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"Rights" as Meta-Normative Principles

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THOMAS MORE: THE law is not a "light" for you or any man to see by; the law is not an instrument of any kind. The law is a causeway upon which, so long as he keeps to it, a citizen may walk safely.

— Robert Bolt, *A Man For All Seasons*

If the free institutions fostered by the Enlightenment are to be maintained, if the liberal order is to overcome its current malaise, an adequate moral vision is absolutely necessary. Indeed whatever else may sustain a political order on a day to day basis, it is the sense that the order is legitimate that will ultimately determine its fate. The moral vision which most eloquently characterizes our own sense of political legitimacy is the American Declaration of Independence. Its leading concept can be summed up in two words—individual rights.

Yet, the doctrine of individual rights suffers from many difficulties and misinterpretations. Chief among these problems is explaining the exact relationship between rights, morality, and law or politics. This problem is primarily a result of a failure to grasp the moral function of individual rights. Indeed, this failure is found almost as often among defenders of individual rights as its opponents. In our book, *Liberty and Nature*,¹ we offer a theory of rights that is designed to support both individual rights and be rooted in a solid moral framework. To accomplish this task we needed to do two things simultaneously. One was to explain the purpose or function of rights in such a way that the work they do is not reducible to the work done by some other moral concept. The other was to show how rights are grounded in the moral framework itself, in our case a self-perfectionist moral framework.

In this essay we shall lay out some of the structure of our argument in *Liberty and Nature*. Our purpose is to give a sense of that argument without all the detail that seemed necessary for a more complete account. We will begin by explaining just what kind of ethical concept "rights" constitute. Next we will describe some of the central features of our account of virtue ethics necessary for presenting the summary of an argument for rights that follows. In the penultimate section we will consider some objections to our argument, and in our concluding section we will consider how our view of rights, though based on a self-perfectionist virtue ethics, does not commit us to a classical or communitarian political view, but to a liberal one. The Concept of "Rights"

"Rights" are an ethical concept, but they differ from other ethical concepts. They have a unique function. They are not directly concerned with either achieving the moral good or obtaining right conduct. Rather, rights are meta- normative principles: that is to say, they are concerned with establishing a political context that protects the self- directedness or autonomy of individuals and thereby secures the liberty under which individuals can achieve their moral well-being.

Rights provide guidance in the creation and interpretation of a political/legal system which protects individuals from being used by others for purposes to which they have not consented. Rights are used to determine fundamentally what ought to be a law. They provide the fundamental normative basis for a legal order, but they do not, like the moral virtues, provide individuals with any guidance regarding what choices to make in the pursuit of their own or anyone else's moral perfection.

The fundamental principles of a polity's legal system must have some normative basis if it is ultimately to have authority, and so the attempt to make law entirely independent from morality is a mistake. But it is also a mistake to reduce the moral concepts which underlie a polity's legal system to those moral concepts which provide individuals guidance in the conduct of their daily lives. What is, however, the fundamental difference between normative and meta-normative principles, and how are they connected? An examination of the character of human moral well-being, as conceived by a certain account of virtue ethics, will provide answers to these questions. Virtue Ethics

Human moral well-being, or as many virtue ethicists call it, "human flourishing," is concerned with choices that necessarily involve the particular and the contingent. Knowledge of the moral virtues and true human goods may tell all of us what, abstractly speaking, we ought to do, but in the real world of individual human conduct, where all actions and goods are concrete and where human well-being takes a determinate form, what the moral virtues and human goods involve cannot be determined from the philosopher's arm chair. A successful moral life is by its very nature something which is highly personal. For example, having a career, an education, a home, friends, and medical care are goods which, when considered from an abstract perspective, are good or appropriate for all human beings. They ought to be created or achieved. Yet, this claim is not too helpful in providing guidance to the individual in a concrete situation. None of these goods exist in an abstract or generic manner. How are they to be created or achieved? What kind of job, education, home, and medical care does one need? Who will be one's friends? To what extent and in what amount are these to be pursued? How is the achievement of one of these goods to be related to the achievement of other goods? What is the proper "balance" or "mix"?

