is thereby made easier and more orderly.

particular rights and obligations are ultimately implied by the PGC (or at least what kinds of rights and obligations), and (b) that the world they constitute satisfies the consistency requirements developed in chapter 2. It may be asked, however, why (b) is necessary if the PGC is itself internally consistent. Given that consistency, isn't interpretation simply a matter of straightforward deduction, from principle to particular exemplifications (or from principle to rules to particular rights and obligations)? Consistent premises cannot, after all, imply inconsistent conclusions.

These formal observations are of course correct. But they fail to comprehend the difficulty before us. The PGC, all the arguments that led to it, and those that will flow from it are indeed intended to constitute a deductive system. But that system in its entirety is constructed of terms more or less precise, more or less in need of specification. As these terms work their way into the system they are given or they come to realize that degree of specificity necessary to a more precise picture--the aim being, again, to have the lines they draw eventually reflect the actual lines in the world, which we will know best only when the picture is completed. But they enter the system at various places, and are given or take on additional force as the argument unfolds. (We saw this with terms like "purpose" and "prospective"; we will see it again with "transaction," "cause," "harm," and others.) There seems in fact no way to avoid or shorten this evolutionary process, given the nature and scope of the undertaking. (Recall, for example, the discussion in chapter 2, section 7 concerning the description of right-objects: in principle they can be described in an endless number of ways. Surely we should not expect the PGC <u>in itself</u> to overcome this problem.) Owing then to these difficulties, inherent in the development of any theory, the requirement set forth in (b) above should be seen as a check upon the straightforward deductions of (a). Only so can we hope to avoid the kind of proliferation of rights that could result from interpretation by (a) alone--and, as brought out in chapter 2, section 9, the attendant inconsistency. Thus by a sort of give (a) and take (b), as it were, we will be slowly filling in the parts of the picture.

In addition to these straightforward deductions and checks for consistency, however, we will be looking from time to time at other rights--those that may only appear to be implied by the PGC as well as those often

included in lists of human rights. The purpose of doing so will be to consider whether such rights are in fact justified and hence can be said to exist. Clearly, that they turn out not to be implied directly or indirectly by the PGC will not in itself disqualify them--they may be implied by other principles or rules themselves consistent with, though otherwise unrelated to the PGC. In order to show that a right does not exist, that is, it is not enough to show that it is not implied by the PGC; we must show that it is inconsistent with rights that are implied by the PGC and hence do exist. If this can be shown, then, in ways developed in chapter 2, section 9, and these rights are not implied by first-order specific rules themselves in accord with the PGC,[1] they cannot then be justified, even though implied by other principles or rules unrelated to the PGC, for as we saw earlier, the PGC is itself the supreme principle of morality.

As a general rule, however, it will be best not to work backward, from right to principle, as there is no end to that process. A picture of the desired sort can hope to be developed only by moving in the other direction. In order to avoid error, moreover, it will be well to proceed in small steps, keeping a tight rein on the tools of interpretation (which are yet to be developed). Accordingly, I will begin the task of interpretation by positing a morally neutral state of affairs in the world which I will call the "status quo of noninterference among rational and competent adult individuals," or "status quo" for short (of which more below). This will be a simplification of the (already simple) state of nature. The function this status quo will serve is that of a spatio-temporal starting point from which we can begin to examine the implications of the PGC; in particular, it will help us to determine what changes in the world are prohibited, permitted, or required by the PGC.

The status quo should help us as well with difficulties arising from the description problem: the right to free speech, for example, is an instance of, and thus more narrow than, the right to be free; but it is more broad than, say, the right to speak freely on one's own property, or the right to speak freely on someone else's property when he has given you permission. Clearly, right-objects must be couched in general terms; but contextual

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[1] See the text at n. 2, p. 118 above.

factors will often determine the degree of specificity necessary to adequately characterize a right. Interpretation involves in the first place, let us remember, the fitting of specific rights under generic descriptions; but those specific rights come with varying amounts of contextual baggage which may or may not enter into their descriptions. Hence the fit will depend not simply upon whether they are implied by the PGC but upon whether in their context (i.e., as described) they are. Rather than begin interpretation by leaping into the world as it is, then, or even into the state of nature, only to find ourselves enmeshed in a multitude of complex relationships, the status quo will serve as a simple context, to which more can be added as the argument unfolds. In proceeding in this slow but careful way the aim is to give some order to the undertaking.

4.2. The status quo

The basic idea behind the status quo, again, is that of having a morally neutral starting point, a state of affairs in which the "moral slate" has been wiped clean, so to speak, leaving no claims left over from the past. As has been shown most recently by Nozick, justice is historical: whether a given state of affairs is just depends upon how it came into being. Presumably, then, we go to the beginning and work our way forward if we want to determine whether a particular time-slice is just. Short of that herculean undertaking we settle for an "appropriate" beginning, something approximating a clean moral slate. (Court settlements, or decisive wars can sometimes serve this function, or a period of tranquility will often do.[1]) But all of this

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[1]The variety of starting points--as found in everything from the (traditional) mother's question "Who hit whom first?" to the adjudication of international disputes--is almost endless, as are the questions surrounding this moral phenomenon. When is the slate wiped clean? Is it ever? What is it that time does? Does it right wrongs, or merely make them fade away? When do old claims cease to be justified? Are statutes of limitation merely practical? How do illegitimate regimes "come to be" legitimate? (Notice the difference in difficulty between this and the question "How do legitimate regimes come to be illegitimate?") Can the Palestinians go back twenty-five and more years? (To what?) Or American Indians two hundred years? Or the Israelis two thousand? In view of the importance of starting points to the adjudication of all kinds of disputes one would like to see greater discussion of their parameters than is generally to be found.

assumes that we have the moral machinery before us, and we don't--we have the supreme principle of morality only. Because our primary purpose here is the development of this machinery--which has to take place against some background--the heuristic value of a starting point is rather more fundamental than would be the case were adjudication by known rules our only concern. Thus we will make the status quo an ideal starting point, one free of historical complications of all kinds: the complexities of the real world can be brought back in--and made more perspicuous for having been eliminated at the outset--once the basic moral picture is more clearly in view.

If the slate is to be wiped clean entirely, then, there can be no special relationships in this status quo, no interpersonal claims based upon prior transactions or interactions. There may of course be claims in the present and future, the determination of which will be our first concern; but in the beginning these will relate only to general relationships between otherwise unrelated individuals, not to special relationships created by or arising from historical events.[1] It is thus a status quo of individuals as such, not individuals under any special descriptions. It would be well, moreover, to make these individuals rational and fully competent adults, thereby eliminating any special dependencies or other problems that may arise in this regard. In sum, the status quo is a world of rational and competent adults with no special claims upon each other.

Each individual in this status quo has his full complement of rights, whatever they might be, all of which are, ex hypothesi, nonconflicting. (It will be shown below that these rights do not conflict.) In calling this a status quo of noninterference I assume that interference can occur only when individuals act. In order to get clear about this assumption--and better determine the conditions under which interference occurs--let us start with no individual action.[2] (Thus the status quo is both a temporal and a spatial

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[1] My use here of "general" and "special" relationships follows Hart's in "Are There Any Natural Rights?" pp. 183ff.

[2] In saying that the individuals in the status quo do not act in the beginning I do not mean to deny the point brought out in chap. 1, sec. 5, that we are (almost) always performing many actions. Rather, I intend these individuals to be not acting in the common sense understanding of that description: let them be standing motionless at some spot on the earth.

starting point.) In the beginning, moreover, let there be no holdings or other property rights; for although these could arise without reference to special relationships (e.g., by original acquisition), they would at least presuppose action of some sort.

The status quo is now complete. I am not unmindful that this is a highly artificial picture; in particular, we do not come into the world as rational adults, unrelated to others by historical events. Nevertheless, for explanatory purposes the aim has been to simplify the world to a model just rich enough to allow interpretation of the PGC to begin. A world of no relationships would be too lean--it would contain one person at most. A world of more than one person will allow for both general and special relationships, which exhausts the category. But special relationships are more complex than general ones, owing their existence as they do to historical events; moreover, these events occur in the more fundamental world of general relationships, in terms of which they must be explained. Hence we will start with a world of general relationships only.

Let me sketch briefly the course the discussion will follow. We need first to be clear about what the PGC in fact says; this question will be addressed over the next two sections where the broad picture implied by the PGC will be drawn. It is here that the most basic rights and obligations it implies will be set forth. We will then develop the picture in greater detail by determining the various forms these rights and obligations take at the level of general relationships. Rights at this level include what I will call "passive rights," or roughly, rights to be left alone, and "active rights," or rights of action. The discussion will go back and forth between these two kinds of rights and between these and property rights (which have their origins in and therefore depend ultimately upon the exercise of our active rights), for all three kinds are related to each other in complex ways, making difficult a consideration of one without the other two. We will move then from general to special relationships, first as they arise in the form of nonconsensual or forced exchanges, then as they arise in their various consensual forms. The status quo is thus a starting point only: we will be moving away from it, in short steps, to an increasingly recognizable world. At last, then, we are ready to begin the difficult task of interpretation.

4.3. The PGC and freedom

It was noted earlier that Gewirth's descriptions of the basic rights to flow from the PGC have varied from paper to paper.[1] While these variations share certain central and important similarities, their differences are not insignificant, contributing as they do to the problem of interpretation. If the right not to be harmed, for example, is described also as the right to basic well-being or welfare, is the correlative obligation one of not harming or one of assisting, i.e., is it a negative or a positive obligation, a prohibited or a required action? There is a difference here, as was demonstrated in chapter 1, with important implications for the other basic right, to freedom. As we shall see, Gewirth is on both sides of the question,[2] not least because he seems not to be clear about the relationship between the two basic rights he has shown to exist, which in turn is due to an apparent failure to grasp the fundamental nature of the PGC itself. I want to look into this last point first by sketching the broad though basic outline of the PGC, after which I will consider some aspects of the relationship between the basic rights it implies.

The PGC is addressed to every agent as follows: apply to your recipient the same generic features of action that you apply to yourself. Now the first and most fundamental thing to be noticed is that the PGC does not require anyone to do anything. It is addressed to agents; but it does not require anyone to be an agent. Thus an individual in the status quo would not violate the PGC if he simply did nothing.[3] Moreover, even if he did act, the PGC is addressed to him only insofar as there is a recipient of his action. Acting in a way that involves no recipient would not violate the PGC. Thus of the three basic pos-

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[1] See p. 102, n. 1, and the text which follows above.

[2] For arguments limited to negative obligations see "CCE," p. 292; "JEJ," pp. 338-39; "NMLO," pp. 294-95; and "NSA," pp. 253-54. For arguments including positive obligations see "OPLM," pp. 71-72; "MR," pp. 6, 30; and "IOPR," pp. 57-58.

[3] See p. 128, n.2 above. Again, I intend here the common sense notion of "doing nothing" (without which the better part of our law would be a theoretical shambles). A more precise formulation would be: an individual in the status quo would not violate the PGC if he did nothing other than what he was already doing.

sibilities relevant to the PGC--not acting, acting with no recipient, and acting with a recipient--it is only in the last case that the PGC comes into play.[1]

The force of these observations for the question of freedom is this: if the PGC applies to an individual only insofar as his actions involve recipients, then he is free to act otherwise or to not act at all; which is to say, he is under no obligation not to do so. Moreover, if anyone wishes to act upon him, it is he (that actor) who is under the burden of the PGC. Thus the burden of obligation is upon those whose actions involve recipients, and upon them only. All others are free to do as they please.

At this stage of the argument, then, I want to secure the following fundamental point: the PGC, both indirectly and directly, is a principle of freedom. Indirectly, it is a permissive principle in the sense that it allows that about which it says nothing--not acting, and acting with no recipient; in no respect, that is, does it prohibit these. Directly, and more importantly, by placing the burden of obligation upon those whose actions have recipients, or are about to do so, the PGC implicitly sanctions the state of noninterference that precedes these actions: by virtue of the voluntariness criterion, which requires that agents secure the consent of their recipients before involving them in transactions, it says that in the absence of that consent the status quo of noninterference must be respected. In short, the obligation not to interfere with others without their consent entails the correlative right not to be interfered with. We may conclude here, then, that the most basic right secured by the PGC--for it is logically prior to all other rights and generically most fundamental--is the right to noninterference, which may be variously described as the right to be free from the interference of others, the right not to be acted upon, the right to be left alone, and so forth. I take this, in fact, to be the most basic element in our traditional concept of individual freedom.

So fundamentally important and far-reaching are these early findings--

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[1]Strictly speaking, of course, the PGC always applies, even when we are not acting or acting with no recipient, for it directs our behavior as it might involve a recipient. The point I am making here and below, however, is that it just doesn't come up in these two cases, for there is no reason it should, there being no recipient. In such circumstances, that is, we cannot fail to satisfy the obligations the PGC sets for us.

for they apply to the whole world of general relationships--that we shall have to explore them at much greater length when we treat those relationships. It should be clear from this explication, however, that an important part of interpreting the PGC will involve determining when there are and when there are not recipients, when actions do and when they do not involve others, and when that involvement is sufficient to constitute interference--for as we will see later, not every involuntary "involvement" can or should be seen as a violation of one's right to noninterference. It is impossible, of course, to set all of this out at once. Nevertheless, the broad outline should be emphasized: the world of action divides into not acting, acting with no recipient, and acting with a recipient--the PGC controlling the last case only--however fuzzy the lines between these broad categories may be. Indeed, it will be part of our business to try to sharpen those lines. Before beginning that, however, we should look briefly into the relationship between the right to noninterference, which we have determined to be the most basic of rights, and the two rights Gewirth finds most basic.

Gewirth argues that freedom and basic well-being are the rights directly implied by the PGC; this he infers from its mention of the generic features of action, voluntariness and purposiveness respectively. Now whether and how these right-objects are related to the right to noninterference will depend, to be sure, upon how they are understood and what they entail, especially in the way of correlative obligations. (Freedom and well-being in conjunction, after all, could bring us very quickly to the third of Roosevelt's famous four freedoms--freedom from want.) There is a large subjective element in "freedom," as was brought out in chapter 1; a fortiori there is in "basic well-being." The right to noninterference, on the other hand, is somewhat more solid, conforming as it does to the suggestion set out in chapter 2, section 7 to have the description of right-objects refer to the actions of obligation-holders.

If we take the minimum interpretation Gewirth has given these rights, however, there is clearly a substantial affinity between them and the right to noninterference. In their minimal forms, he argues, the rules directly implied by the PGC are "Do not coerce" and "Do not harm," which of course imply obligations not to coerce or harm others and hence rights against being coerced or harmed by others. Now to involuntarily involve another in a transaction just is to coerce him (and insofar as coercion is seen as a harm, it is to harm him

as well.) This in fact is Gewirth's understanding of coercion, for he states the rule as follows: "In acting toward a recipient do not coerce him, that is, do not make him participate in the interaction with you against his will, or involuntarily, or without his consent."[1] Although this formulation is not exactly like the explication above (and indeed, Gewirth does not follow his rule, as we will see below), it amounts to the same thing, to saying that the right to freedom, or against coercion, is equivalent to the right to noninterference; for it requires either that you do not transact (and therefore do not interfere) with a person at all, or if you do, that you do it in such a way (i.e., with his consent) that it is not an interference.

