The Morality of Freedom

JOSEPH RAZ

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of Neutral Concern', *Midwest Studies in Philosophy*, 7 (1982). Chapter 9 is based on 'Principles of Equality', *Mind*, 1978, which is here considerably revised and extended. Chapter 13 contains material used in my paper to the Aristotelian Society in February 1986, and published in its proceedings of that year. Chapters 14 and 15 contain material published in R. Gavison (ed.), *Issues in Contemporary Legal Philosophy: The Influence of H. L. A. Hart* (Oxford, forthcoming), ch. 8.1, 'Autonomy, Toleration, and the Harm Principle'. I am grateful for permission to use these articles.

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government's own interest is only what serves its ability to promote and protect the interests of its subjects.

These are judgments based on controversial conceptions of the role of political institutions. We will examine theories which controvert them. I am here anticipating the later endorsement of these conceptions to illustrate the reason for focusing on political institutions. Because they are obligated to regulate the activities of those over whom they claim authority, by studying them we indirectly study the norms which they should impose on other corporations. This is the reason why our attention will be focused on political institutions. This way of posing the question does not imply that corporations and unions are not subject to stringent moral requirements in the conduct of their business.

3. *The Revisionist Challenge*

Much ink has been spilt in argument about political freedom. This is often felt to call for an apology for adding to the library. But the persistence of the issue is surely evidence of its elusiveness and difficulty. Indeed the difficulty is so great that several liberal political theorists doubt whether liberty, or political freedom, is valuable at all. They do not claim that all those people who cherished liberty, those who fought for it, and those who felt fortunate to have enjoyed it, had nothing valuable in mind when they wrote or thought of the value of liberty. Rather, these revisionist theorists claim that those who wrote and talked of the value of liberty really cherished not liberty but something else. Justice, equality, some list of rights such as the rights to freedom of worship, of expression and of association, are among the candidates for what liberals really value and to which they misleadingly refer as the value of liberty.[1]

Given my introductory remarks about the variety of political causes espoused in the name of freedom in the history

[1] The most explicit attack on the idea that liberty is of value was mounted by R. M. Dworkin. See in particular the essay 'What Rights Do We Have?' in *Taking Rights Seriously*, London, 1977. In denying the value of liberty as such Dworkin is following J. Rawls, whose *A Theory of Justice*, Oxford, 1971, understands 'Liberty' to refer to a list of basic liberties, which are not mere exemplifications of one distinctive value.

of the liberal tradition, such revisionist suggestions are not to be dismissed out of hand. It is possible and not at all implausible that a common political slogan such as 'Freedom' does not in fact refer to one distinct value. It may have a perfectly legitimate rhetorical use as a shorthand reference to a complex of values, or to certain values as they manifest, or ought to manifest, themselves in certain concrete situations. Indeed in Chapter 9 I will myself suggest that some such account is needed to make sense of the continued and pervasive popularity of 'Equality' as a political battle-cry. That is, I shall argue that when understood as a distinct value it has little appeal.

Furthermore, liberalism was long divided between those who regarded liberty as intrinsically valuable, and those who claimed that it is of instrumental value only. The latter include the utilitarians and the free-market economists. Their most powerful spokesman in recent times was F. A. Hayek, who drew on the impossibility of marshalling all the information required for the successful governing of a society in any way other than through the invisible hand of the market and the free interaction of people generally.[1] The instrumental approach lends itself more readily to the revisionist argument, for it naturally makes the value of liberty depend on other values. It is thus ready in principle to allow for exceptions and to admit that on occasion liberty is not merely overridden by other concerns but is devoid of all value.

The arguments for the instrumental value of liberty are crucially important. Without them no political morality is complete. In many areas they provide the weightiest arguments in support of liberty. Yet the focus of attention in this book is elsewhere. It denies the revisionist approach and affirms the intrinsic value of liberty. But first we should realize the strength of the revisionist challenge.

We can best do that by examining the difficulties that two simple attempts to provide a quick answer to the question of political freedom encounter. Cannot the value due to

[1] See, e.g., F. A. Hayek's *The Constitution of Liberty*, Chicago, 1960, and *Law, Legislation, and Liberty*, London, 1973. For an excellent discussion of Hayek's political thought see J. Gray, *Hayek*, Oxford, 1984.

I

THE BOUNDS OF AUTHORITY

The conclusions of the first chapter were negative. It rejected certain common approaches to the problem of liberty, and raised serious doubts concerning its intrinsic value. But the chapter also points in a positive direction. The doctrine of liberty consists in principles of political morality which require governments to protect and promote individual freedom. Not surprisingly the doctrine of liberty is part and parcel of the general doctrine of political authority. It contributes to the definition of its scope and duties. The question of political liberty does not arise unless the existence of political authorities is justifiable. Liberals believe that, at the very least given the prevailing circumstances of human life, human well-being can best be achieved in communities subject to political authorities. They also believe that those authorities are bound by principles requiring the promotion and protection of freedom. The two beliefs are connected in that violation of the principles of freedom may undermine the legitimacy of the authority. The doctrine of freedom is part of a view of the foundations of legitimacy of political authorities.