These questions can only be answered by a consideration of the unique needs and circumstances of the individual, and the insight of the individual himself is crucial to determining the proper answer. Practical reason is needed in the achievement, maintenance, enjoyment, and coherent integration of these basic human goods. Determining what moral virtue and goods call for in terms of concrete actions in specific circumstances can vary from person to person, and

certain virtues can have larger roles in the lives of some persons than others. Determining the appropriate response for the situation faced is, therefore, what moral living is all about.

This view of human flourishing could be described as entailing a "pluralistic realism" regarding human values, and this is true. The human good is something real, and it is individualized and diverse. But there is something at the concrete level that is really common to all the various forms of flourishing and indeed must be. It is the essential core of practical reason itself, and this essential core has another name—self-direction. The act of exercising reason, of using one's intelligence, is not something automatic. It is something that the individual human being needs to initiate and maintain. Thus, self-direction or autonomy pertains to the very essence of human flourishing—it is the formal essence—and thus is common to all forms of flourishing regardless of how diverse.

Self-directedness is, therefore, both a necessary condition for self-perfection and a feature of all self-perfecting acts at whatever level of achievement or specificity. This is another way of saying that the phenomenon of a volitional consciousness² is both a necessary condition for, and an operating condition of, the pursuit and achievement of self-perfection. The absence of self-directedness implies the absence of self-perfection, although the absence of self-perfection does not imply the absence of self-directedness, nor does the presence of self-directedness imply the presence of self-perfection (but the presence of self-perfection does imply the presence of self-directedness).

None of this is, of course, to say that any choice one makes is as good as the next, but it is to say that the choice must be one's own and involve considerations that are unique to the individual. One person's moral well-being cannot be exchanged with another's. The good-for-me is not, and cannot be, the good-for-you. Human moral well-being then is something objective, self-directed, and highly personal. It is not something abstract, collectively determined, or impersonal.

This last point is crucial, because it allows us a way to determine the unique moral function of rights. According to our theory, rights are concerned to protect the condition under which self-perfection can occur. Obviously the securing of the condition for the possibility of self-perfection is logically prior to and distinct from the pursuit of self-perfection. But securing the condition must be understood as essentially "negative" if we are correct that self-directedness does not imply or guarantee self-perfection and that one's self-perfection is not exchangeable with another's. We are not, in other words, trying with our theory of rights directly and positively to secure self-perfection, but rather to protect, and thus prevent encroachments upon, the condition under which self-perfection can exist. Our aim is thus to protect the possibility of self-perfection but only through seeking to protect the possibility of self-directedness.

The single most common and threatening encroachment upon self-directedness and consequently self-perfection is the initiation of physical force by one person (or group) against another. We therefore need a principle which will, to borrow a phrase from Robert Nozick, allow each his own "moral space"—a sphere of freedom whereby self-directed activities can be exercised without being trampled by others or vice versa.

The aim of our theory of rights is thus to secure politically and legally the possibility of self-direction. However, why is self-direction taken as the condition to be protected? Are there not many other conditions that are also necessary for the possibility of self-perfection? Why should not securing these conditions be a political and legal concern and not merely a matter of ethics? In other words, why do we need to consider rights as only fundamental political or legal principles? Should not rights be concerned with more than the protection of self-direction? Why should we consider them as only meta-normative? The Need for a Meta-Normative Principle of "Rights"

The individualized character of human flourishing creates a need for another type of ethical principle once we realize that human moral well-being is only achieved with and among others. We are social beings, not in the Hobbesian sense of merely needing others to get what we want, because we are powerless on our own, but in the sense that our very maturation as human beings requires others. Indeed, a significant part of our potentialities is other-oriented. If this is true, however, there is a difficulty. If one person's particular form of well-being is different from another's and may even conflict, and if persons can prevent others from being self-directed, then certain interpersonal standards need to be adopted if individuals are to flourish in their diverse ways among others. There needs to be an ethical principle whose function is not primarily that of guiding a person to well-being or right conduct, but that of providing a standard for interpersonal conduct which favors no particular form of human flourishing while at the same time providing a context for diverse forms of human flourishing to be achieved. Such a principle provides a context by protecting that which is necessary to the possibility of each and every person finding fulfillment regardless of what determinate form the virtues and human goods take in their lives. Thus, it is very important that there be such a thing as a meta-normative principle.