A question arises concerning the second rule, however, quite apart from the notorious subjectivity surrounding the term "harm." Gewirth sets the rule out as follows: "In acting toward a recipient do not frustrate his purposes, that is, do not diminish or remove something that seems to him to be some good of his."[2] This is very broad language, to be sure. That difficulty aside, however, the rule tells us <u>how</u> to act toward a recipient--or better, how not to act--in the sense that the <u>content</u> of that action must be nonmaleficent. But why should this question even come up? For the PGC, in virtue of its rule against coercion, tells us in the first place <u>not</u> to act upon a recipient without his consent, a consideration logically prior to the question of <u>how</u> we should act toward him. Once the recipient does consent, however, we presumably <u>know</u> how to act, we know what the content of our act should be, for he has consented (or he hasn't) to whatever it is we may have proposed. Indeed, Gewirth himself recognizes this when he says, in response to a related objection, that "so long as a recipient participates freely in a transaction the question of what is harmful or beneficial to him should be determined by himself, in accordance with his own purposes."[3]

Quite apart then from the well-known difficulties involved in determining what is or is not harmful for others, there is an important sense in which the rule against harming is redundant; for the logically prior rule

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[1] "CCE," p. 292. [2] Ibid.

[3] "NMLO," p. 294. Cf. also "OPLM," p. 73: " . . . there is no conflict between what men freely choose to do and their interests or welfare, except insofar as the latter may involve means to what men want rather than the wants themselves as ends."

against coercing, with its consent requirement, obviates the need for this second rule--at least within our status quo, where individuals are rational and competent adults. In the real world, however, this conclusion of redundancy should not be pressed, for there will be occasions when we will want to defer to the second rule, a point Gewirth only adumbrates.[1] In particular, the rule against coercing is sufficient for the ordinary cases; but the rule against harming is required in the anomalous cases, when consent is not fully possible--as in emergencies, or with relevantly incapacitated individuals, including children not our own.[2] It is required so that we can both allow for interference and yet control the content of that interference. Unless we want to prohibit all interference, that is, even in emergencies and when "benevolent," the rule against harming is needed as a control. But the difficulties here are immense, the possibility for opening a Pandora's Box very real.[3] For

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[1] "NMLO," p. 294.

[2] Rules regulating our behavior toward our own children come under the category of special relationships.

[3] It is an unduly rigorous (and even perverse) deontology that prohibits all unconsented to interference, even in emergency situations. Quite apart from requiring Good Samaritan interference--and this theory will not--we should at least permit it when consent is not possible. At the same time, such interference should be controlled, for the incompetent Good Samaritan, no less than anyone else, should be held responsible for the consequences of his actions.

This last consideration, in fact, points to one of the more important consequentialist reasons for not requiring Good Samaritan obligations: to require behavior at a certain level of competency and impose liability for failure to meet that standard is objectionable on any number of grounds; likewise, to require behavior and grant immunity from liability is equally objectionable. So even on consequentialist grounds it is best not to have Good Samaritan obligations at all. For a discussion of some of these problems see James M. Ratcliffe, ed., The Good Samaritan and the Law (Garden City, N.Y.: Doubleday, 1966). For an analysis of the underpinnings of the common law's refusal to impose Good Samaritan duties see Richard A. Epstein, "A Theory of Strict Liability," Journal of Legal Studies 2 (1973): 189-204; also Fitzgerald, "Acting and Refraining," pp. 138-39.

It is of course a different and often very difficult question just when consent is not possible and hence when benevolent interference may be permissible. The problem of so-called "informed consent" as it affects medical practice (and malpractice) generally and the problem of consent in psychiatric care in particular are relevant here. On the former see Richard A. Epstein, "Medical Malpractice: The Case for Contract," American Bar Foundation Research Journal, 1976, no. 1, pp. 119-28. On the latter, and for horrendous examples of the

purposes of application to the ordinary world, then, these two rules should be seen as related by priority, for that is their logical relationship: thus the rule against coercing controls, unless special circumstances make its application impossible, in which case the rule against harming controls.

The point I want to secure for present purposes, however, is this: in that Gewirth's two basic rules (in these minimal forms) direct our behavior only as it involves recipients--and this they explicitly do--they say nothing to us when we have no recipients, leaving us free on those occasions to do as we please; thus the rights they entail for everyone, agents and recipients alike, are tantamount to the right to noninterference--indeed, the rule against coercion clearly implies this. How we choose to label these rights, then, is perhaps a matter of preference: I prefer to speak of the right to noninterference as the most basic right implied by the PGC--treating the rights against being coerced or harmed as manifestations of this right--because I believe it gets the emphasis right, establishing clearly the presumption against interference and for freedom. In any event, we have made explicit here the fundamental feature that is only implicit in the PGC, a feature that Gewirth, as we are about to see, has failed to appreciate.

4.4. Welfare, causality, and consistency

Although these early findings may be thought clear enough to allow the argument to proceed to general relationships, confusions rooted in the metaphysical underpinnings of the PGC can and do arise; they have led Gewirth, in fact, to opposite, indeed, to contradictory findings about the moral order, not unlike many others working with similar principles.[1] In particular, Gewirth

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abuses that can accompany such interference ("for the 'patient's' own good"), see Thomas S. Szasz, Psychiatric Justice (New York: Macmillan, 1965). Owing to this possibility for abuse, the priority relationship between Gewirth's two rules (mentioned in the text immediately following above) should be seen as establishing a strong presumption against "benevolent" interference; this, coupled with liability for the harmful consequences of such interference, should help to minimize abuses. Such a presumption implies, of course, a preference for natural harm over man-made harm, for that will be the likely balance--and I believe the correct one.

[1] Cf., e.g., Rawls, A Theory of Justice, pp. 60ff.; Charles Fried, Right and Wrong (Cambridge: Harvard University Press, 1978), chap. 5.

has argued that in something like our status quo the PGC at times does prohibit not acting, requiring instead positive actions of specific kinds, a conclusion involving the relationship between his two basic rights, but rooted ultimately, though implicitly, in a very dubious theory of causality. Typical cases, he believes, are those involving forms of rescue or welfare (which might be characterized as rescue over time), requiring so-called "Good Samaritan" obligations; but the variations capable of being built upon these paradigm cases are almost endless.[1]

I am going to give several arguments against this conclusion--in addition to the most basic, straightforward ones presented above--any one of which should be sufficient; the cumulative effect, I trust, will be overwhelming. Perhaps I should note some reasons, however, for directing so much attention to this issue. It has already been mentioned that the welfare model is a paradigm capable of generating endless variations; if the paradigm can be shown to be specious--i.e., if it can be shown that there are no rights to welfare--the same will be true of these variations insofar as they depend upon the same principles. This model, moreover, has certain basic features that make it theoretically interesting. It is not uncommon for political philosophers, for example, to speak of two "kinds" of rights--the traditional rights to liberty and the more modern social and economic rights; insofar as the latter are variations upon the welfare-rights paradigm it is well to know how they fit with the traditional rights, if indeed they do. Again, the objects of welfare rights are generically different from those of traditional rights; they are rights to things, or at least to assistance, not simply to liberty or noninterference.[2] As such, their correlative obligations, entailing positive actions, are altogether distinct from the obligations correlative to traditional rights, which entail only negative actions; the welfare model, that is, involves stepping over a certain natural line separating negative and positive actions. My aim will be to show, for the many reasons that follow, that that line should not

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[1]Cf. "IOPR," p. 58; also "OPLM," p. 71: "The 'duty to rescue' is an obvious example of this, but there are also many other such cases in a mass society of interdependent persons."

[2]See Maurice Cranston, "Human Rights: A Reply to Professor Raphael," in Raphael, Political Theory and the Rights of Man, p. 96.

be overstepped in the name of obligations. If I am able to do so, then the case against welfare rights will have been made in the most basic terms possible; for there are no terms accurately characterizing the obligations correlative to all rights that are more basic and all-encompassing than action and nonaction.

In order not to be misunderstood and thought obdurate, if not worse, I should probably at this point make clear in very simple terms what I will and will not be arguing. I will not be saying that individuals ought not to assist others. Nor will I argue, except later, that they ought to. Rather, I will be saying that these cases do not involve moral obligations, that indeed, were there to be Good Samaritan obligations we would have contradictions at the heart of our theory, as I will demonstrate below. But I do distinguish between "obligation" and "ought": one can say with perfect consistency that one has no obligation to help others and yet that one ought to do so, a distinction I will develop briefly toward the end of this section. If there are no Good Samaritan obligations, then, there are of course no correlative rights to rescue, welfare, etc. These findings, as refinements of those in the last section, are likewise far-reaching.

Now Gewirth begins his argument for positive general obligations by locating what he calls the impartiality requirement of the PGC. He claims that the PGC

> . . . says to every agent that just as, in acting, he necessarily applies to himself and claims as rights for himself the generic features of action, voluntariness or freedom and purposiveness at least in the sense of basic well-being, so he ought to apply these same generic features to all the recipients of his actions by allowing them also to have freedom and basic well-being and hence by refraining from coercing them or inflicting basic harm on them. This means that the agent ought to be impartial as between himself and other persons when the latter's freedom and basic well-being are at stake. . . .[1] (Emphasis added.)

The equivocation here, indicated by the added emphasis, is instructive. Gewirth has moved from obligations that are owed to one's recipients to obligations that are owed in general, to other persons, persons not necessarily one's recipients. This in itself is of course unexceptional, for the obligations implied by the PGC are owed to everyone; it's just that they don't come up unless a transaction

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[1] "IOPR," p. 57; cf. also "JEJ," p. 340; "MR," p. 26; "OPLM," p. 68.

is imminent or threatened[1]--or, unless some kind of transaction is to be required. We get an indication that this last will be coming in the qualification Gewirth places upon this class of "other persons": the agent ought to be impartial, he says, when these others' "freedom and basic well-being are at stake." Notice the shift here, for it is important: the freedom and well-being of the agent's recipients are at stake because of his impending action; this connection is dropped, however, when Gewirth switches to talking about other persons, for their freedom and well-being need be at stake only simpliciter, not because of any impending action of the agent. Thus on this extended view we must be impartial as between ourselves and other persons not only when these others are the recipients of our action, but also when it is simply the case that their freedom and basic well-being are at stake, whether owing to natural causes, to the actions of others, or perhaps even to their own actions. In short, the agent causality requirement, explicitly a part of the PGC (by virtue of the word "recipient"), has been severed.[2]

There is clearly no warrant for this extension of the PGC, for as was brought out in the last section, the PGC is a principle of freedom, not of beneficence. A principle that requires us to be impartial as between ourselves and others--when by our actions we are not even involved with these others--is hardly a principle of freedom.

Not unexpectedly, then, Gewirth goes on from this impartiality requirement to complete the argument:

> Given the PGC, there directly follows the negative duty not to inflict serious gratuitous harm on other persons. There also directly follows the positive duty to perform such actions as rescuing drowning persons or feeding starving persons, especially when this can be done at relatively little cost to oneself. For the PGC prohibits inflicting basic harms on other persons; but to refrain from performing such actions as rescuing and feeding in the circumstances described would be to inflict basic harms on the persons in need and would hence violate the impartiality required by the PGC. It would mean that while the agent participates in the situation voluntarily and with basic well-being, not to mention his other purposes, he prevents his recipient from doing so. Although there is indeed a distinction between

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[1] See p. 131, n. 1 above.

[2] For a discussion, not always correct, of agent causality, especially as it involves causal relevance problems, see Joel Feinberg, "Sua Culpa," in Doing and Deserving (Princeton: University Press, 1970), especially pp. 195-211.

> causing a basic harm to occur and merely permitting it to occur by one's inaction, such intentional inaction in the described circumstances is itself an action that interferes with the basic well-being of the person in need. For it prevents, by means under the agent's control and with his knowledge, the occurrence of transactions which would remove the basic harms in question.[1]

There is much that is wrong in this passage, its prima facie or commonsense appeal notwithstanding. Notice first the cost factor: "at relatively little cost to oneself." How did a cost-benefit analysis work its way into this heretofore nonconsequentialist argument? The effect, of course, is to have rights related by degree to costs: our rights to welfare "exist" insofar and only insofar as their costs are not too dear! Or is it rather that they go on existing even when we can't afford to recognize them? In any event, the existence of these rights is hardly secured in good deontological fashion. Indeed, the very concept of a right is undermined by this inclusion of cost considerations.[2] But if we are going to have such rights, and hence their correlative positive obligations, how can we not include the cost factor? Just so, which is one good reason not to have them. It is well to distinguish, again, between beneficence and obligation, the better not to undermine either.

I want to concentrate, however, on the theory of causality implicit in this passage. The importance of the impartiality requirement, as Gewirth understands it, should now be clear. For the harm he is speaking of above, at least in the beginning, does not derive from anything the agent has done or is about to do: "other persons" are drowning or starving for reasons, ex hypothesi, unrelated to the agent. He is not the cause of their plight. As we saw above, however, Gewirth thinks that the agent must nevertheless be impartial as between himself and these others: hence the positive obligation to assist.

Now this impartiality argument alone is a weak and easily defeasible foundation for positive obligations, as has already been demonstrated. Thus it is that Gewirth goes on to try to show that to fail to assist would be to directly violate the PGC by causing harm to these others. There are several variations of this argument in the passage: to refrain would be to inflict basic harms; the agent prevents his recipient from participating in the situation, he

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[1] "IOPR," pp. 57-58. Cf. also "OPLM," pp. 71-72.

[2] See p. 115 above for a variation of this point.

interferes with those in need, he prevents the occurrence of transactions--all, mind you, by doing nothing! The language of causality is being used here very loosely, to be sure.[1] To refrain is hardly to inflict; nor is it to prevent or to interfere. These last three are active, not passive verbs: in the absence of any special relationships we inflict, prevent, and interfere by acting, not by refraining.[2] Indeed, on Gewirth's analysis there appears to be no end to the harm for which we may be held responsible. Or does he intend the "in the circumstances described" clause to break the connection? This is a slim--and slippery--reed on which to rest our plea of not guilty. Gewirth adds that the agent "participates in the situation." Is that what he does? "Participate" is again an active verb. Is the agent's mere presence to be construed as "participation"? If so, a door to disquieting conclusions is wide open.[3]

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[1] An appeal to ordinary usage, moreover, would be of doubtful value, for the "ordinary" use of causal language is less than reliable, especially as cases become more difficult or out of the ordinary. The analysis to be developed here, in fact, will if anything seek to constrict the range of causal explanations as these involve human agents, which is contrary to what I take to be the human tendency--no doubt a manifestation of deep-rooted animistic views--to go the other way, to involve others as causal agents when more innocent explanations would better serve.

[2] I include this proviso regarding special relationships because of the peculiar problem of "cessations." Later I will argue that the assertion in the text holds even in the case of special relationships--except when the not doing is a cessation, and hence a kind of action.

[3] To get a glimpse of those conclusions we need go no further than Gewirth in "OPLM," p. 71, n. 12. There he approvingly quotes A. Tunc, "The Volunteer and the Good Samaritan," in Ratcliffe, The Good Samaritan and the Law, pp. 45-46: "From a philosophical point of view, it does not appear possible to distinguish between the man who does something and the man who allows something to be done, when he can interfere. Such a distinction would disregard the liberty of man, his freedom of choice, his creative power, his 'engagement' in the world and among other men. A stone does not bear any liability if a murder is committed beside it; a man does. By his decision not to interfere or to intervene, he participates in the murder [emphasis added]." Although Gewirth softens this conclusion slightly by noting that there are cost and circumstantial factors to be considered, these qualifications are raised simply by way of distinguishing the morally obligatory from the supererogatory. See also Singer, "Negative and Positive Duties," p. 101: "If you are suddenly stricken ill, and I can easily save your life by handing you a pill and a glass of water, or by giving you an injection with a near-by hypodermic needle, and I fail or refuse to do so, I am morally as responsible for your death as I would be if I had deliberately given you poison [emphasis added]."