The following three chapters explore these foundations. Chapter Two vindicates the general view that having authority over another person implies a duty of obedience on his part. This view dictates the direction of the inquiry of Chapter Three which seeks to establish, at a fairly abstract level, the conditions which any authority must meet to enjoy legitimacy. Chapter Four considers the argument that any political authority, even one not meeting the conditions argued for in Chapter Three, is legitimate if it is based on the consent of the governed. It rejects this claim on the ground that consent is binding only if it meets certain conditions, and that in the case of consent to be governed by authority those

are roughly the conditions establishing the legitimacy of an authority independently of consent. This chapter also applies the conclusions previously reached to present in outline a view as to whether existing political authorities are legitimate authorities enjoying a (moral) right to rule.

2
Authority and Reason

The doctrine of freedom is part of the doctrine of authority. It consists of principles binding political authorities to protect and promote the freedom of their subjects. These are some of the principles constituting the doctrine of authority, i.e. those which determine the conditions under which a person has legitimate authority and by which authorities should guide their actions.

The inquiry leads us to examine the foundations of political authority. It is common to regard authority over persons as centrally involving a right to rule, where that is understood as correlated with an obligation to obey on the part of those subject to the authority.[1] If that view is correct it provides the pivotal clue to the direction of the inquiry. It has to focus on the conditions under which one person can bind another. Since several writers have recently challenged the common view it is necessary to re-examine it. This is the purpose of the present chapter.

1. *Authority and Justified Power*

R. Sartorius is one of those who challenge the common view that legitimate authority held by A over B implies a duty on B to obey A.[2] He does, however, regard political authority as 'a morally justified form of authorship constituted by certain moral capacities, justification-rights, and claim-rights'.[3] A parent's authority is likewise regarded by him as

[1] See, e.g., J. Lucas, *The Principles of Politics*, Oxford, 1966, Tuck 'Why is Authority such a Problem?' in P. Laslett, W. G. Runciman and Q. Skinner (eds.), *Philosophy, Politics and Society*, 4th series, Oxford, 1972; G. E. M.Anscombe, 'On the Sources of the Authority of the State', *Ratio*, 20 (1978), 1; J. M. Finnis, *Natural Law and Natural Rights*, Oxford, 1980, ch. 9

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including the capacity (presumably moral) 'to issue binding directives to his or her children'.

The explanation of normative capacities gives rise to difficulties. The only explanation which has succeeded in withstanding objections and in gaining widespread acceptance explains them as, essentially, abilities to impose or revoke duties or to change their conditions of application.[1] The obligation to obey a person which is commonly regarded as entailed by the assertion that he has legitimate authority is nothing but the imputation to him of a power to bind. For the obligation to obey is an obligation to obey if and when the authority commands, and this is the same as a power or capacity in the authority to issue valid or binding directives. In the absence of an alternative explanation of capacities one must conclude that Sartorius's analysis of authority over persons in general does not accomplish its purpose.

Perhaps, however, political authority differs in that respect from other kinds of authority? Perhaps it can be understood independently of normative powers or capacities? An analysis along such lines is offered by Robert Ladenson. He regards political authority as a right to rule, 'that is to say, strong reasons can be advanced for holding that possession of the governmental power and acceptance by those one presumes to govern of its exercise jointly constitute a justification for coercive acts which would otherwise be immoral'.[2] Power over a person here is not normative power. It means 'the ability to make that person do what one wishes'.[3]

It is clear that not every power amounts to an authority. My neighbour can stop me from growing tall trees in my garden by threatening to burn rubbish by my border. He, therefore, has some power over me but no authority. Nor does his power turn into an authority just by the fact that I acquiesce and do not pick a fight with him. An authority, according to Ladenson, has a justification-right to possess and exercise its power. A justification-right is contrasted with a claim-right in not implying any obligations. My

[1] See H. L. A. Hart, *Essays on Bentham*, Oxford 1982, ch. 10.

[2] R. Ladenson, 'In Defense of a Hobbesian Conception of the State', *Philosophy and Public Affairs*, 9 (1980), 139.

[3] Ibid., p. 137.

neighbour's justification-right to threaten me does not mean that I have a duty to obey him. It merely means that he does no wrong in threatening me and this is compatible with my having a right to resist him.[1]

Let us therefore assume that such threats are in general wrong because they interfere with a person's use of his own property. Let us further assume that my neighbour has nevertheless the right to threaten me either because my behaviour will greatly harm his interests or for whatever other reason seems to you an acceptable justification provided it is compatible with our final assumption, i.e. that I have the right to resist him (both his and my rights being justification-rights). It seems clear that my neighbour does not have authority over me just because he can affect my behaviour and will be justified in doing so. If this is authority we all have authority over our neighbours. Nor is it clear whether Ladenson would deny that. He adds two further elements to his explanation of political authority. First, it is authority to use coercion. Second, it is justified by the fact that its possessor successfully exercises governmental power with the acquiescence of his subjects. It is tempting to say that these two conditions do not belong to an explanation of authority over persons generally. They simply establish which authorities are political authorities. But perhaps it is wrong to divide the explanation of political authority into two separate parts, an explanation of authority and of what makes it political. Let us therefore examine the two conditions that Ladenson requires.