Given what we have already said about our conception of human flourishing and the central, necessary role that self-directedness plays in this conception, self-directedness is that feature of human flourishing that everyone must first have protected in the concrete case if they are to flourish, and it is the only such feature. Yet, since this point is crucial to our theory of rights, the relation of self-directedness to practical reason as well as the virtues and goods of human flourishing bears repeating: practical reason cannot be practical reason without self-direction, and no constituent virtue or good of human flourishing can be such a virtue or good without practical reason. So, self-directedness is both central and necessary to the very nature of human flourishing. It is the only feature of human flourishing which is common to all acts of self-perfection and peculiar to each. Thus, when it comes to finding a feature of human flourishing upon which to base a meta-normative principle, self-directedness is the only feature which each and every person in the concrete situation has a necessary stake. Also, it is the only feature whose protection is consistent with the diverse forms of human flourishing.

We cannot have a meta-normative principle that will structurally prejudice the society more towards some forms of self-perfection than others. To do that would be, in effect, to act against the requirement that our theory support self-perfection. So the principle we arrive at must be universal in the sense of being equally applicable to all individuals.

In addition, the universality requirement necessitates that we center our principle around that characteristic present in all forms of self-perfection (or its pursuit), for otherwise we will again prejudice the situation in favor of some forms of self-perfection over others. So-called "generic goods," for example, food, clothing, shelter, knowledge, friendship, artistic appreciation, and love, or even central virtues like integrity, courage, and justice, will not suffice as our standard here. Even though they are universal in the sense of helping to define the meaning of self-perfection for all individuals, their particular form or application is given by the individual. This means that while, for example, artistic pursuit or appreciation may be necessary for anyone's self-perfection, the particular form it will take will differ widely. Our principle must apply to both the particular and general in the same way and in the same respect, or we will be back to an a priori slanting of the situation in favor of some forms of self-perfection over others. Now, of course, it becomes much more difficult to find a candidate for grounding our principle of rights—one that is retained across individuals and throughout the developmental process of achieving and maintaining individualized self-perfection. Nevertheless, a principle that provides for the protection of the self-directedness of persons will not favor any particular form of flourishing and yet will still allow the possibility that everyone can flourish. Such a principle is our meta-normative conception of rights.

On the basis of what we have said so far, it is clear that the type of rights we possess consistent with protecting the condition necessary for the pursuit of any form of self-perfection would be rights of equal liberty, such that no one is allowed to take an action towards another which threatens or destroys that condition needed for another's actions to be self-directed. The basic rights we possess are thus principles of mutual non-interference. And this translates socially into a principle of maximum compossible and equal freedom for all. The freedom must be equal because it must allow for the possibility of diverse modes of flourishing and therefore cannot be structurally biased in favor of some forms of flourishing over others. The freedom must be compossible in the sense that the exercise of self-directed activity by one person must not encroach upon that of another.

Because we are not directly concerned with the promotion of self-perfection itself, but only the condition for it, it is not the consequences per se that will determine encroachment. What is decisive is whether the action taken by one person towards another secures that other's consent or is otherwise in accord with that other's choices. For one may violate another's rights and produce a chain of events that lead to consequences that could be said to be to that other's apparent or real benefit, or one may not violate another's rights and produce a chain of events that lead to one's apparent or real detriment. Yet since the purpose here is to structure a political principle that protects the condition for self-perfection rather than leads to self-perfection itself, the consequences of actions are of little importance, except insofar as they threaten the condition which rights were designed to protect in the first place. For our concern here is not with how acts will turn out, but rather with setting the appropriate foundation for the taking of any action in the first place. Objections

The preceding outline of our theory is perhaps best clarified by answering some objections. The following four objections³ should be sufficient.

I. The first objection runs as follows: a meta- normative principle must be based on something in which each and every person, in the concrete situation, has a necessary stake. It must be something that is both common and peculiar to every act of self-perfection as well as neutral to the various forms of flourishing. Self- direction certainly meets these criteria, but it is not the only thing to do so. Such constituent virtues as, for example, integrity, courage, and justice, are necessary to any form of flourishing. Everyone must have integrity, courage, and justice if they are to flourish. They are the same requirements for everyone. Though there might be different levels of artistic appreciation that are appropriate for different persons, there is no diversity when it comes to virtues such as these. Self-perfection requires that everyone exercise these virtues. If there is diversity or pluralism when it comes to these virtues, then human flourishing is reduced to nothing more than a form of relativism—be it some form of conventionalism or simply subjectivism—and the claim to base rights on a self- perfectionist virtue ethics becomes a sham.