Moreover, even if we give Gewirth his point about participation (and I do not), it hardly follows that the agent, by doing nothing else, prevents his recipient from participating--not, that is, without stretching the word "prevent" out of all recognition. (Gewirth's subsequent use of "prevent" will be treated below.)[1]

Before continuing with the rest of the passage, however, I want to press this question of the causal efficacy of not doings. For if not doings can cause coercion and harm, they would seem to be proscribed by the PGC. The PGC's two basic rules would then entail both the proposition "Do not act such that your action will coerce or harm others" and the proposition "Do not fail to act in a way such that your failure will coerce or harm others." In short, the PGC would not simply proscribe; it would prescribe as well. Now to be sure, positive actions are causally efficacious: they rearrange the world, which rearrangements are their effects. The question I am raising about the entailments of the PGC, however, concerns negative actions (and, in the context developed in the last section, positive actions the effects of which are causally unrelated to the effects at issue[2]). Are these causally efficacious (and if so, in the requisite way)? Do we or can we coerce or harm when we don't act (or when we act in a way causally unrelated to the harm or putative coercion at issue[3])?

It is at this point, as we attempt to answer these questions, that the status quo finds its most important use.[4] For these are questions about cau-

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[1]See also "OPLM," p. 72, n. 13: " . . . when one is able to prevent harm to other persons and is aware of this, to refrain from harming them requires that one prevent that harm." It follows, then, that if one does not prevent that harm, one does not refrain from harming them, i.e., one harms them--which is absurd! This analysis utterly ignores the source of the harm; or worse, it shifts the source of the harm from whatever it might be to the bystander!

[2]These positive actions should be distinguished from both negative actions and other positive actions that are causally efficacious in the requisite way. I mention them here--though I do not discuss them until the next section--because they are part of the immediate broad entailments of the PGC, as brought out in the last section.

[3]I say "putative" because, unlike with harm, coercion can be caused ultimately only by human agents--guns, fences, etc., coerce only by having agents somewhere behind them; thus if the answer to this question is negative, there may in fact be no coercion.

[4]See chap. 1, sec. 5 for the background for the causal arguments that follow. The analysis presented here is meant to apply to the context of the

sality and hence about changes over time. The status quo, let us recall, is a spatio-temporal starting point, absent any special relationships, with no action at first; hence there is ex hypothesi no interference and therefore there are no right-violations. (This is not a substantive conclusion, but a mere description of the starting point.) How then do violations come about? And what are their causal roots? A necessary condition is for coercion or harm to come about. Since ex hypothesi these do not obtain in the beginning, they can come about only through some change in the status quo. (This is not to say, of course, that a change in the status quo necessarily involves coercion or harm, but only that for these to occur a change must occur.) Now changes may occur of a natural sort which may cause harm (though not coercion): floods, famine, pestilence and the like can debilitate the individuals in the status quo. Less dramatically, gradual changes--such as onsetting hunger--may occur to bring about this same effect. And of course when individuals begin to act these actions are themselves changes, which may produce both harm and coercion. But not doings are not changes. They cannot therefore cause changes, for there is nothing about them--no change about them--that could possibly serve to make of them causal events--they are causally inefficacious. Hence they cannot cause coercion and harm, nor can they violate rights against being coerced or harmed. (On the contrary, were not doings not allowed, these rights would be violated, as should be clear from the last section and is to be spelled out more fully below.) In the status quo, then, the PGC does not prescribe, it only proscribes; it does not require actions, it only prohibits actions of a certain kind, viz., those that coerce or harm others. For in order to show a violation of the PGC it is necessary to establish a causal relationship; in the case of not doings that relationship cannot be established.[1]

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status quo and to the general relationships that obtain in and develop from it only. It can be extended to the world of special relationships, however, and it will be when they enter the discussion, but only in a more complex version, which will be developed when the need arises. Thus questions that would relate to this richer context should be held in abeyance until then.

[1]In so concluding I do not follow H. L. A. Hart and A. M. Honoré, Causation in the Law (Oxford: Clarendon Press, 1959), pp. 2-3, 28-29, 35-38, 47, 55-57, 131-33, 329-32. These authors treat omissions as causes on rather straightforward, "common sense" grounds, distinguishing causes from mere conditions and normal or expected conditions from abnormal or unexpected ones. When a negative

This means, then, that there is no way that Gewirth's analysis will succeed as long as he construes the agent's behavior as a negative action (which is what it is), for the causal relationship cannot be established. Interestingly, Gewirth appears to be aware of this, for notice the shift in the language he uses to characterize the agent's behavior. Having argued that to refrain is to inflict harm, he then grants that "there is indeed a distinction between causing a basic harm to occur and merely permitting it to occur by one's inaction," a point I urged in analyzing the first part of the passage. Because inaction only "permits"--and Gewirth needs "causes"--he goes on to call the agent's inaction an action. The warrant for this shift in terminology, apparently, is the inaction's being "intentional" and its taking place "in the described circumstances." Given any set of circumstances, then, we presumably can create actions as quickly and as easily as we can create intentions not to do the things that might be done in those circumstances! It is that simple, Gewirth believes, to become a causal agent, and indeed, as he continues, to interfere with others! In short, if (a) I am aware that you need assistance, (b) I can assist you, and (c) the cost is not too great, and I do not assist you, I am a causal agent; absent any of these conditions I am not. This is a broad theory of causation indeed, rooted deeply in normative considerations.

Here again, even if we give Gewirth the point about the inaction's being an action--under a different description--this hardly makes of it an interference. (If to refrain is to interfere, then the right to noninterference is all but inscrutable.) On the contrary, what Gewirth wants is an interference--with the ongoing causal chain! Indeed, all we need do to determine whether the agent's "interference" causes the harm is to eliminate him and his "action" from the account--under whatever correct description--and then ask whether the harm would occur anyway. Clearly it would, the drowning or starv-

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condition is abnormal or unexpected it may be seen as a cause, on their view. While this analysis has a certain intuitive appeal, it places a considerable burden on determining what is normal or expected. Moreover, in the case at hand it is not likely to be of great help, raising serious normative questions as it does. Accordingly I prefer to use a "change," or "physical," or "force," or "act" paradigm of causation; while some would call this (pejoratively) a more "primitive" approach, that in my judgment is its virtue. For it serves to eliminate normative factors, thereby enabling us to better distinguish what in fact happens from what is either expected or required according to some normative criterion.

ing would go on, for again, the agent is not the cause of these harms. We can give an adequate causal account of the harm, that is, without any mention whatever of the agent. Indeed, any such reference would be superfluous, for there is no description that will correctly capture what the agent is "doing" that can establish the causal relationship.

We should look more closely, however, at the final point in the passage, concerning preventing the occurrence of transactions, for an interesting and important issue will emerge here. Let us take it in two steps. By redefining the agent's inaction as an action, it would appear that Gewirth can claim that the agent prevents "the occurrence of transactions which would remove the basic harms in question," i.e., that there are causal upshots of this "action" for which the agent is responsible. This argument does not depend upon our ordinary sense of "prevent" whereby the agent prevents by intruding upon an ongoing causal sequence, or upon a sequence about to occur for reasons unrelated to the agent, thus changing the sequence in some respect. Rather, it depends upon some sense of "prevent" whereby the agent prevents by not initiating a sequence, where none exists, where there is only the possibility of his starting one--thus the agent prevents "the occurrence of transactions" (which he has the power to make occur). But surely this is a misuse of the good word "prevent." For again, it means that there are as many "preventions" as there are intentions not to do what might be done in the circumstances. Moreover, and more importantly, by depending upon the formation of the intention not to do, the argument implies, contrary to the assertion with which it begins, that the "action" which "prevents" is in reality an inaction, a not doing, and not an action after all.

It might appear, however, that Gewirth's argument on the point could have gone through had he spoken of preventing the occurrence of an interaction and modified slightly his characterization of this situation--which brings us to the second step and to the important though latent issue here. A transaction is an action by one person upon another (or others), whereas an interaction is an action between people, an exchange, or better, reciprocal transactions. Now prior to any transaction, much less interaction, there is no contact of any kind between the individuals in this example--let us call them A, the would-be rescuee, and B, the would-be rescuer. How then does any contact arise? Clearly, B could simply act upon A, which is what Gewirth claims the content of the obligation amounts to: correctly put, he would "interfere"

with the ongoing causal sequence (and with A, which is permitted by the priority relationship discussed earlier). But there is no obligation upon B to do this, as has been shown, nor would B prevent anything were he simply to refrain from rescuing. Suppose, however, that we change the description of the situation slightly, or better, that we flesh it out: let A be seen as initiating an interaction by requesting, at least implicitly, that B rescue him. Hence A's transaction amounts to making a request upon B. Now B is at perfect liberty either to ignore or to refuse this request; i.e., he is under no obligation to enter into interactions. If he refuses, however, he is at least to this extent acting: he acts "upon" A by refusing, a transaction formally equivalent to A's initial transaction of requesting. By virtue of its being a positive action, then, this refusal has causal upshots: for one, it enables us to say that there has been an interaction of request and refusal; it might be seen also--or at least Gewirth appears to see it--as "preventing" the occurrence of a different interaction, viz., request and acceptance, or request and compliance (i.e., rescue).

Again, however, this argument, even as modified, depends upon the spurious sense of "prevent" noted above: for in the end this "prevention" amounts to no more than the failure to initiate an action, albeit a different one--it is not an intrusion upon a causal sequence. The question "Do we prevent interactions by refusing to engage in them?" is ill-put, for it is a misuse of "prevent," an attempt to trade upon its causal force: either we engage in interactions or we don't, and when we don't we do not thereby prevent them. The conclusion to be drawn here, then, and the important point at bottom, is that even when we recast the example in the form of request and refusal, as it clearly allows, there is no prevention that can properly be attributed to the relevant agent (B here), and hence no causal efficacy as required by the PGC. For an interaction of this kind cannot properly be seen as a causal sequence: A, by his request, is not initiating a causal sequence which B's refusal interferes with or prevents from reaching its natural end. Indeed, were this so, B's acceptance or compliance could as easily be seen as an interference with the sequence which might otherwise have terminated in a refusal! A's request is a transaction; B's refusal (or acceptance, or compliance) is a different transaction; together they constitute an interaction, but not a causal sequence

such that if the first occurs the other will necessarily occur unless interfered with or prevented.[1]

The ramifications of this conclusion, of course, are enormous. I have recast this simple example in terms clearly involved in it, if only implicitly, in order to bring out certain relationships between the parties as these relate to the PGC and its implications. This model of request and response is identical in every important respect to a market model, for a market offer is merely a request to enter into a certain kind of interaction, to either buy or sell (the direction the possible interaction takes--whether initiated by buyer or seller--is irrelevant). It should be clear, then, that the refusal to enter into such an interaction, the refusal to buy or sell, does not violate anyone's rights; for from this mere not doing the appropriate causal relationship, required by the PGC, cannot be established. There is, in short, no right to contract; there is a right not to contract.

These several arguments relating to the theory of causality underlying the PGC have served to establish the general conclusion--or better, the general presumption--that in the status quo and in the world of general relationships to evolve from it there are no positive obligations and hence no correlative rights to welfare, at least insofar as these entail positive obligations. These are direct arguments, supplementing those of the last section, to the

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[1] Those who treat causality (and "prevent") more loosely than I will perhaps not be persuaded by this argument. They will continue to say that the mere act of refusing the request "prevents" the (appropriate) interaction from occurring. (Would it be different if the agent had simply ignored the request; or is this a causally efficacious "act" as well?) Even so, they will be unable still to make the further and crucial connection between the agent's refusal and the harm, for the refusal does not cause the harm; it merely, on this view, "prevents" the interaction which would have removed the harm, which is hardly the same thing. For related criticisms of this counterfactual approach to causality--the so-called "but for" test of law--see Epstein, "A Theory of Strict Liability," pp. 160-65.

It is interesting to note that those who would extend the scope of causal arguments in order to establish duties of benevolence are often the same people who would limit such arguments in other areas. They would say, e.g., that pornography does not cause crime, that whatever the "influence" of pornography, the criminal behavior in question is a new act, not causally related to the pornography. I agree with this analysis (in a suitably explicit version), but the underlying causal theory is rigorous; it does not allow causal extensions in this case anymore than it does in the welfare examples under discussion.

effect that the PGC does not imply these rights and obligations. As was pointed out in section 4.1 above, however, in order to show that a class of rights does not exist it is not enough to show that these rights are not implied by the PGC; we must show as well that they are inconsistent with rights that are implied by the PGC, rights that do exist. Only so will the logic of the matter be satisfied.

Let us consider the issue indirectly, then, by raising questions about consistency, by asking what kind of a world it would be were these welfare rights to exist. The PGC purports, again, to be a consistent principle: it does not--or at least it should not--imply a world in which the statement "A has and does not have a moral right to x at the same time and in the same respect" is true. Yet this is precisely what would happen were there to exist these rights to welfare.

In brief, I am going to show that the right to freedom or noninterference would be negated by any right to welfare that entailed positive obligations, that the two are inconsistent, a point which should by now have become evident, but one requiring an explicit demonstration nonetheless. If we are going to have a consistent theory of rights, then, one of these must go; this is tantamount to applying a kind of Ockham's razor to the world of rights, as mentioned in chapter 2, section 9. Which of the two will go is clear, given that the right to noninterference is implied by the PGC, and indeed, is logically the most basic right there is.[1]

Now the introduction of the right to welfare involves the second kind of inconsistency discussed in chapter 2, section 9. Reducing the description of the right-object to a claim upon the behavior of others, it becomes the right to the (positive) assistance of others (thus the correlative obligation is captured by the description of the right-object, as suggested in chapter 2, section 7). But clearly, we cannot all have this right and the right to noninterference. For if A is to enjoy his right to the assistance of others, the obligation correlative to this right entails that B be interfered with, that

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[1]Recall as well the discussion in chap. 1, sec. 6: were there a right to welfare, the effect of the correlative positive obligations upon the freedom secured by the PGC would be qualitatively different from the effect of the negative obligations correlative to the right to noninterference.

he not be left alone, that he be required to participate in a transaction with A. B cannot both enjoy his right to noninterference and satisfy his obligation to assist; which is to say, B cannot enjoy his right to noninterference at the same time that A enjoys his right to assistance. These two rights cannot coexist, they are inconsistent, for they entail the proposition "B has and does not have the moral right to noninterference at the same time and in the same respect."

It is only by eliminating the right to welfare, then, at least in the various forms in which it entails positive obligations, that we can have a world of nonconflicting rights as depicted in chapter 2, section 9, a world in which we can at all times enjoy whichever exemplifications of our right to noninterference we choose to enjoy, subject only to the restrictions we incur as a result of our own actions.[1] This is a world of consistent rights, for the right-objects do not conflict, nor do the correlative obligations conflict with the right-objects; i.e., everyone can enjoy whichever of his rights he chooses to enjoy at the same time and in the same respect that everyone else does, and the negative obligations correlative to these rights can be satisfied by everyone at the same time and in the same respect that he enjoys his own rights to noninterference.

The points I am making here are sometimes put in terms of universalizability. Thus these welfare rights are not universalizable in the way our rights to noninterference are, for we cannot all have and enjoy them at all times as we can our traditional rights: cast in the idiom of the modern "welfare state," we cannot all be on welfare at the same time, for someone must be providing the welfare.[2] As I hope to have shown, however, it is not simply because there are

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[1]See p. 91 above for the amplification of this last proviso. Briefly, our rights can be alienated only by our actions. Thus the argument cannot be made against the contradiction drawn out above that B has his right to noninterference except when conditions do not allow, e.g., when others need his assistance; the "at the same time" provision, that is, is meant to convey the point that B has all of his rights at all times except those when he has alienated them (or some of them), and this is not one of those times--hence the contradiction.

[2]The term "welfare state" is thus misleading insofar as it implies a state in which all depend upon the state for their welfare, i.e., insofar as it masks the fact that some get their welfare at the expense of others, the state being merely the means of redistribution.

The sense of "universalization" I use here is not that of Kant, Singer,

practical limitations upon their universal implementation that welfare rights are not universalizable, i.e., it isn't simply because there isn't enough wealth (in a given society), as some have thought.[1] Rather, there are logical impediments to their being universalized: because they entail, by way of correlative obligations, the active involvement of others--during which time these others cannot enjoy either their welfare rights or their traditional rights to liberty--these welfare rights cannot in principle be universalized. Economic egalitarians should note well, therefore, that insofar as their program involves "universal" rights to welfare (i.e., rights held by all), it is flawed at the core: it is not only practically impossible--as market economists have long argued--but more fundamentally it is logically impossible.[2]

It is surprising, upon reflection, that Gewirth has put forward these (all too common) arguments for positive obligations, for the direction of his overall theory is plainly otherwise: it is toward freedom, in the sense of voluntary, uncoerced action, not toward beneficence, at least insofar as this

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Gewirth, and others (cf. p. 106, n. 3 above). Rather it is closer to Maurice Cranston's use when he treats "universal moral rights" as being " . . . the rights of all people at all times and in all situations" ("Human Rights, Real and Supposed," in Raphael, Political Theory and the Rights of Man, p. 49; cf. also ibid., pp. 50, 51, and his "Human Rights: A Reply," pp. 96, 97). If a right can be alienated by someone other than the right-holder, it is not universal (see chap. 2, sec. 9 for a fuller explication). Thus some rights, e.g., welfare rights, are not in principle universalizable.

[1] See, e.g., Cranston, "Human Rights," p. 50, and "Human Rights: A Reply," pp. 96-100.

[2] It may be objected that this kind of broad universalization is not claimed by economic egalitarians. Rather, they intend that we enjoy our welfare rights "in shifts" as it were--now you provide, then I provide. (There is of course nothing wrong with voluntary special relationships of this sort.) But this is not what the economic egalitarian really has in mind; if it were, he would not object when shown that the same result could be accomplished without the transfer (and the attendant transfer costs)--you provide for yourself, I provide for myself (and each at the rate he desires, and when he desires). No, without the egalitarian redistribution factor, i.e., without the opportunity to distribute equally what has been contributed unequally, the egalitarian would have no interest in such an arrangement. With it, however, my point is even stronger: for now we not only have welfare rights that are not universalizable (in the present sense of that notion), but we have the obligations correlative to those rights distributed unequally. This is "egalitarianism" only because it ignores the contributory side of the equation.

is exacted at the expense of freedom. The rule against coercion would alone prohibit these positive obligations, for it proscribes making others participate in interactions against their will. (Although the welfare recipient is not ordinarily in a position to force such participation [how does the drowning person "make" you rescue him?], we must imagine that Gewirth has in mind here some kind of dispositional coercion, perhaps through the state, such that the recipient can be said to "make" the agent participate in the interaction. Coercion need not always be occurrent, that is, as when the gunman makes his victim participate in the interaction.) Or again, Gewirth has characterized the basic right to flow from the PGC--in language most directly involved in the arguments leading up to it--as the right to participate voluntarily and purposively in transactions in which one is involved.[1] If the agent does not want to assist others, for whatever reason, but is nonetheless required to do so, he is hardly participating in the transaction voluntarily.[2] Moreover, what is his purpose in this transaction? If he has none, then on Gewirth's own harm criterion he is being harmed--and used! For the costs to his well-being that are required in this transaction are being used to assist others. A theory aimed at securing basic human rights should hardly end by allowing individuals to use one another.

This concludes the arguments of this section. It has been my aim to show, on generative and causal grounds, as well as grounds of logical consistency, that a certain pervasive class of rights widely thought to be among our moral rights--viz., rights to welfare that entail correlative positive obligations--do not in fact exist, and that if they are made to exist it will be at the expense of other, more fundamental rights, which can be shown to exist. This is a conclusion that many will find disturbing, for it contradicts if not our Western moral tradition in its more reflective form at least the drift of that tradition over the past two hundred years. Nevertheless, there it is. We have here a classic case of the inability to have it both ways: if we want and

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[1] See especially "JEJ," p. 338; "MR," p. 25.

[2] Indeed, Gewirth has written that "if transactions are to be morally right, then their recipients must participate in them voluntarily" ("OPLM," p. 70); given that the agent here can be seen as a recipient of the would-be rescuee's request (with sanction), he is being made to participate involuntarily.

claim liberty as a right, then we cannot at the same time claim welfare as a right, for the two are mutually inconsistent. This is a truth upon which many of the classical liberal theorists rightly fastened, however imperfectly, one borne out in this century, often in tragic degree. For the attempt to secure well-being through the language and theory of rights--increasingly the goal of the liberal tradition as it has evolved, sometimes to opposite and perverse ends--has only undermined, as it had to, the liberty which is the proper end of those rights.

Now to those who would urge that surely we can have a _little_ welfare at the expense of liberty I can only repeat--not in the name of rights. The logic of rights, in other than a positivist scheme, will not permit it, however appealing such a "trade-off" might appear. For it _is_ a trade-off, with cost factors to be considered, as mentioned above. Unlike rights, costs are matters of degree, not kind; and they lead directly to the value-judgments--and the attendant arbitrariness and subjectivity--we are trying to avoid. Once we cross the relatively clear line between the not doings of negative obligations and the doings of positive obligations, there is no equally clear place to draw the next line. How much assistance? At what cost to the agent? Under what circumstances? The questions are endless, the answers anything but clear. It is best, therefore, to leave the line where it is naturally drawn, at the point of consistency, where each can enjoy whichever of his rights he chooses to enjoy, subject only to the alienations he himself brings about.

To exclude _rights_ to welfare from the body of rights is not, of course, to exclude welfare. Indeed, we want our liberty _because_ it is a means toward our welfare. Posing the issue as above in terms of costs and trade-offs, however, has served to emphasize that _all_ welfare or well-being has _some_ cost, which is or has been or will be borne somewhere. The world thus far depicted, then, is one in which those costs are borne for the most part only by those who stand to benefit, whose welfare they enhance. Thus individuals are at liberty to make whatever trade-offs they desire, to assume whatever costs they think fitting, toward whatever ends they may have. They are of course at liberty as well to make those trade-offs for the benefit of _others_, though they are not obligated to. Beneficence is _permitted_, that is; for to act upon others when they are willing, indeed anxious to be acted upon, is no violation of their rights. The choice to give of oneself, however, and under what cir-

cumstances, belongs to the individual upon whom the costs will fall.

But ought one to be beneficent? And why? And how is it that one ought to help others and yet is not obligated to? There is much more to be said on this subject than I will be saying here. Briefly, however, we can distinguish "ought" and "obligation" as different elements in our moral vocabulary, reflecting what Hart has called "different dimensions of morality."[1] Just as there are occasions when we ought not to fulfill our obligations,[2] so there are times when we ought to do what we have a right not to do. This is so because "ought" and "obligation" have different functions; they direct behavior in different ways, at different levels, and for different reasons. "Rights" and "obligations," as these concepts are properly used, do not describe the whole of morality; but they do describe that basic part that is concerned with human freedom, which they distribute in a clear enough way to permit force or coercion to be used to secure the distribution.[3] As Hart has put it:

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[1]Hart, "Are There Any Natural Rights?" p. 186.

[2]On those occasions we may justly be held accountable for not having fulfilled our obligations, even though we ought not to have done so, as examples from the laws of torts and contracts will indicate. If a child runs into the path of my car, for example, I ought to avoid hitting him if I can, even though this may involve not fulfilling my obligation to keep from harming others or their property, to whom I will then be obligated for damages, at least on a theory of strict liability. (If I am able to initiate a successful action against the child or his parents this will of course restore the status quo for me.) But I am not obligated to avoid the child if doing so imposes costs upon me, for it is he who has presented me with this "can't win" situation; hard as this result may sound, it becomes especially clear (and important) as the costs to me of avoiding him become greater, if I have to put my own life in jeopardy, for example. Otherwise, individuals would be required to sacrifice themselves (at least in part) for others, a requirement the theory of rights does not permit.

[3]Notice that force--or the enforcement of these rights and obligations--is only permitted, not required. But here the issues get murky (or at least I have yet to see my way entirely through them). For we ordinarily think of rights and obligations as describing enforceable relationships, i.e., we say that obligations are those acts or omissions that should be enforced, unlike those "further" acts or omissions we only "ought" to perform, such as supererogatory acts, acts of kindness, and so forth. Yet we say this only up to a point: when obligations become impossibly burdensome, for example, as when insolvency arises in tortious or contractual contexts, we then say that we "ought" not to enforce the relevant obligations. Indeed, in our ordinary state we go still

> . . . there is no incongruity, but a special congruity in the use of force or the threat of force to secure that what is . . . someone's right to have done shall in fact be done; for it is in just these circumstances that coercion of another human being is legitimate; . . . and a certain specific moral value is secured (to be distinguished from moral virtue in which the good will is manifested) if human relationships are conducted in accordance with these principles even though coercion has to be used to secure this, for only if these principles are regarded will freedom be distributed among human beings as it should be.[1]

A theory of rights depicts, then, a kind of minimal but secure framework within which individuals may act; here there is relative surety as to one's relationships with others, for this is a rational construction, not based upon or subject to alteration by particular wants or preferences. At the same time, there is considerable latitude, which is as it should be; thus individuals are at liberty to pursue whatever "higher" morality they wish, whether egoistic or altruistic (in varying degrees), whether grounded in aesthetics, religion, humanism, or whatever. It is in this further realm of morality that concepts like "ought" have a special force, the nature and source of which I will only adumbrate. It may not be too misleading to say that "ought," as it directs our behavior beyond the minimal requirements set by rights and obligations, suggests certain other and related concepts such as "respect," "compassion," "sympathy," "responsibility," and so on; these derive not so much from the rational side of our being--as do rights and obligations as they are generated from our conative behavior--as from what Hume called our

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further and prohibit the self-enforcement of such obligations. (Could we justify doing so in a state of nature?) In effect, then, we say more than that we "ought" not to enforce such obligations; we say that there is no right (i.e., we have an obligation not) to enforce the performance of the obligation to which we hold the correlative right. There are profound issues here which require a great deal more attention than they have yet received.

[1]Hart, "Are There Any Natural Rights?" p. 178. Notice the distinction in this passage between moral virtue and moral value, a traditional way to contrast the "ought" of this further realm of morality with "obligation." I do not believe, however, that Hart has captured the issue precisely here. For his emphasis upon the moral value of freedom and upon how freedom should be distributed suggests that this distribution is in the end a function of some value system (our modern Western values, say) and not of the deontological moral order. Similarly, Hart is equating the idea of a right with the permissible use of force (to secure that right); it may be that we can describe the world of rights quite neatly, as a rational construction, but from this nothing follows necessarily about which of those rights we ought (have a right?) to enforce, as noted above.

"humanity or a fellow feeling with others." When we engage in Good Samaritan behavior or say that we "ought" to do what we have a right not to do we are implicitly reflecting or appealing to sentiments such as these. There is no "proving" the rightness of this behavior or its appropriateness in varying contexts, as we prove the existence of rights; one either senses it (in varying degrees) or one doesn't, one either behaves as a member of the human community or one behaves inhumanely. It is the mistake of many contemporary liberals to believe that the "oughts" constitutive of this further realm of morality are coextensive with obligations and hence with rights; they would thus have rights and obligations cover the whole of morality, and because rights can be enforced, they would politicize the whole of morality. It is the mistake of many contemporary libertarians to believe that the more limited realm of rights and obligations is the whole of morality.[1]

4.5. General relationships

Thus far, then, we have developed arguments to show that starting from the morally neutral status quo, the PGC entails a basic right to noninterference, correlative to which is the basic obligation of all others not to interfere. More specifically, individuals in the status quo have a right (1) to do nothing, (2) to do whatever does not interfere with others, and (3) to involve themselves with others only with the consent of those others. Correlatively, individuals in the status quo have an obligation not to interfere (1) with others' doing nothing, (2) with their doing that which does not involve anyone else, and (3) with their consensual relationships with third parties. And finally, there is no obligation (1) to act, (2) to not act when that action does

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[1] Let me clarify a point that may generate confusion. At the beginning of sec. 4.1 above I said that there is no human activity about which an adequate theory of rights can have nothing to say, given that rights are integral to human action. Here, on the other hand, I am distinguishing two dimensions of morality, the more limited or minimal realm of rights and obligations, and the further realm involving, let us say, a more refined or humane behavior. There is no contradiction here, for in setting the minimal standards of behavior a theory of rights is still speaking to the whole of human activity; it is saying that individuals may engage in whatever behavior they choose consistent with those minimal standards; thus it says that they have a right to behave beneficently, and at the same time that there is no obligation to do so.

not interfere with others, and (3) to not involve oneself with others when these others consent. These are all different ways of spelling out the basic right to noninterference as it obtains in the status quo. The arguments for these conclusions, as we have seen, are based upon straightforward deductions from the PGC, involving a common-sense theory of causality that has an act requirement as a necessary condition of causation; moreover, we checked these conclusions for consistency and found them consistent, whereas the contradictory of these conclusions led to inconsistency.

Notice the importance of the status quo. (a) It is a benchmark for reparation of subsequent wrongful action: rights violators must return the wronged party to the status quo, thereby preserving or honoring the integrity of the individual; only he can alienate his rights; were others to be able to do so they could thereby use him for their own ends. (b) In its normative aspect (it is a clean moral slate) the status quo is a guide for future rightful action: act in such a way that the rights held by others in the status quo, as set forth above, are not violated, i.e., in such a way that the moral slate is kept clean. We keep the slate clean by satisfying our obligations.

In the status quo, however, individuals enjoy only what might be called "passive rights," for this is a state of affairs in which no one acts at first. Passive or quiet rights, then, are those rights the enjoyment of which cannot possibly interfere with others, for their "exercise" does not satisfy the act requirement of the theory of causation implicit in the PGC. These are the traditional rights to be "left alone," the rights of quiet enjoyment that are, in virtue of their passivity, the easiest to justify and delineate. But individuals in the status quo are also at liberty to act, to exercise their "active rights," which may interfere with others; and so the question immediately arises, as individuals move out of the status quo and start to act, what exactly do we mean by interference, or coercion and harm? The term "harm," again, is notoriously subjective, having been the ruin of many a philosophical system. What the law has traditionally tried to do--and not without success--is find objective lines in the world, not subjective (harmful) effects in the minds of men. Thus it has sought to define interference with reference to the property in the world and the lines that bound that property more or less clearly. I will follow that tradition, for it has proven, in virtue of its

empirical foundation, which avoids subjective and therefore possibly arbitrary wants and preferences, to be the most objective method by which to pursue the difficult task of interpretation, a method that thereby treats all equally. At bottom, the idea is to try to make interference a descriptive, not an evaluative matter.

If interference is to be defined with reference to property, then, we have to get clear first what we mean by property and how it serves to define interference, and second how property arises or is justified. Let us take these issues in order.