This objection is, however, guilty of an ambiguity. Integrity, courage, and justice are the same for everyone only in the sense that these virtues must be applied by everyone to the task of self-perfection. What they are applied to, how they are applied, what specific actions they require, and how they are integrated with the other goods and virtues that make up human flourishing varies greatly from person to person. These virtues are the same for everyone only when they are abstractly considered.

The assumption that such central virtues do not allow for diversity in the concrete comes from treating human flourishing in a Platonic manner. There is no such thing as "human flourishing." There is only individual human flourishing.⁴ The human good neither exists apart from the choices and actions of individual human beings nor independent of the particular "mix" of goods that individual human beings need to determine as being appropriate for their circumstances. Individuals do more than provide loci at which "human flourishing" becomes spatially individuated; for human flourishing becomes real, achieves determinacy, only when the individual's unique talents, potentialities, and circumstances are jointly employed. The specifics of these individuating features of human flourishing are neither implied nor included in an abstract account of human flourishing.

The individualized character of human flourishing requires that the problem of balancing and prioritizing virtues not be solved in an a priori manner. An abstract consideration of human nature does not tell one what the proper relation of one virtue to the other virtues and goods should be. The proper mixture of the necessary elements of human flourishing cannot be read off human nature like one reads the Required Daily Allowances for vitamins and minerals off the back of a cereal box.⁵ Rather, this is a task for practical reason, and practical reason occurs only through individuals confronting the contingent and particular facts of their concrete situation and determining at the time of action what about that situation is truly good for them. This does not, however, mean either that one can with moral impunity ignore any of the necessary virtues or goods of human flourishing or that one course of action in the concrete situation is as good as the next. We are not pushed to conventionalism or subjectivism. Yet it does mean that ethical rationalism is false, and one must be very careful in trying to find something which is common

at the concrete level to all forms of human flourishing. Certainly, such virtues as integrity, courage, and justice do not suffice in providing a basis for a meta-normative principle.

II. Instead of thinking of some intrinsic feature of human flourishing as something upon which to base a meta-normative principle, why not consider something which is extrinsic but which also seems completely neutral with respect to forms of flourishing? Why not consider money? Does not money provide the power to attain one's ends, regardless of what those ends might be? Money is a medium of exchange and store of value. As a medium of exchange and store of value, it does not favor one form of flourishing over any other. Every person needs the ability to attain the ends his well-being requires, and money, by and large, will allow them to do so. Thus, at least minimal transfers of money to those who are not as well-off as others seem to be something that fits the criteria for being a meta-normative principle. This seems true especially if done in the right amounts. Cannot money be taken from some without significantly altering their projects and given to others such that, because of money's neutral character, they can flourish in their own individualized way?

This suggestion is, however, mistaken in a number of ways. First, money as a medium of exchange and store of value is indeed neutral to the various forms of flourishing, but the value of a person's money to that person is not something that is so neutral. The value of Jane's money to Jane is, for example, found in the particular way it is used by Jane in fashioning a worthwhile life. Thus, to take people's money from them without their consent is not to take some neutral value but to take the particular values they achieve and maintain by the use of their money.⁶ It is precisely because money has no intrinsic value that the coercive transfer of Jane's money to someone else is, regardless of the amount taken, not neutral with respect to her well-being. A meta-normative principle must, however, be based on something which is in principle consistent with the flourishing of each and every member of the political community.

Second, it is not the case that transferring people's money to others without their consent affects simply a minor or non-essential part of their lives. There is no "economic side" of life that exists in splendid isolation, separate and unrelated to the rest of a person's life. Although economic activities do not (and should not) exhaust human action, economic factors affect everything a person does. There can be no pursuit of human flourishing that does not involve the exercise of practical reason in the creation, maintenance, and use of wealth. So, to control how a person will use his money is, in the words of F. A. Hayek, "not merely control of a sector of human life; it is the control of the means for all our ends. And whoever has sole control of the means must also determine which ends are to be served, what values are to be rated higher and which lower—in short what men should believe and strive for."⁷ It is, therefore, the height of presumption, not to mention paternalism, to suppose that the expropriation of certain sums of money will have no impact on a person's projects.