4.5.1. Interference and property

In defining property I will follow the classical theorists who spoke of life, liberty, and possessions as the sum of one's property.[1] Thus an individual owns his person, actions, and holdings--tangible and intangible--however unclear the reference and boundaries of this property may in some cases be (about which more below); and in owning his actions he owns all the uses that he can make of or that go with his person and holdings. Now we interfere with another when we take what he owns; for if what he owns is or is an extension of himself (as I will briefly argue below), then to take what is his is to involuntarily involve him in a transaction and hence to violate the PGC. For all practical purposes, then, Gewirth's second basic right--against being harmed--collapses into the first. We objectify "harming," that is, by treating it as an upshot of the violation of the right to noninterference or freedom: to harm someone is to involuntarily involve him in a transaction, i.e., to take what he owns. Interference, then, is a taking. We determine whether a given event is a taking, and hence a case of interference, by

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[1] "Lives, Liberties and Estates, which I call by the general Name, Property" (Locke, Second Treatise, par. 123). The idea of owning oneself is not at all far-fetched. It arises straightforwardly in the case of medical transplants. See "Notes: The Sale of Human Body Parts," Michigan Law Review 72 (1974): 1182. (Locke's position on the subject is less than clear. He argues that "every Man has a Property in his own Person" [Second Treatise, par. 27]; yet he also argues that we are God's property [ibid., par. 6]. Perhaps these positions can be reconciled. But whether or not they can, they both have to be justified; and on that score, the latter view is an undertaking of some dimension.)

clearly defining the object owned and putatively taken.[1] Proceeding in this way will help to clear up much of the confusion that surrounds questions of interference; for again, it is defined with reference to that which admits of empirical description.

This approach will handle straightfoward cases of interference quite easily, of course, cases of injury or damage to person or property, or cases of trespass or theft of property. For each of these broadly defined actions can be defined even more broadly as a taking: what the proscribed act does is take the use and enjoyment of the property in question, to which the owner has an exclusive right (see section 4.5.2 below). But the reduction of interference to a taking will help especially when we come up against what often pass as difficult cases of "interference," as two brief illustrations will help to bring out.

(1) If I build a fence on my property that blocks your view do I interfere with you and harm you? On loose interpretations of these terms I do. But of course the same could be said, depending upon your particular wants or preferences, for almost anything I might do with my property. In order then to avoid the arbitrary results we get when we start with subjective values, we follow the procedure set out above. Notice that "your" view runs over my property; only thus do you "have" it. But my fence-building depends not at all on anything that you own. Were you to prevail, however, it would be my use of my property that would in fact be taken. My building the fence, then, does not take anything that you own. (If you really want "your" view, buy the necessary conditions for it, viz., my property.)[2]

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[1] A distinction is often drawn between complete and partial takings, as when we completely take a piece of property or a life, as against taking only a use of the property or restricting (taking) only a liberty of the person. But the distinction turns entirely upon how broadly or narrowly we define the object taken, for what we own can be parceled in many ways. Those who want to take "only uses" often invoke this distinction--as in land use restrictions--hoping thereby to avoid compensation. But a taking is still a taking, however broadly we define that with which the owner is left. See M. Bruce Johnson, "Planning Without Prices: A Discussion of Land Use Regulation Without Compensation," in Planning Without Prices, ed. Bernard H. Siegan (Lexington, Mass.: Lexington Books, 1977), pp. 63-112.

[2] Cf. Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc., 114 So. 2d 357 (Fla. Ct. App. 1959).

(2) If I have a business through which I make lower market offers than you in your business, thereby "driving you out of business," do I interfere with you and harm you? Again, on loose interpretations of these terms I do. Here too, then, we have to look closely to see if in fact anything is taken. Your trade with third parties (which just <u>is</u> your business) is not taken, anymore than your view was taken; for in neither case do you <u>own</u> these. Rather, you "enjoy" them at the pleasure of others; and these others have a perfect right--equal to your own--to use their property or their potential trade as they choose, provided those uses do not take what others own.[1]

We see, then, how useful this procedure is in sorting out--indeed, in objectifying--heretofore difficult cases of interpretation. But other difficult cases will remain, cases that arise not because of any shortcoming in the interpretive procedure but because the objects taken are not easily defined, having a substantial mental basis. Two such kinds of cases involve endangerment and nuisance. All but isolated action is risky to some degree or other and hence has the <u>potential</u> for interfering with others, however remote that potential may be. As action becomes increasingly risky there reaches a point--<u>some</u> point--after which it "takes" the uses that others can make of their holdings, at least insofar as these others no longer feel safe in exercising those uses.[2] You do not feel constrained to wait until something happens--some "real taking"--before raising objections to my dynamite experiments next door. Similarly, all but isolated actions involve <u>some</u> invasion by noise, odor, smoke, vibration or other forms of nuisance. My party upstairs may take the quiet you own, the sleep you perform, and so forth.[3] But here the case is slightly dif-

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[1] Cf. Mogul v. McGregor, 23 Q.B.D. 598 (1889), aff'd, [1892] A.C. 25; Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946 (1909). See Epstein, "Intentional Harms," pp. 423-41.

[2] Notice that acts that endanger involve some combination of two variables: the probability that the unwanted causal sequence will occur; the magnitude of losses if it does occur.

[3] Notice the crucial difference between these holdings and those "holdings" claimed in the earlier examples. Here the quiet, sleep, and "peace of mind" (in the dynamite example) can all be described without bringing in the holdings or actions of others. The view and the trade, on the other hand, were enjoyed only because others contributed with <u>their</u> holdings or actions. Thus we in fact have takings here of things held outright.

ferent: whereas with endangerment we have potential takings that "shade into" real ones, as others come not to be able to live with the fear the action causes, here we have real takings from the beginning--physical trespass, however trivial. Were we to prohibit all potential or minor takings, however, life in reasonable proximity would cease, for all but isolated action would have to be prohibited. In cases like these, perhaps, we find a place for public law.[1]

4.5.2. The justification of property rights

How is it then that we come to own what we do? How do we justify our ownership of our life, liberty, and possessions? These are large and complex questions, for which I am going only to outline a few answers.[2] In particular, I want to focus upon the idea of presumptions and burdens of proof, which play a prominent role in this subject (as through so much of the law). One would not think that self-ownership--ownership of one's person and actions--would require much argument. True, Locke thought that we were possessions of God; I should not want to undertake a defense of that position, however. In fact, the presumption would seem to rest with self-ownership; for anyone who would argue that he owns us would have, not least, the burden of the language to overcome. Indeed, we are punished just because we committed the crime; it was our action. If we want to argue that someone else is responsible for the action we performed, the burden is upon us to show it.

This, in brief, is the negative case for self-ownership, aimed at defeating opposing claims. A positive case can also be made along the lines of Gewirth's argument. For the generic claims that we necessarily apply to our-

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[1] See Charles O. Gregory, Harry Kalven, Jr., and Richard A. Epstein, Cases and Materials on Torts, 3d ed. (Boston: Little, Brown & Co., 1977), pp. 495-546. It is noteworthy, as an indication that this may be a place for public law to enter, that in the more ordinary tortious takings we apply the doctrine, "you take your victim as you find him"; i.e., we tailor the liability (in a regime of strict liability) and the damages to the individual victim and hence invoke no "public" standard. In nuisance and endangerment cases, however, the ordinary man standard is usually invoked; i.e., the extra-sensitive plaintiff will not ordinarily get relief.

[2] A good place to start on this difficult subject is Lawrence C. Becker, Property Rights: Philosophic Foundations (London and Boston: Routledge & Kegan Paul, 1977).

selves, and hence must apply to all who are like us in being prospective agents, include the element of voluntariness. To act voluntarily just is to act as the author and hence as the owner of one's actions. By the principle of universalization the same conclusion applies to all other agents; thus each of us owns his actions and hence the necessary means--the voluntary person--with which he performs those actions. Starting then with the generic claims that agents necessarily make in acting (Gewirth's dialectically necessary method), we can generate self-ownership.

We come then to the ordinary sense of property--and in particular to land or resource acquisition--which is where the more difficult issues arise. In general, I follow here Nozick's historical or entitlement theory of justice in holdings,[1] whereby at any point in time a set of holdings is justly distributed if the process by which the distribution arose was itself just, i.e., if it took place without violating anyone's rights. Holdings justly arise by (1) original acquisition (of unheld things from the state of nature), (2) voluntary transfer, and (3) redistribution in rectification of violations of the rules that apply in (1) and (2). I will treat (2) and (3) in section 4.6 below, since these involve special relationships. Here I want to discuss, very briefly, how original acquisition might be justified, how things might come to be justly acquired from the state of nature.

It should be noted, before beginning, that there is some question as to how crucial the problem of original acquisition is in the modern world.[2] To be sure, it arises in the case of resource discovery and acquisition--a not insignificant issue--and in such areas as fishing rights or even sunken treasure findings. But in the contemporary economy most income, wealth, and holdings

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[1] Nozick, Anarchy, State, and Utopia, pp. 149-53.

[2] Regarding "the general economic importance of original appropriation," Nozick writes: "Perhaps this importance can be measured by the percentage of all income that is based upon untransformed raw materials and given resources (rather than upon human actions), mainly rental income representing the unimproved value of land, and the price of raw material in situ, and by the percentage of current wealth which represents such income in the past." He goes on to cite David Friedman, The Machinery of Freedom (New York: Harper & Row, 1973), pp. xiv, xv, who "suggests 5 percent of U.S. national income as an upper limit for the first two factors mentioned"; cited in Nozick, Anarchy, State, and Utopia, pp. 177-78.

result from use of or labor upon things already held or from the transfer of such things by (2) above (or, increasingly, from redistribution based not upon past wrongs but upon "social goals"). Nevertheless, because these things retain a trace of the state of nature about them--a trace that is often exploited by critics of the free market--it is important to at least outline the subject. I regret that the brief discussion that follows will not dispose of the matter, but we have here a subject in need of much more attention that it has received to date.

Here again the idea of presumptions and burdens of proof enters. Recall that in our status quo no one acts in the beginning. But the question arises, by what right are these individuals where they are in this theoretical world? They are, ex hypothesi, standing at some spot on the earth. Why aren't they trespassing? The answer, I should argue, is that no one else has a prior claim to be where any other individual is. And indeed, if such a claim should be made, the burden would rest upon the claimant to make his case. For there being, ex hypothesi, no prior action, and hence no prior act of possession, the claim would appear to be gratuitous. Property arises, then, through some (very complex) act of claiming, either explicit or, as in the case at hand, implicit--through occurrent holding in the absence of any prior claim. Thus the presumption rests with the occupant, since others can make out no case why it should be shifted to them.

This argument, then, is a blend of the negative and positive arguments set out above in support of self-ownership, for it combines the absence of any other claims with the presence of an (at least implicit) affirmative claim by the occupant. But the affirmative claim here is rather more problematic than the one above. For it is a claim not simply about oneself but about the world and one's dominion over the world, a claim to have a right not simply to own oneself but to be where one is and indeed to own where one is. Moreover, it raises questions about the boundaries and the limits of the claim--two closely connected questions that arise a fortiori as our individuals start to act, to move out into the world and make further claims. Thus while the claims we make about owning our actions generate a title to those actions, the claims we make to the things outside us with which we "mix" our actions do not straightforwardly, at least, generate a title to those things. I allude, of course, to Locke's idea that property rights in unowned objects originate when we mix

our labor with those objects,[1] when we work the land, pick the apple, catch the fish, mine the ore, and so forth. To be sure, Locke's idea has an intuitive appeal; and indeed, it served, more or less, to justify original acquisition in America (setting aside the problem of the Indians). But enough embarrassing questions remain to suggest that more work on this subject remains to be done.[2]

In the absence of a theory that will show precisely how it is that this "claiming" and "mixing" serve to generate property rights in unowned things, let me simply offer a consideration against the alternative, that no private property is possible. If indeed we have a right against interference, then how would we ever realize that right if everything were public? In such a realm we would all be thrown together, as it were; there would be no private places to go to escape interference--we would have a claim on everyone else and everyone else would have a claim on us. For interference, recall, is a taking, even if the property taken includes, as here, only one's life and liberty. But we live our lives and perform our actions against some material background; we do not live in vacuo. If that background is not ours to control, if indeed others have as much right to it as we, then we could act only at the pleasure of others. For every claim to move could be cancelled simply by a counterclaim. And we could offer no plausible reply, for there would be no material condition of action over which we would hold any exclusive right. Indeed, we go out and acquire property just because it insures us that condition: it is our property that enables us to be free.[3]

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[1] Locke, Second Treatise, par. 27.

[2] See Nozick, Anarchy, State, and Utopia, pp. 174-75.

[3] Notice that this is precisely the reason there is decreasing freedom in the socialized countries and next to no freedom in the communist countries: the governments in these countries have taken the material conditions of freedom. In drawing the connection between freedom and its material conditions, which reflected the lot of much of the working class at the time he was writing, Marx was correct; so he and his followers proceeded to apply this insight to the whole of society!

In the text above I have put the issue starkly in order to draw out the fundamental point. In the ordinary world, of course, we get around the difficulty that arises from everyone's having an equal right to control the public spaces by establishing rules of conduct for such spaces, which we determine according to some decision procedure. But this is a practical expe-

I want to proceed, then, by simply assuming that just as "being there first" seems to generate a property right in the status quo, so "getting there first" generates a similar right as individuals move out of the status quo. At the very least one could add that no one else has a better claim to what has been "staked out" than the person who has made the effort to do that; certainly those who have done nothing have no claim. Let us assume also that boundary problems will work themselves out with reference to economic considerations, economies of scale, and so forth. As our individuals move out of the status quo, then, property will arise, claims will be staked out, and the world will eventually get divided up--all of which can happen, in principle, without anyone's rights being violated. Or can it? Are there limits to what an individual can claim (or to what he can claim in combination with others), after which any further claiming will violate the rights of others? (Anti-trust theorists take note!)

The tradition, at this point, is to invoke some version of Locke's proviso, that we can acquire provided there is "enough and as good left in common for others."[1] Thus Nozick pursues, with some invention, "the crucial point," which is "whether appropriation of an unowned object worsens the situation of others."[2] For Locke, "'tis very clear, that God, as King David says, Psal. CXV.xvi. has given the Earth to the Children of Men, given it to Mankind in common."[3] The problem before Locke, then, is to show how private property arises out of this common property. For it would appear that all must give their consent before such acquisitions could occur. At the least, the proviso would seem justified in this setting in that it insures that the situation of others is not "worsened," as Nozick puts it.

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dient only; i.e., the conduct set by these rules cannot be seen as a direct manifestation of our individual wishes--as is possible in our own private spaces--but is rather a reflection, in our society, of majority opinion (e.g., nude bathing prohibited in San Diego, California) or earlier-affirmed rules (e.g., Nazi marching permitted in Skokie, Illinois). The democratic device, in short, gives us nothing like the liberty insured by the private device. See Berlin, "Two Concepts of Liberty," pp. 118-72.

[1] Locke, Second Treatise, par. 27.

[2] Nozick, Anarchy, State, and Utopia, p. 175.

[3] Locke, Second Treatise, par. 25.

It is at this important juncture, I should argue, that the theory of rights must bite the bullet: the discomforting conclusions must be squarely faced, especially as they surround the so-called right to opportunity. To begin, the idea that God gave the earth to all in common, like the idea that we are God's possessions, is hardly self-evident. Absent arguments rich enough to compel assent to this proposition, the presumption must be parsimonious, viz., that in the beginning no one owns the earth--which of course is not the same as all owning in common. Original ownership arises, then, through the performance of complex positive acts of acquisition, as mentioned above; if these have not been performed, then the earth lies unowned, not unlike the fish in the ocean. But if the presumptions are now correct, then what is the moral basis for the Lockean proviso? What right of others do we violate when we acquire as much as we want? Nozick points to scarcity: "if the stock of unowned objects that might be improved [when our labor is mixed in] is limited, . . . an object's coming under one person's ownership changes the situation of all others."[1] True, but where are the rights in the matter? We can certainly understand that others have interests here; but where is the property held by others that is taken by this acquisition? Here Nozick argues that others are made worse off because they no longer are at liberty--have the opportunity--to acquire or use what once they could.[2] This argument has an intuitive appeal--indeed we see it in rich variation every day. But if the presumptions above are correct, as an argument from rights it will not withstand scrutiny. For it implies that there is a right to the conditions of opportunity, and this cannot be justified.