Third, it is, of course, possible for the use that people make of their money to be foolish and improper. Also, it might be that some people would be better off if they had less money just as it might be that some would be better off if they had more money. We do not for a moment assume that an important moral critique cannot be made regarding how some people use their money or that there are not some who simply need more money in order to have a morally

worthwhile life. However, we should not let these issues distract us. Our concern here is with the basis for a meta-normative principle and whether anything other than self-direction can meet the criteria that meta-normativity requires. We have already argued for the necessity of an ethical concept whose concern is not with persons attaining self-perfection, but only with securing a political context in which self-perfecting lives in all their various forms might be achieved. Though the nature of their relationship will be discussed in greater detail later in this essay, it is important to realize that the ultimate principles of politics and ethics should not be confused and do not have the same function. Ethics is not social management, and politics is not a guide for virtuous living.

III. Why should the right to equal negative liberty be the only meta-normative principle? Rights are concerned with the conditions for interpersonal living, but are there not other ethical concepts that also have this concern? Particularly, does not the concept of justice have to do with how human beings should treat each other? Is this not a notion that needs to be considered when one talks of interpersonal principles? In fact, is not justice the ethical concept that covers both normative and meta-normative issues, and might it not be that justice requires that the ultimate principles of politics be concerned with more than just the protection of self-directedness?

These questions are very important, for they allow us to discuss more precisely the sense in which human beings are social in nature and in what sense meta-normative principles are concerned with the interpersonal. Further, these questions afford us the opportunity to distinguish two different senses of "justice" and thereby address a confusion in political philosophy that is nearly as old as philosophy itself.

Human beings cannot achieve moral maturation in isolation. Their fulfillment demands a life with others. This need to live with others must be expressed in some form, but, considered abstractly, it can be expressed in any. The specific form in which human sociality is expressed can be termed an "exclusive relationship." Exclusive relationships cover a continuum of relations—everything from close friends and confidants to business and work relations to mere acquaintances—but they all involve a principle of selectivity on the part of the participants in the relationship. Some people are included and others excluded from the relationship on the basis of some value(s) the participants share. It is through exclusive relationships that various types of groups, and communities—and even cultures—are formed.

Since human flourishing is individualized, however, the way or manner in which the need for sociality is expressed is not limited to some select pool or group of humans. Though nearly everyone starts life within a family, a community, a society, and culture, this does not mean that one must be confined to only those relationships that constitute one's family, community, society, or culture. The forms of human sociality should not be understood as necessarily limited or closed to any human being. Human sociality can involve the exploration of relationships with new and different people and varied ways of living, working, and thinking. This open-ended character of human sociality leads us to describe the relationships that might develop as being "non-exclusive." No principle of selectivity is involved, for we are noting that human sociality, prior to a person's choice and selection, imposes no limitation regarding with whom and under what circumstances one may have a relationship. Further, non-exclusive relationships often provide

the wider context in which exclusive relationships are formed, because many, if not most, exclusive relationships come about only because there was first a non-exclusive relationship.⁸ So, human beings are social animals in the sense that though there must be some set of exclusive relations through which one expresses one's sociality, there is no a priori exclusion of anyone from participation in those relations.

Not acknowledging that human sociality allows for an openness to strangers or human beings in general is sometimes thought to be one of the central failings of a self-perfectionist virtue ethics. It is claimed⁹ that even though our self-perfection involves other-concern, this concern always involves some principle of selectivity based upon some value(s) of one's own; and despite the fact that these relationships involve various degrees of commitment, they remain exclusive. Indeed, it is true that self-perfectionist virtue ethics have tended to emphasize exclusive relationships¹⁰ with others, but this does not by itself preclude a self-perfectionist ethics from acknowledging that human sociality involves non-exclusive relationships as well. There is nothing about a self-perfectionist ethics that requires denying that human sociality is open to relationships with strangers, foreigners, or people with whom no common values are yet shared. In fact, it would seem that acknowledging the non-exclusive feature of human sociality is one of the things meant by claiming that human beings are by nature social animals.¹¹ To identify a need for sociality, regardless of the social or cultural form it takes, is to speak of relationships in a non-exclusive sense.