The status quo is especially helpful in drawing this point out. In this theoretical beginning individuals own themselves, their actions, and the area immediately around them (however bounded). At this point they all have

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[1]Nozick, Anarchy, State, and Utopia, p. 175.

[2]Ibid., p. 176. Nozick distinguishes two interpretations that the Lockean proviso might be given, one involving others being made worse off by their no longer having the opportunity to appropriate, another involving their being made worse off by their no longer having the opportunity to use (without appropriation) what previously they could. The discussion that follows, however, is less than clear. Use, after all, is just appropriation for a time; and those excluded are, during that time, every bit as much excluded as if the appropriation were permanent.

an equal opportunity, provided the world is not yet "full," to go out and make claims over the world, or parts of it, through the complex process mentioned above, an opportunity to try, to compete in the business of acquisition. But that opportunity is not something individuals have tout court. They "have" it simply because at that point in time the world happens to be the way it is--unowned. Owing to that condition, their opportunity exists. The situation here is exactly parallel with the earlier view and trade cases (except that there the conditions were held by others, not unowned). In none of these cases, that is, is the object putatively "taken" held outright but only because of conditions over which the "holder" has no rights (as yet). Now when individuals start to act, to go out into the world, to pursue their opportunities, to compete in the business of acquisition, this condition of nonownership, in a world of scarcity, may disappear--and so may the opportunities for which it was necessary. But nothing was taken, for nothing was owned. In short, no rights were violated in the process, for we do not have a right to the world's being the way it is at any particular time in its history. It is irrelevant, then, whether the acquisitions were large or small, for in neither case can anyone show that he has a right that has been violated. Those who do not acquire simply lose "their" opportunities; they lose in the competition, and that is what I meant when I said that it is here that the theory of rights must bite the bullet.[1]

Now it is customary at this point to observe that far from worsening the position of others, acquisition most often improves their opportunities. For the owner of the previously unowned object mixes his labor with it, builds a factory, creates jobs and products that heretofore did not exist, adds to the GNP, and so forth. (Thus multinational or giant corporations, by being more efficient, create more opportunities than would be the case were they to divest.) The arguments are familiar and I should argue persuasive. In particu-

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[1]Thus when equal opportunity does not arise accidentally (as here) or voluntarily, it is brought about only by taking from some and giving to others. Moreover, once this initial balance is upset--as it inevitably will be if individuals are allowed to express their differing tastes through acquisitive activities--the taking must begin all over again. With repeated applications, this equality of opportunity comes to the same thing as equality of results. See Antony Flew, "The Procrustean Ideal: Libertarians v. Egalitarians," Encounter, March 1978, pp. 73-75.

lar, they help to mitigate the complaints of those who may have lost in the competition. But strictly speaking they are irrelevant to the point at issue and indeed to the theory of rights. For they take us straightaway to the theory of value, which is a theory grounded not in reason but in the sentiments, in our wants and preferences, in the subjective side of our being. To many, in fact, arguments from improved opportunities will not persuade. For they prefer the "unimproved" state of nature to the cultivated, the bucolic to the industrialized, the simple to the complex, the slow-paced to the fast, to draw but a few of the contrasts. And in these disagreements there is, as A. J. Ayer and others have correctly observed, no truth or falsity to the matter: they are simply expressions of preference.[1] It is with reference to the theory of rights, then, not with reference to the "goods" we produce, that we must justify our acquisitive actions and disjustify the claims of those who would object. For in doing what we have a right to do we take nothing over which others can show they hold any rights.

The implications of these conclusions, of course, are far-reaching. We come into the world with rights against our parents (about which more below). But outside of these, and rights to our person and actions, we have no rights of recipience against the rest of the world, as brought out in section 4.4 above; thus we do not have a right "to opportunity" insofar as this entails that others must provide us, through their positive actions, with the conditions of opportunity. Nor do we even have a right "to opportunity" insofar as this entails that others must refrain from acting in pursuit of their opportunities, the point just developed.[2]

Thus the theory of rights is strict. It does not appeal to the sentiments. It treats all equally. Some will go out and acquire; they will "improve" what they acquire, or they may "waste" it. Others will stay back, will lose "their" opportunities, and will become dependent upon the sympathies of

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[1] See, e.g., A. J. Ayer, Language, Truth and Logic, 2d ed. (New York: Dover, 1946), chap. 6.

[2] Clearly, then, the burden of responsibility that the theory of rights places upon those who beget children is considerable. Should it be any other way?

the "successful." A world that starts out equal may end up very "unequal,"[1] depending upon everything from the natural lottery of abilities, chance, and, perhaps in part, attitudes, to the choices individuals freely make, the risks they take on or avoid, and so forth. All of this the theory of rights--which is the theory of freedom--will allow. If we want to mitigate any of these results, then we must go outside the theory of moral rights to do it. To try to do it in the name of these rights is to risk undermining the clear, consistent, and rational picture of the moral world they describe, and the equal freedom they insure.

4.6. Special relationships

Thus far our theoretical world contains general relationships only, described by general rights and obligations. I have drawn these in broad terms--involving, at bottom, negative and positive actions--in order to try to bring out the logical structure of the theory of rights: however more specifically these rights, obligations, and actions may be described, as required by various contexts, they will always come under one of these broad categories. In sum, then, in the world of general relationships we are obligated only to not interfere with others, as specified above; as a corollary, we have a right to do anything that does not interfere with others.

Now as individuals leave the status quo they will do more, of course, than make their property claims in the world: they will come in addition to associate with each other--either forcibly or voluntarily--and thus will special relationships arise. Forced associations include torts, crimes (by which I mean intentional torts), and contractual takings (i.e., misrepresentation and nonperformance). Voluntary associations include the many kinds of contractual relationships, as well as gift giving and child-begetting (which is a unilateral, quasi-contractual relationship between parents and child). With the exception of the complex special relationships that arise when enforcement

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[1] To say this may be misleading; for the "inequality" that arises from a world that starts out equal may simply reflect different preference schedules: the industrious may end up with greater material goods, but at the price of foregone pleasure or recreation. Egalitarians who concentrate on the distribution of material goods at any point in time usually ignore these trade-offs.

becomes a problem (i.e., when obligations are uncertain or are not performed voluntarily), which will be taken up briefly in chapter 4, this broad sketch exhausts the class of special relationships as these might arise in the state of nature; and since the class of moral relationships in the state of nature is exhausted by general and special relationships, we now have a complete outline of the moral world that obtains there, at least as this world is described by the theory of rights.[1]

Before taking up the justificatory foundations of these special relationships, let me say something more about their broad features, especially as this involves the possibility of conflicting rights and obligations. As mentioned earlier, a special relationship arises because someone <u>does</u> something to bring it about--signs a contract, commits a crime, begets a child, and so forth. Whereas the parties to the relationship stood <u>generally</u> related before this event, they now stand <u>specially</u> related,[2] at least with

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[1]This outline is complete for our ordinary world as well, with the exception of the relationship between the individual (or groups of individuals) and the state, and the enforcement relationships just set aside until later. Now it should be noticed that in the contemporary state these enforcement relationships are ordinarily a subset of the individual-state relationship, this because the state claims a monopoly on the use of force. (Adjudication may be private, of course; but then it is a contractual relationship. And I say "ordinarily" because self-enforcement is permitted on occasion.) Indeed, in the "night-watchman" state of classical liberal theory these enforcement relationships are the <u>only</u> components of the individual-state relationship. But however more numerous the components of this relationship may have become, my reason for setting it and the subset of enforcement relationships aside--my reason for not yet leaving the state of nature--is simply this: I want to continue the inquiry into just what rights and obligations there <u>are</u>, quite apart from the issues (and further rights and obligations) of enforcement. Whatever the mechanism of enforcement, that is, whether private (as in the state of nature) or public (as in our ordinary world), we will need to know what it is that is to be enforced. These rights and obligations are those that constitute the relationships outlined above.

[2]I am assuming here that we are starting from a world of general relationships only, something like our status quo. Individuals can of course take on new special relationships with those with whom they are already specially related; and they can add on special relationships with others as well--all of which can lead not to conflicting rights but to overcommitment. The <u>theory</u>, that is, can sort these "conflicting" rights and obligations out, even if for practical reasons the individual cannot satisfy all of his obligations; thus the theory may on occasion require compensation in lieu of specific performance, which is tantamount to recognizing the existence of the relationship and requiring that its obligations be met.

respect to the terms of the special relationship. (Those general rights and obligations not reached by the terms remain intact.) Thus the rights and obligations that describe these relationships are "created." And they are limited to the parties to the relationship: if A and B enter into a relationship that benefits C, it is A and B who hold the special rights and obligations, not C.[1] Now in the process of creating these special relationships we may "alienate" some of our general rights and obligations, just as we take on special rights and obligations that heretofore did not exist. If A hits B, A alienates his general right to that amount of his property necessary to make B whole again; B now has a special right to that property, whereas before this event he had a general obligation not to take it, an obligation alienated by the event. Thus it is in virtue of this "creation" and "alienation"--two sides of the process that brings the special relationship about--that conflicts of rights are avoided: complementary rights and obligations are at once extinguished and brought into being.[2]

4.6.1. Forced associations

It is against the background of general relationships, then, that we go about creating our various special relationships. Thus it is with reference to

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[1] See Hart, "Are There Any Natural Rights?" p. 181.

[2] A little more should be said about the extremely complicated question of conflicting rights and obligations. The theory of rights can resolve, with little difficulty, what often pass for conflicting-rights situations. Consider, for example, a common pro-abortion argument (and let us assume here that the fetus has rights), that the expectant mother's right to control her own body takes precedence over any right of the fetus. In this case, clearly, the question of precedence should never even arise; for in begetting the child the mother alienated that right in the relevant respects. Hence, there is no conflict of rights to talk about. (For an interesting discussion of some of these issues see George S. Swan, "Abortion on Maternal Demand: Paternal Support Liability Implications," Valparaiso University Law Review 9 [1975]: 243.) But there will remain cases in which the theory of rights will sort out conflicts in a principled way only by requiring what many might think heroic and even dubious means. Thus to require a rape victim to carry the baby to term, while imposing all costs upon the rapist, is tantamount to allowing the taking to continue; moreover, this "principled" solution is such only on the view that compensation does in fact satisfy unmet obligations, when of course it is only a practical expedient.

our general rights and obligations that the justification for these special rights and obligations must begin. Since voluntary associations are somewhat more complicated than forced associations, let me start with the latter, setting aside the special case of contractual takings until after I have discussed voluntary associations. Now as we have seen, each of us has a general right against being interfered with by others. When the correlative obligation is not met, however, we do not leave the situation as it is. Rather, there arises a new, a special obligation resting with the tortfeasor or criminal to make his victim whole again, correlative to which is a special right of the victim to the necessary restitution from the wrongdoer. (Notice that these rights and obligations rest with and against these <u>special</u> people, not with or against third parties, as when losses are socialized in order to compensate victims.) What I want to do, then, is indicate how it is that these special rights and obligations are justified and hence come into existence.

There are at least two approaches that will serve to justify this special relationship. The first involves a straightforward implication from the obligation to not interfere. What this obligation clearly entails is that the status quo of holdings not be forcibly disturbed. But we bring about that result either by not interfering in the first place, or, failing that, by returning what was taken when we did interfere. Only so will the status quo be either preserved or restored and hence the general obligation be satisfied. Thus the special rights and obligations that arise between tortfeasors or criminals and their victims are simply entailments of the general rights and obligations of these parties; they have been brought into being by the acts of taking that infringed upon the general rights of the victims.

A second and somewhat richer approach appeals to the ideas of responsibility and equality of treatment. As we saw earlier, the PGC is a causal principle; in speaking of agents and recipients it implies that agents are the authors of their actions and are thus, in this sense at least, responsible for the changes those actions bring about in the world--agents <u>cause</u> their actions and hence those changes. (If agents were not thus responsible it would make no sense at all to address moral principles to them.) And indeed, nowhere do we see this sense of responsibility more readily acknowledged than when the changes are favorably viewed by their authors, when agents want to keep to themselves the desirable changes they have brought about, or at least those

changes over which they can be said to hold a right:[1] with alacrity these agents claim authorship--and liability, which is a different sense of "responsibility." They go on to claim, moreover, that if they are not allowed to keep those changes to which they have a right, then unequal treatment will be the result: those who have done nothing will end up having or at least sharing what has been created by and hence is owned by these agents. By parity of reasoning, however, the agent must also keep to himself the unfavorable changes he has brought about,[2] at least insofar as these involve takings. And this includes not only those changes that have fallen directly upon the agent but those that have fallen upon others as well. For if the agent, in pursuit of his own ends, is allowed to take from others, then here too unequal treatment will be the result: those who have done nothing will end up suffering the upshots of action that properly "belong" to others. Thus the equality of treatment required by the PGC entails that agents rectify the wrongs they have caused: it entails, that is, the special rights and obligations of rectification.

It is irrelevant, then, whether the taking was intentional or accidental; or, if accidental, whether it was due to negligence or altogether unforeseen. Moreover, it is irrelevant that the taking reflects the "most efficient" use of resources.[3] (Whose resources?) That the agent acted as a

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[1]Here enter, inter alia, all the difficult questions of copyright, patent, and other forms of discovery retention. In general it is easier to keep agents tied to the destructive than to the constructive consequences of their actions. And not surprisingly, for the definition of property taken is often easier than that of property created, especially as the latter works its way into the market. See, e.g., L. Ray Patterson, Copyright in Historical Perspective (Nashville: Vanderbilt University Press, 1968).

[2]Notice that a consistent behavioral approach to these issues, which seeks to mitigate our traditional idea of responsibility, will attempt to socialize both benefits (through various redistribution schemes) and losses (through various social insurance or "no-fault" schemes), this because in neither case, on this view, can we be said to "own" the upshots of our actions. It is against a view such as this that Gewirth's dialectically necessary approach, which starts with claims that agents make about themselves, is especially useful and insightful.

[3]This rationale is central, of course, to the economic analysis or explanatory approach to law, which is very different from the justificatory approach being taken here. See, e.g., Richard A. Posner, "A Theory of Negli-

"reasonable man," that he was prudent in taking cost considerations into account is of no consequence to the victim, whose property has been taken all the same. With respect to considerations of equal rights, then, only a theory of strict civil liability is justified; the negligence standard, which allows losses to be shifted to the wrongdoer only if the action was "unreasonable" (whether by a moral or an economic criterion), simply ignores the rights of the victim, preferring instead the interests of the wrongdoer.[1] The victim is not the cause of his losses; it was the agent, in pursuit of his own ends, who brought them about, however innocently. Thus it is the victim who is to be preferred, subject to certain principled defenses, for he is the more innocent of the two.

Now of course there are many ways in which takings can occur and numerous defenses and subsequent pleas that will all be part of a well worked-out theory of civil and criminal liability.[2] That task is quite beyond my scope here. I do want to mention, however, that from the point of view of the victim there is no reason to treat intentional or criminal wrongs any differently than civil wrongs. There is no justification, that is, for leaving the victim uncompensated while the state imposes sanctions, or rehabilitation, or whatever upon the criminal. Criminal wrongs may very well call for punishment of the wrongdoer in addition to compensation of the victim by the wrongdoer;

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gence," Journal of Legal Studies 1 (1972): 29, and generally, Economic Analysis of Law (Boston: Little, Brown & Co., 1973).

[1]For a recent history of the erosion of strict liability in favor of the negligence standard, this to facilitate the "social goal" of economic growth, see Morton J. Horwitz, The Transformation of American Law, 1780-1860 (Cambridge: Harvard University Press, 1977).

[2]For such a theory, as applied to the law of torts, see Richard A. Epstein, "Pleadings and Presumptions," University of Chicago Law Review 40 (1973): 556; "A Theory of Strict Liability"; "Defenses and Subsequent Pleas in a System of Strict Liability," Journal of Legal Studies 3 (1974): 165; "Intentional Harms." For a review of these essays, placing them against a larger philosophical background, see Roger Pilon, "Richard A. Epstein: Rethinking Torts," Law and Liberty 2, no. 3 (1976): 1. For more specific applications see Pilon, "Justice and No-Fault Insurance"; Richard A. Epstein, "Products Liability: The Gathering Storm," AEI Regulation, September/October 1977, p. 15.

but they call at least for compensation if the general obligations not met are to be rectified.[1]

4.6.2. Voluntary associations

Let me turn then to the special rights and obligations that describe voluntary associations, setting aside the special case of child-begetting. Here again the justificatory arguments begin with our general rights and obligations. Recall that the PGC implies that each of us has a general right to associate with others provided we do so with their consent. If A and B want to associate with each other and want to order that association by creating special rights and obligations between themselves, then they have a general right to do so, a right against third parties; these third parties have a correlative general obligation not to interfere with A and B, an obligation not to take or prevent those actions of A and B that will bring about this special relationship. In creating these special rights and obligations, after all, A and B are taking nothing that these third parties own;[2] hence they have a perfect right to go about creating them.

This much justifies bringing these rights and obligations into being--as against the claims that might arise from third parties. But it does not justify the special rights and obligations themselves--as against the parties to the relationship. Here the argument is simply this: these rights and obligations are justified because they are voluntarily accepted and hence created by the parties to the relationship. They are justified, that is, because the respective individuals, in exercise of--indeed, as an instance of--their right to be free, accept and hence cause their existence. Thus the argument from

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[1]See Randy E. Barnett, "Restitution: A New Paradigm of Criminal Justice," Ethics 87 (July 1977): 279, where it is argued that restitution alone is sufficient by way of remedy for criminal wrongs. But see Roger Pilon, "Criminal Remedies: Restitution, Punishment, or Both?" Ethics 88 (July 1978): 348, where it is argued that only a combination of restitution and punishment will rectify criminal wrongs. Cf. Locke, Second Treatise, pars. 7-11.

[2]Again, I am starting from a world of general relationships only. In the ordinary world, of course, there may be cases in which third parties have special rights against first or second parties that will have the effect of precluding these parties from entering into particular voluntary associations: if A has agreed to sell x to C, he cannot subsequently sell it to B, although in and of itself the agreement between A and B is unexceptionable.

acceptance or consent is straightforward here, unlike in the case of general rights and obligations.

Now it is a matter of some discussion just what happens when this acceptance takes place, whether it is a pure act of will or, at the other end, a more material transfer of titles. In truth, contractual agreements, in all their variety, involve both of these elements, at least implicitly. The acceptance itself is clearly an act of will, whatever the signs to evidence it. But there must also be an object of acceptance. On this point, however, difficulties arise, for if the object of acceptance is nothing more than subjective expectations, as one line of argument would have it,[1] then all the arbitrariness we want to avoid can enter. And indeed, if the object of acceptance is in subsequent disagreement, then the original act of agreement itself is called into question.

In order to avoid these difficulties, then, we have to do what we did in the case of general relationships, viz., look to the property foundations of the agreement. Not only will this give empirical and hence objective content to the interaction, but it will capture as well the transfer aspect of a contract. Expectations fit uncomfortably here at best; while it is true that we create expectations in others when we act, these can hardly be objects of transfer. (In truth, they describe only our views about what has in fact been transferred.) I suggest, therefore, that we treat each contractor as having transferred to the other the title to something he owns, some future act or course of action, some piece of tangible property. What each party accepts, then, is the exchange of titles between the parties, not the subjective expectations that this exchange may have created.

For the transfer to be morally legitimate, however, and hence for the rights and obligations that result from it to be justified, it is imperative that the acceptance that consummates it be voluntary. Thus the process must be free from duress, which occurs when one of the parties uses or threatens to use force in order to extract the agreement, thereby vitiating the act of

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[1] See, e.g., Roscoe Pound, Jurisprudence (St. Paul, Minn.: West Publishing Co., 1959), 3:162-63. These disagreements in contract theory often relate as much to questions of evidence or proof as to substantive questions about the nature of the contractual agreement. But these are distinct issues, and should be kept so, however closely related they may be.

acceptance itself. With duress we have two distinct takings: the use or threat of force in such a situation is an intentional taking; and the involuntary transfer of the object thus extracted amounts to a further taking. While it is possible, with care, to include "undue influence" under the concept of duress--for here it is arguable that consent is vitiated by the acts of one of the parties--it is not possible to include so-called "economic duress." That A was "compelled" by his own private necessity to enter into an agreement with B is no reason to set that agreement aside. (Necessity of one kind or another is what leads to all exchanges.) If B has a perfect right to make no offer--and of course he does--then he has a right to make the offer that A accepts. To be sure, A could accept B's offer and then have it adjusted by the court on a finding of "substantive unconscionability"; but in that case we would have duress, for A would be using force--that of the state--to get a term he could not get in the marketplace: the state, in short, would underwrite a private taking![1]

Voluntary associations may be vitiated by fraud as well as by duress. But the case against fraud--a complex issue I am only going to touch upon here--is rather more difficult to make out. Let us be clear first, however, about what fraud is. It is not the nondisclosure of facts, even where those facts, had they been known, would have precluded the agreement. As we saw earlier, there is no affirmative obligation to act and hence no obligation to speak. Thus there is no obligation to help strangers in making their market decisions. Suppose, for example, that A makes a handsome offer to B for a painting B owns, thinking wrongly that it is a Rembrandt. B, having given no representations at all about the painting, accepts, and the exchange is made. Here, one could say, the painting represented itself; and if A was so rash as to buy it on this representation alone, then we haven't a case of fraud before

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[1]This is precisely what happens, of course, when the court sets aside or adjusts private agreements on grounds of substantive unconscionability, which is very different from the procedural unconscionability being sketched above. For an excellent discussion see Richard A. Epstein, "Unconscionability: A Critical Reappraisal," Journal of Law and Economics 18 (1975): 293.

Notice too that the necessity that "compels" A to the agreement may be brought about even by the actions of B, provided B has an independent right to perform those actions. Again, the theory of rights is strict; it does not look to the motives behind an action in order to determine whether it may or may not be performed.

us but a simple case of bad judgment. It is at his own risk that A makes an offer to B for something, B having made no representations about the thing.[1]

If in the process of negotiations, however, B does make representations, and he misrepresents the object under consideration, then the issue of fraud arises.[2] Yet even here it is by no means clear just what rights and obligations are at issue. For while B misrepresents the object he wants to exchange, he does not compel A to accept that object or those representations. A may walk away from the offer, or he may check the representations out for himself; thus it is difficult to determine just what is taken by B when A accepts the offer.[3]

It is customary at this point to say that misrepresentation vitiates a contractual agreement because there is in fact no agreement when it is

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[1]It should be noted--prudent business practices aside--that the gathering and giving of information is itself not without costs. Just as in the broader case of action, then, the theory of rights does not require one individual to expend himself upon another--though of course he may do so if he chooses. Needless to say, the modern trend toward "full disclosure"--whatever that could possibly mean--is very much at odds with the strictures set by the theory of rights. See, e.g., Jonathan M. Landers, "Some Reflections on Truth in Lending," University of Illinois Law Forum, 1977, no. 2, p. 669.

[2]On the related cases of partial disclosure, concealment, and innocent misrepresentation see Epstein, "Unconscionability: A Critical Reappraisal," pp. 298-99.

[3]Surely nothing is taken if A does not accept, unlike in the case of duress; there the use or threat of force is itself a taking, quite apart from whether it compels acceptance.

Notice that these questions arise in ordinary truth-telling cases as well, not excluding those involving news reporting. It is easy to say, of course, that we have an obligation to tell the truth. But that claim has to be fit within the larger generic framework developed earlier. As we have seen, there is no moral obligation to speak. But even if we do speak it is doubtful that there is any moral obligation to tell the truth, unless it can be shown, along lines developed earlier, that telling falsehoods takes something that others own. Moreover, it must be shown precisely how it is that this taking occurs, which is just the problem above. If that were able to be shown in some far-reaching way, then it would seem that our First Amendment speech and press (and religion?) guarantees would have to be justified not with reference to the theory of rights but on consequentialist grounds--say, that in the long run these liberties work for the best. This would be a less than happy result! (John Stuart Mill invoked just such consequentialist grounds in his defense of freedom of expression; see On Liberty, ed. Currin V. Shields [Indianapolis: Bobbs-Merrill, 1956], chap. 2, pp. 19-67.)

present--there is no "meeting of the minds."[1] A and B exchange titles on the basis of their respective representations; had B's representations been accurate, however, A would not have accepted (at least to just those terms). Thus the consent that brings about the exchange is spurious. What B takes, therefore, is the object A hands over in exchange, not having given the appropriate consent.

Intuitive as this argument may appear--and perhaps it will suffice in a certain range of cases--it is less than satisfactory. In the first place, A and B do reach an agreement, but that agreement does not cover the transaction that is in fact performed by B (I will develop this point below). Moreover, the argument appeals to counterfactual conditionals, which may or may not be true (had the representations been accurate A might very well have consented to the identical terms). Finally, the argument does not really draw out the element of compulsion that is there to be drawn out. In order to do that, however, we will have to place a somewhat different interpretation on "misrepresentation" than is ordinarily provided, but one that more satisfactorily brings out the element of fraud involved. In brief, I suggest we treat misrepresentation not simply as a failure to accurately represent the object exchanged--as a narrow interpretation of the idea would have it--but as a withholding of the object in fact represented.

Notice first that in the example before us consent is given, but again, not to the transaction that is in fact performed by B. A and B have made an agreement, that is; they have agreed to an exchange of titles. Now a title just is a representation: it relates an owner to the object owned through a representation of that object. Thus when A accepts the title to something owned by B he accepts both the title and, in time at least, the object that stands behind the title. (He need not accept immediate receipt of the object, of course, though he does accept immediate ownership of it.) If what he receives, however, is something other than the object the title represents, then

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[1] Notice that this cannot be said of the nondisclosure example above. To be sure, at one level there was no meeting of minds: the painting A thought he was getting was not the painting B thought he was giving. But at the level of description consistent with the example there was a meeting: for A offered to buy simply "that painting," which is precisely what B gave him.

either B's transaction is not yet complete or B has defrauded him. The compulsion, then, arises from B's retention of the object represented by the transferred title (assuming there is such an object), i.e., from his failure to hand over the object to which A now holds the title: B, in effect, is taking that object, and thus A's right to the object he now owns is violated. We need look to no mental elements, then, but only to the representations given and accepted--the titles exchanged--and compare these with the objects exchanged. If one of the objects does not match the representation, then either it is being withheld or it does not exist; but in either case the agreement has not been satisfied. In short, in his misrepresentations B has in fact represented something, the title to which has been accepted by A; B now has the obligation to transfer the object represented by or standing behind the title.[1]

It should be noticed, then, that this interpretation of fraud finds the defect not so much in the process of contract formation as in the failure of contract completion. Still the defect is in procedure, not in substance. The contract may be set aside, that is, not because of any finding relating to the "fairness" of the terms--the "substantive unconscionability" mentioned above--but because as a procedural matter its terms have not been satisfied. It is a very different thing to set a contract aside because its terms are found unsatisfactory by the court. When it does that the court is making substantive or value judgments, designed to supersede those that have already been reached by the parties to the agreement.

Now I have said little on this point until now because in truth it is a point about which the theory of rights has little to say--other than that the court has no moral right to intercede on behalf of one of the parties to obtain for him a term that he could not obtain voluntarily from the other party. If equal rights means anything it means that individuals--regardless

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[1] Admittedly, this interpretation of fraud has more the flavor of nonperformance than misrepresentation; accordingly, it works better for those cases in which we want to require specific performance--however broadly understood--than for cases in which, prior to the transfer of titles, B holds no title to be transferred. A full discussion of these issues would take us into problems of contract formation, evidence, and so forth, all of which are beyond my present scope. My aim has been simply to indicate how it is that fraud may result in a taking and hence in a violation of rights.

of their respective "bargaining power"--shall be equally free from interference to reach whatever agreements they can with each other in the marketplace. This they presumably will do with reference to whatever theory or conception of value they bring with them into the marketplace. Thus the question whether a particular term (e.g., a price) is fair is for them and them alone to decide. Likewise, given that we are dealing with competent adults, whether a particular exchange is in the best interests of the parties to the exchange is for those parties alone to decide. It is basic to our conception of human dignity that we let individuals decide these questions of value for themselves, that we do not force them (e.g., through the courts) to accept values they did not choose --whether they be poor and weak, or rich and powerful.

In this discussion of voluntary associations I have concentrated on the basic, straightforward contractual model, trying to make explicit the underlying justificatory issues, because this is, after all, the paradigm for virtually the whole of our everyday world of social intercourse. From marriages to social, religious, cultural, educational, and other organizations, from business partnerships to trusts, to giant corporations, from simple market interactions to complex employment relationships, the contract and its constitutive rights and obligations serve as the moral and legal foundation. With the repeated and manifold exercise of their contractual rights, then, individuals can move quite rapidly from our earlier status quo to something looking very much like our ordinary world.[1] And all of these changes will be legiti-

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[1]Let me sketch here the anomalous relationship set aside earlier, between parents and child. This is the truly unique relationship, involving as it does the literal creation of another human being. Since the "entrance" of this individual into the relationship is neither voluntary nor involuntary, but is rather "nonvoluntary," the argument that justifies the obligations of parents to their children borrows from both the tort/crime and the contract models. In performing acts of procreation, just as in performing any other action, the parents are responsible for the consequences should those acts create rights in others (the defense of ignorance will no more avail here than in any other tort case). We are responsible, that is, for the upshots of the actions we voluntarily perform, however unintended those consequences may be. Of course, in many cases of begetting--one would hope in most--the consequences are not only voluntarily but intentionally brought about as well. Thus the contractual model is more appropriate here. But whether children are willingly or only reluctantly brought into being, the special rights they hold against those responsible for creating them are every bit as real as the special rights of tort victims or contractors. The difficulty here, however, is that there is no status quo, as in the tort case, or no agreed upon terms,

mate provided the process by which they come about is legitimate, i.e., provided no general and special rights are violated as this complex world unfolds.

With the exception then of the enforcement relationships to which right violations may give rise--again, "may" because enforcement is a problem only when there is uncertainty as to what obligations there are or when obligations (general or special) are not carried out voluntarily--this completes the outline of our moral rights and obligations. I have set forth arguments to show that there are such rights; and I have indicated broadly what there are and are not rights to, i.e., what rights and obligations there are to be enforced, should that be necessary, whatever the means for doing so. There is much more to be said, of course, about each of the issues I have raised along the way, and many I have not raised. I want to proceed, however, taking up at last, though only very sketchily, the most difficult problem with which a theory of rights must contend, the problem of enforcement.