Yet the non-exclusive side of human sociality does require that two senses of "justice" be distinguished. Justice can be understood as a meta-normative and a normative principle. As a meta-normative principle it does not assume a shared set of values or commitments. Hence, the context is as universal as possible. It is only concerned with making possible relationships among humans, each of whom has a unique form of human flourishing, ethically compossible. The type of moral requirement that is imposed for establishing this context must be something everyone's form of flourishing requires and something which everyone can in principle fulfill. Such a moral requirement is by necessity minimal in character. As we have explained, the right to equal negative liberty is such a requirement. Therefore, "justice" in the meta-normative sense, that is, understood in terms of the basic right to liberty, is concerned only with the peaceful and orderly coordination of activities of any possible human being with any other in a social setting.

Justice understood as the normative principle of giving others their due is one of the central virtues of human flourishing. This virtue is not confined to merely some set of "negative" obligations. "Positive" obligations are often required. ¹² However, the proper application of the virtue of justice, like that of every other normative virtue, requires practical reason. Not only does one have to know what action in the contingent and particular situation is just, one also has to integrate the actions required by this virtue with those required by the other virtues and goods that constitute one's flourishing. Knowledge of circumstance, the other person's character, and how a possible course of action integrates with the other actions that one's self-perfection requires is needed. Knowing what the virtue of justice requires does not come in neat ethical recipes, and it requires more knowledge than that one is in the presence of a fellow human being. Therefore, what the virtue of justice requires when dealing with a personal friend, a business partner, a next-door neighbor, or a man on the street who asks for some extra change is not the same thing.

Different courses of actions are required. As a normative principle, justice is not something that is blind or applied in an impersonal or uniform way. It requires discernment of differences of both persons and circumstances.

Justice as a meta-normative and normative principle have been confused.¹³ This confusion is due to the failure to see the difference between justice that is concerned with exclusive relationships and justice that is concerned with non-exclusive relationships. Justice is, by definition, concerned with the interpersonal or social.¹⁴ But justice when it is understood as a constituent virtue of human flourishing is concerned with others in a far more specific way than when it is understood as providing a basis for a political order in which all we know is that there are other human beings involved. Certainly, justice as a virtue needs to involve more than just a respect for someone's negative rights. Interpersonal or social life in an exclusive sense needs more than this. This is the truth of the communitarian and classical ethical perspective. Yet, when interpersonal or social life is understood in a non-exclusive sense, that is, when we are concerned with relationships with any human being, relationships which are often the context for exclusive relationships, then negative rights are just the sort of principle that is needed; for only the protection of a person's self-direction can be sufficiently universal. To require anything more of justice in this sense would not only romanticize our commitment to other fellow human beings, it would ignore the real personal basis each of us has for respecting rights— the need for social or interpersonal life in both exclusive and non-exclusive senses. This is the basis for the truth of the natural rights classical liberal political perspective.

IV. Despite all our efforts to link our defense of liberty to a strong moral framework, it seems that there remains a fundamental dilemma that our theory faces. On the one hand, if liberty is to be anything determinate and identifiable, it must mean more than the absence of external impediment. Liberty cannot be merely the ability to do what one wants. If liberty occurs only when one is able to do what one wants, then whose liberty is to be protected? Is Mary's liberty to do what she wants unconstrained by Fred, or Fred's liberty to do what he wants unconstrained by Mary to be preferred? Given that people have conflicting wants, as is frequently the case, what does it mean to promote liberty? Liberty needs some normative basis for determining its scope and content. Otherwise, it neither provides guidance in adjudicating situations where there are conflicts of wants, nor does it provide understanding of what it would be to promote liberty. Liberalism becomes a meaningless political ideal.¹⁵

On the other hand, if we tie liberty to a normative standard, if we link liberty with reason, with morality, with law, then how can one ever have the a moral right to do what is not morally proper? If we, in other words, agree with Lord Acton that liberty is "liberty to do what we ought to do," it would seem that we can offer nothing more than pragmatic arguments against philosopher or theologian kings who wish to legislate nearly every matter of morality. There would especially be no principled rights-based limit on what matters of morality should be enforced. Our attempt to show that people have a fundamental right to equal negative liberty, which overrides all other moral concerns in determining what the fundamental character of polity's political and legal institutions should be, would be undercut. So, either liberty is tied to morality or it is a meaningless political ideal. But if liberty is tied to morality, then people cannot claim that they have a right in any principled sense to do what is not morally proper.

There is, however, a deep ambiguity in this dilemma, and it is similar to that found when we were discussing different senses of justice. Is the "ought" in the maxim, "liberty to do what we ought to do," really a guide to the individual in the conduct of his life, or is this "ought" directed more toward what the basic principles of a polity's legal system should require? In other words, could not "liberty to do what we ought to do" mean that liberty is defined in terms of what a polity's legal system ought to protect and sanction? The law would, then, not be opposed to liberty but would provide the institutional context for its very existence. And could not the principles used to determine what a polity's legal system ought to protect and sanction be other than those that lead persons to self-perfection, e.g., the virtues, but rather principles whose aim and function is providing a political context for interpersonal living?

In other words, could not the conception of rights that we have put forth be the ethical notion that gives scope and determinacy to the concept of liberty? As we have made clear, such a concept of rights does not have the function of assisting persons in achieving self-perfection or performing right conduct. Rather, its primary ethical aim is providing guidance in the creation and evaluation of political contexts. Rights provide ethical guidance in the creation of a political context for social life in which any and every one—regardless of how diverse their manner of self-perfection—might have the possibility to choose for themselves how they should live. Such an approach would not guarantee that people would even choose, let alone choose as they should, but it would nevertheless provide a link between—though not an identification of—ethics and politics.¹⁶

A New Foundation for Natural Rights Classical Liberalism

It is fashionable today to proclaim the death of liberalism as the political expression of the failed Enlightenment project. The doctrine of universal natural or human rights, for example, is said to be an Enlightenment abstraction which undermines the importance of community by ignoring the specific forms of connectedness that constitute our actual social being. Indeed, the general abstractness of liberal ethical and political theories is said to contribute to the impersonal and atomistic quality of those theories. The crises of liberalism has generated a wave of anti-liberal polemics and their incumbent solutions. These range from repackaged forms of socialism to certain types of conservatism which never were very comfortable being linked to liberalism. They all share in positing society as the basic unit of analysis and the determinate of every important principle in ethics and politics.

How closely connected liberalism as a political theory needs to be to other doctrines propounded by Enlightenment thinkers is itself a large and arguable issue. It is, in any case, an issue of no concern to this essay. What does concern us is that the political theory outlined above is decidedly liberal, but its self-perfectionist neo-Aristotelian ethics is not traditionally connected to liberalism. To some, therefore, it may appear as though we are trying to square the circle. From our perspective, however, both the appeal and failures of traditional liberalism are the predictable result of a problem shared equally by its critics—namely, the failure to distinguish the normative and meta-normative.

Liberalism has a tendency towards ethical skepticism, reductionism, or minimalism. Theories which are richer in ethical content tend towards political paternalism, socialism, or authoritarianism. The tendencies in both directions are the result of treating all ethically normative propositions as being of the same type with perhaps varying degrees of importance. When this is applied to liberal politics, where the role of the state is limited to enforcing only matters of rights or justice, the ethically significant comes to be identified with justice or ones rights. All else is moved to the category of the supererogatory. Modern liberals, in contrast to their classical counterparts, feeling uncomfortable that moral matters such as helping the less fortunate are minimized or left out entirely, want to expand the list of rights. They want, in other words, to turn what might otherwise be merely a matter of personal discretion (the supererogatory) into a matter of justice or respecting rights. Yet however much these modern liberals may dominate the academy today, their overwhelming numbers do not make liberalism any more amenable to this sort of expansion of rights; and in the end the efforts to make all moral matters a species of justice contributes to the skepticism that inevitably results when rights are devoid of limitations. Justice simply is not the whole of ethics. Yet since it is close to the whole of politics for the liberal, it would seem that liberal politics would have to give way if ethics is to have anything beyond minimal content. To abandon this sort of politics is, obviously, to give away liberalism itself. Thus to maintain liberal politics, we must either keep our obligations to a minimum or be skeptical about any well developed ethical palate.