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as in the contract case, to aid in delineating the content of these rights. As a result, such ideas as "custom" or "community standards" enter, with all their attendant problems, not only of verification but of justification as well.

CHAPTER IV

TOWARD LIMITED GOVERNMENT

By now the force of the subtitle of this essay should be clear: to restate certain points set out in the Introduction, the theory of rights just outlined moves toward limited government by limiting what there is for government to do--at least along one common line of argument for political legitimacy (about which more in a moment). For if governments are indeed instituted among men to secure their rights, then the scope of the activities of such governments--and hence their size--will be a function of the rights there are to be secured. As I believe I have just shown, there are not nearly as many rights as is often supposed; in particular, the catalogue of rights that constitutes the contemporary liberal and socialist agenda is substantially exaggerated (and accordingly is cruelly misleading). Thus if the moral legitimacy of government is itself a function of securing only those rights it is instituted to secure, by enforcing only those correlative obligations there are to be enforced (which of course is the crucial side of the equation), then the theory just outlined moves toward undermining the moral legitimacy of much of what contemporary governments are engaged in doing--securing nonexistent "rights," enforcing nonexistent "obligations." A legitimate government will not "create" rights to be secured but will only recognize preexisting moral rights, which it will make legal rights by way of this recognition and enforcement. This was the sense of political legitimacy that informed the classical liberals; it is the sense that informs much contemporary libertarian thought. On the classical view, then, it is not simply what might be called the "direct" violation of individual rights that must be avoided--as when governments violate rights of speech, press, religion, and so forth. It is also the "indirect" violations that are to be eschewed, as when governments enforce spurious obligations; for not only do individuals not have such obligations, but by logical

entailment they have a right not to be forced to do or not do the acts thus made obligatory.

If this theory of rights is correct, then, if it accurately describes that part of the moral order--minimal though it is--that can be justified--as opposed to the countless value-laden orders that are rooted in dubious or (more usually) nonexistent epistemologies--then a government more extensive than the limited "night-watchman" state cannot be justified. For such a government would violate individual rights: it would force individuals to do what they have a right not to do--and eventually, as history has amply demonstrated, to not do what they have a right to do. (Illegitimate governments, after all, have more reason to silence their critics than do their legitimate counterparts.) The argument from the other direction, however, the claim of the anarchist that no government is legitimate, is much more difficult to counter, as Nozick recently demonstrated.[1] For the anarchist is going to the heart of the matter: he is asking how any forced association can be justified, which is precisely how he characterizes government. Even when it limits its activities to securing individual rights, he argues, it does so by claiming a monopoly on the exercise of this right; hence it prohibits self-enforcement, which every individual in the state of nature has a right to do. And not incidentally it extracts a fee from the individual for this unsolicited service.

The anarchist is of course correct, Nozick's heroic efforts to overcome his objections notwithstanding.[2] Those efforts point precisely, however, to the salient issues in the matter of political legitimacy. In essence, Nozick tried to show that the general fear to which self-enforcement in the state of nature gives rise leads those who have an interest in lessening their fear--who happen also to be the same individuals who have previously purchased enforcement services from what has come in time to be the dominant protective association--to purchase the rights of self-enforcement from those few holdouts who, by exercising their enforcement rights, give rise to the fear.

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[1] See generally Nozick, Anarchy, State, and Utopia, part 1.

[2] I ignore here the conventional arguments for political legitimacy that spring from consent or social-contract theory because they encounter well-known objections. See, e.g., Wolff, In Defense of Anarchism. And of course I ignore theories that are rooted in conceptions of "the common good."

> If the protective agency deems the independents' procedures for enforcing their own rights insufficiently reliable or fair when applied to its clients, it will prohibit the independents from such self-help enforcement. The grounds for this prohibition are that the self-help enforcement imposes risks of danger upon its clients. Since the prohibition makes it impossible for the independents credibly to threaten to punish clients who violate their rights, it makes them unable to protect themselves from harm and seriously disadvantages the independents in their daily activities and life. Yet it is perfectly possible that the independents' activities including self-help enforcement could proceed without anyone's rights being violated. . . . [I]n these circumstances those persons promulgating and benefiting from the prohibition must compensate those disadvantaged by it.[1]

Nozick goes on to give an account of the factors involved in the compensation formula, concluding in particular that the protective agency would be morally obligated to provide protection services for these independents. Thus by an invisible-hand process, each individual pursuing his own self-interest, a de facto monopoly on enforcement services, looking very much like a state, would legitimately arise.

This summary cannot hope to capture the complexity, much less the subtlety of Nozick's arguments. Nevertheless, it is enough to indicate that he is up against the classic eminent domain situation. The hold-out who does not want to sell his enforcement rights, at any price, has a perfect right not to; that, after all, is just what having a right entails. Now to be sure, Nozick does not go (straightaway) to a "public interest" justification for the taking he in fact ultimately sanctions, as is done in the case of eminent domain (albeit with "just compensation" thrown in). Rather, he finesses his argument around the difficult risk and fear factors, which gives an air of justification to his moves. What we need to do, then, is explicate these moves a bit more fully; in particular, we need to see more clearly how the taking comes about. This will shed light in turn upon the profound issues of procedural justice that stand in the way of political legitimacy.

We begin by returning to chapter 3, section 4.5.1, where our rights and obligations in the matter of endangerment were little more than mentioned.[2] I argued there that individuals have rights against endangerment, at least beyond a certain level; for acts beyond this threshold take the quiet uses that

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[1] Nozick, Anarchy, State, and Utopia, p. 110.

[2] I have discussed this subject in greater detail in my "Corporations and Rights," part 4.

can be made of holdings. The presumption, then, for causal reasons rooted in the PGC, is on the side of passive, not active rights. Accordingly, there is a line somewhere that separates the acceptably risky activities from those that are unacceptably risky to others, a line that divides the permissible from the impermissible. The idea that there is such a line, however determined, makes intuitive sense, however difficult it may be to draw it or how arbitrary it may appear when drawn (about which more below). Given such a line, then, generally related individuals have a right to perform the acceptably risky acts, provided they compensate those injured on the occasions when the risk materializes; they do not have a right to perform the unacceptably risky acts. Within this "public" framework, however, which describes our general rights and obligations in the matter of endangerment, individuals are of course at liberty to enter into special relationships with others whereby they shift the line vis-à-vis these others. Thus fearful people may purchase prohibitions of actions otherwise permitted; and risk-takers may choose to expose themselves to greater risk than the public line permits in exchange for compensation from actors who wish to go beyond the threshold. But absent those special agreements, we do not have to compensate those whom we prohibit from going beyond the line, even though that prohibition may "disadvantage" them (aren't we all disadvantaged by our obligations?); for they have no right to go beyond that line in the first place. Nor, on the other side, do we have to compensate those extra-sensitive individuals who are "disadvantaged" by our performance of acts falling below the threshold. It is thus a regime of equal rights, however the exercise of those rights may affect the extra-sensitive or the under-sensitive.

This much, in brief, is the outline of our rights and obligations in connection with risky action. It depends, of course, upon there being such a public line. But in the state of nature, drawing such a line in a principled way raises immense difficulties (which among other things will lead me below to practical arguments for the state). In fact, an appreciation for these difficulties has led Nozick, it seems, to try to delineate the issues of risk without reference to such a line.[1] Thus he seems to want to permit "most"

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[1]See Nozick, Anarchy, State, and Utopia, pp. 65-84. In truth, I am unable to determine precisely what his argument is here, interlarded as it is throughout with conjectures, speculations, and interrogatories--as undoubtedly

risky acts provided compensation is paid to those actually harmed--which would permit a great deal of endangerment, raising serious questions about how much fear we must live with.[1] At the same time, he wants to permit the prohibition of risky acts provided compensation is paid to those "seriously disadvantaged" by the prohibitions for reasons peculiar to them--as when epileptics are prohibited from driving or indigent uninsureds are prohibited from putting others at risk in various ways.[2] The result of all of this, however, is a substantial muddying of the normative waters, as is to be expected when a reference point (or line), however arbitrary, has been lost sight of. In particular, if these prohibitions are done by right, then one would assume that there was no right to perform the acts prohibited. But then what is the justification for requiring compensation for the prohibitions? And is there a right to this compensation, yet not a right to perform the acts prohibited?[3]

Nowhere perhaps is this uncertainty more evident than in the passage above. Does the protective agency have a right to prohibit independents from engaging in self-help enforcement? The answer would seem to turn upon whether independents themselves have rights of self-enforcement--or better, upon whether they have rights to engage in reliable and fair self-enforcement. Nozick appears to answer this a bit later: "It goes without saying that these [compensatory] dealings and prohibitions apply only to those using unreliable or unfair enforcement procedures."[4] We must suppose, then, that the protective agency cannot legitimately prohibit the activities of independents whose procedures are reliable and fair. I have been unable to locate a development

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it should be on so difficult a matter. Nevertheless, I believe I am stating above the main conclusions.

[1] Ibid., pp. 75-77. [2] Ibid., pp. 78-79, 81-84.

[3] Notice too that it appears now that (some of?) our rights and obligations, at least in the endangerment context (which in principle includes all interpersonal action), are rooted in "fairness" considerations as these relate to particular differences between particular people, not in general principles of action. Here too, as with general line drawing, problems of arbitrariness will arise, but at a much less general and hence less justifiable level.

[4] Ibid., p. 112.

of this side of the question in Nozick's argument; but if the protective agency is not permitted to prohibit such procedures, as would have to be the case if indeed we do have rights of self-enforcement, then it will never become a state as long as there are reliable and fair independents around; for the monopoly feature will not arise if there are hold-outs unwilling to be bought out. Absent grounds for prohibiting their activities, that is, independents have a right to be left alone and to perform those activities.

One way for Nozick to get out of this difficulty, of course, is to assume that the agency will treat all self-help enforcement as unknown and hence as presumptively risky. This might be one interpretation of what he in fact does--though I will not press this view because here again I am unable to determine precisely what his argument is.[1] He does say, however, that "[e]veryone has the right to defend against procedures that are in fact not, or not known to be [emphasis added], both reliable and fair."[2] That being the case, he believes that the dominant protective association will amount to a de facto monopoly, this in virtue of its power.

> Since the dominant protective association judges its own procedures to be both reliable and fair, and believes this to be generally known, it will not allow anyone to defend against them [original emphasis]; that is, it will punish anyone who does so. The dominant protective association will act freely on its own understanding of the situation, whereas no one else will be able to do so with impunity. Although no monopoly is claimed, the dominant agency does occupy a unique position by virtue of its power. It, and it alone, enforces prohibitions on others' procedures of justice, as it sees fit.[3]

The test here, however, is straightforward. Let us grant that only the dominant agency will be able to effectively exercise the right to prohibit unknown or risky procedures as well as the right (and let us assume that it is a right) to impose its procedures on others. Since it does not and cannot prohibit the use by independents of procedures known to be reliable and fair, the only issue is whether it has that knowledge. Here the independent can simply

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[1] In fact, Nozick says that "[t]here will be a strong tendency for [the agency] to deem all other procedures, or even the 'same' procedures run by others, either unreliable or unfair. But we need not suppose it excludes every [original emphasis] other procedure" (ibid., p. 108). Here again, this side of the issue is never developed.

[2] Ibid.

[3] Ibid.

make his procedure known to the agency; if it is reliable and fair, even as the agency sees it, no prohibition can be justified. Or he can even ask the agency to prescribe a procedure for him, which is the ultimate test of the agency's integrity. But in either case there is no reason why the independent must have his enforcement services provided by the agency. If the agency insists, however, upon prohibiting the independents' self-help activities, even in the face of the evidence he has adduced which satisfies the agency's criteria, then the prohibition is nothing but a taking, the payment of compensation notwithstanding. For with the risk removed, the justification for the prohibition will be removed; any prohibition in these circumstances amounts to the agency's denying to the independent a right it exercises itself.

Now it may be objected that this analysis has the agency "calling the shots," if not actually carrying them out, and this, when all is said and done, is the crucial item. This is true; but it should be noted also--and Nozick himself is not unmindful of the point--that the agency calls these shots as much from might as from right. Thus if there should be disagreement between the agency and the independent over what constitutes fair and reliable procedures, only the agency will be in a position to assert its view of the matter, despite the fact that both it and the independent will claim the right to do so. This "conflict of sovereignty" will not move us toward the legitimate state, however, short of one of the parties yielding his sovereignty voluntarily. Rather, it points simply to the need for a resolution of the uncertainty regarding the reliability and fairness of the respective procedures. In particular, it points to the need for a body of procedural rights and obligations to which all must agree, something like the body of substantive rights and obligations set out in chapter 3. For absent such a body of rationally grounded rules, uncertainty such as this will of necessity be resolved by might, not by right and reason.

But is such a body of procedural law as is envisioned here possible? Has Nozick not pointed throughout his discourse to many of the profound epistemological issues that militate against such a vast and complex project? How, for example, can we generate necessary acceptance of probability assessments (as, e.g., in questions of evidence, or probable cause searches), which take us straightaway into value issues? But we needn't limit these questions to procedural matters. Even at the substantive level considerations of value are

inescapable, as we have just seen in connection with an endangerment line. Such a line is required in the case of nuisance as well, and here too we are up against value judgments. Or consider the adjudication of forced exchanges. The theory in chapter 3 gives us substantive rules of responsibility and entitlement to which everyone must agree; add to this a hypothetical body of necessary procedural law and we would still have to make value judgments in the end. In order to redress particular wrongs, that is, whether through compensation or punishment or both, considerations of value must eventually be introduced. For the consent that ordinarily brings individuals together in the first place and then enables them to distribute values between themselves is missing. If A has hit B they are already in association; B has a right to be returned to the status quo, but just what that entails, beyond a certain level of description,[1] is a matter of values, not of rights. To be sure, A and B might agree about the value of, say, a life or a limb; but if they do not, they cannot now simply walk away as if they had been unable to reach an agreement in the marketplace.[2]

Where the theory of rights must turn at last then to the theory of value, we leave the realm of reason, strictly speaking. Here the epistemological foundations become murky, the surety disappears. It is not that we do not have rights in these contexts; it is rather that the ultimate working out of these rights requires an appeal to values, concerning which there is room for honest disagreement. (It has been part of my aim, in fact, to locate just where these value considerations enter the overarching deontological picture.) Here it is, I believe, that we are likely to find the path to the state, or at least to a kind of political legitimacy. For the fear that there may be, in principle, no rational way out of these difficulties could conceivably lead us to this ultimate expedient.

Before taking that path, however, we need to temper our hope with some

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[1]For an indication of how far the formal analysis can be pushed, before values have to be brought in, see Pilon, "Criminal Remedies."

[2]Anarchists sometimes argue that all of this might be worked out by contract and hence voluntarily, thereby avoiding the need for government. Individuals might, for example, make contractual arrangements for adjudication services before they have any forced exchanges. But of course--arguments from prudence aside, for they are not really moral arguments--the purchase of such services may itself have to be forced.

moral reality. If the nexus of rights and values does indeed lead us to forced adjudication and ultimately to the state, we need to recognize that these judgments, rooted in expediency, are themselves matters of value. Accordingly, there will be those who honestly disagree. Whereas we, for these practical reasons, are "forced" out of the state of nature, these others will be forced straightforwardly into political association. It is imperative, then, that we recognize that government is a practical expedient only, and a matter of forced association as well. About it, that is, there is a fundamental air of illegitimacy, which only unanimous consent could dispel. This air alone should temper at every turn our instrumental use of government. Here, especially, there are grounds for moral modesty.

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