The alternative of abandoning liberalism for a content rich ethical politics is no less fraught with problems. Apart from any arguments implied above about the pluralistic character of the good, the politics of ethical assertiveness is simply out of step with modern realities. Modern states are too expansive and diverse to impose ethical programs by political means in any but an inefficient, acrimonious, expensive, litigious, and, in the end, ineffective manner. Thus while everything from aiding the poor to healthy living may qualify as worthy ethical goals, the benefits of defining their exact meaning politically and the subsequent enforcement by (necessarily) large bureaucratic states is a recipe for conflict and subservience. This erosion of liberty—which no one seems to want upon reflection, but which everyone has an incentive to clamor for daily—is the result of failing to see that the norms appropriate for politics are not necessarily of the same order as those suitable for ethical life, and vice versa.

It is our contention that the Aristotelian ethic provides a content-rich ethical matrix for living one's life. This seems beyond dispute, although some may perhaps find other frameworks more compelling or complete. It has also been our contention that liberalism is a politics of allowing the individual maximum freedom with minimal coercible obligations towards others. This too seems undisputed, even if there is some variation on what those obligations might be. It has further been our project to join these two undisputed perspectives rather than to abandon either liberalism or ethics. The combination, however, will not work without a clear understanding of the normative/meta-normative distinction. It has thus equally been our contention that to fail to make this connection leaves vulnerable that liberty necessary for civilized life.

NB: This essay will appear in Machan and Rasmussen, eds., *Liberty for the 21st Century* (Rowman & Littlefield, forthcoming late '95). Dr. Rasmussen is Professor of Philosophy at St.

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1 Douglas B. Rasmussen and Douglas J. Den Uyl, *Liberty and Nature: An Aristotelian Defense of Liberal Order* (La Salle, IL: Open Court, 1991). 2 See *Ibid.* pp. 34, 70-75, and 92-96, and Douglas B. Rasmussen and Douglas J. Den Uyl, "Reply to Critics," *Reason Papers* 18 (Fall 1983), pp. 120-121. Also, see Douglas J. Den Uyl, *The Virtue of Prudence* (New York: Peter Lang, 1991), pp. 181-186. 3 See "Reply to Critics," pp. 115-132 for our response to different but related objections. 4 See *Liberty and Nature*, pp. 63-64 and 89-93. 5 *The Virtue of Prudence*, pp. 187-223. 6 This is not to mention the time and effort used to obtain this money. 7 F. A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1944), p. 92. 8 Cf. *Liberty and Nature*, pp. 173-219, and *The Virtue of Prudence*, pp. 243-250. 9 Julia Annas, *The Morality of Happiness* (New York: Oxford University Press, 1993), pp. 250-252. 10 See, for example, Aristotle's discussion of friendships. 11 It may be the case that the communitarian interpretation of self-perfectionist virtue ethics cannot support the idea that human sociality involves a non-exclusive dimension. 12 See Douglas J. Den Uyl, "The Right to Welfare and the Virtue of Charity" in this volume. 13 They were confused by Plato when justice in the soul was used as a model for determining justice in the state. This confusion was increased by Aristotle's use of the term "polis" to mean a complex system of human relationships- -involving everything from households and associations of families to a state defined as an association of citizens in a constitution. As a result, the difference between justice that is concerned with exclusive and with non-exclusive relationships was never clearly made by Aristotle. The confusion of these two senses of justice was not confined to classic philosophers, however. Modernity tended to view ethics as social management (e.g., Hobbes' claim that ethical obligations only arise as a result of trying to find a way by which humans might live together), and Kant adopted what could be called a jurisprudential view of ethics where individual differences, differences that could not be universalized, were regarded as irrelevant to ethics or morality. 14 Hence, there is a redundancy when the term "social justice" is used. 15 See Douglas B. Rasmussen, "Liberalism and Natural End Ethics," *American Philosophical Quarterly* 27 (April 1990): 153. 16 In *Liberty and Nature*, pp. 131-171, we argue that this conception of rights is just in what the common good of the political community consists. This view of the common good might in the final analysis be closer to Aquinas' view than is generally thought. After all, Aquinas does differentiate between matters of justice that are morally binding and matters of justice that are morally and legally binding. Further, he notes that the common good of the political community does not require that all vices be prohibited, since human law is framed for any person and only vices which threaten social life itself, such as homicide and theft, should be prohibited.