It seems plain that the justified use of coercive power is one thing and authority is another. I do not exercise authority over people afflicted with dangerous diseases if I knock them out and lock them up to protect the public, even though I am, in the assumed circumstances, justified in doing so. I have no more authority over them than I have over mad dogs. The exercise of coercive or any other form of power is no exercise of authority unless it includes an appeal for

[1] If I understand his meaning Ladenson regards 'having a justification right to do A' as meaning being justified in doing A. This is to confuse 'having a right to do A' with 'doing A is all right'. But my argument does not depend on rejecting Ladenson's conception of rights.

compliance by the person(s) subject to the authority. That is why the typical exercise of authority is through giving instructions of one kind or another. But appeal to compliance makes sense precisely because it is an invocation of the duty to obey.

Some, particularly those with Hobbesian sympathies, may think that there is an alternative and better explanation of the fact that authority is usually exercised by issuing directives. These, they will say, are threats or coercive threats. There can indeed be no doubt that threats are another type of what may be loosely called 'appeals for compliance'. Nor do I doubt that all political authorities must and do resort to extensive use of and reliance on coercive and other threats. Yet it is clear that all legal authorities do much more. They claim to impose duties and to confer rights. Courts of Law find offenders and violators guilty or liable for wrongdoing.

None of these and similar claims has much to do with threatening people. To threaten is not to impose a duty, nor is it to claim that one does. None of this shows that legal authorities have a right to rule, which implies an obligation to obey. But it reminds us of the familiar fact that they claim such a right, i.e. they are *de facto* authorities because they claim a right to rule as well as because they succeed in establishing and maintaining their rule. They have legitimate authority only if and to the extent that their claim is justified and they are owed a duty of obedience. Ladenson's mistake is to think that since there can be political authority which is not owed a duty of obedience there can also be one which does not claim that it is owed such a duty.

It should be clear by now that Ladenson's last condition, that the authority has a justification-right to use coercion because it regularly exercises governmental power with the acquiescence of its subjects, cannot retrieve the situation. Acquiescence seems relevant to the explanation of *de facto* authority rather than to that of legitimate authority. To have effective political control requires, in the circumstances of our world, a high degree of acquiescence. Ladenson's conception of authority amounts to a claim that all *de facto* authorities are legitimate. It is a familiar Hobbesian view, which will be challenged in the next chapter. But can it really

be claimed to be faithful to the main features of the notion of political authority prevalent in our culture?

To test it, try to imagine a situation in which the political authorities of a country do not claim that the inhabitants are bound to obey them, but in which the population does acquiesce in their rule. We are to imagine courts imprisoning people without finding them guilty of any offence; damages are ordered, but no one has a duty to pay them. The legislature never claims to impose duties of care or of contribution to common services. It merely pronounces that people who behave in certain ways will be made to suffer. And it is not merely ordinary people who are not subjected to duties by the legislature: courts, policemen, civil servants, and other public officials are not subjected by it to any duties in the exercise of their official functions either.

Two things stand out when contemplating a political system of this kind. First, it is unlikely that any such society ever existed. Societies we know about are invariably subject to institutions claiming a right to bind their subjects, and when they survive this is in part because at least some of their subjects accept their claim. Secondly, if such a society were to exist we would not regard it as being governed by authority. It is too unlike the political institutions we normally regard as authorities.

The two points are related. The second is a conceptual point. But we have the concept of authority that we do because in our world societies have governed by institutions claiming and being acknowledged to have the right to bind their subjects. Ladenson's analysis is not merely not an analysis of the concept of authority which is part of our cultural tradition. It is an analysis of a concept that does not have much use in our world.

To conclude: Ladenson offers an explanation of legitimate authority in terms of *de facto* authority. It is justified *de facto* authority. De facto authority is then understood as some form of power over people. The analysis fails because the notion of a *de facto* authority cannot be understood except by reference to that of legitimate authority. Having *de facto* authority is not just having an ability to influence people. It

is coupled with a claim that those people are bound to obey.[1]

2. *The Recognitional Conception*

In the previous section I underlined the fact that the claims an authority makes for itself are part of what makes it an authority. One way of examining these claims, which I will follow in this and the next section, is to concentrate on the attitude of people who accept the legitimacy of the authority. One can then most clearly discern what authority is by seeing what one acknowledges when acknowledging that a person has legitimate authority.

The first point to emerge from the discussion so far is that the influence authorities intend to exert is direct and normative. Characteristically, it affects people's practical reasoning by means of authoritative utterances. A person is an authority or has authority only if some of his utterances are authoritative. Saying that the influence of an authoritative utterance is meant to be direct and normative means that a person who accepts the authority of another accepts the soundness of the arguments of the following form:

Y has authority;
Y decreed that X is to do A;
Therefore, X ought to do A.

Many conceptions of authority are different interpretations of this inference form. Before we are ready to accept the common view, which regards authorities as claiming the

[1] Sartorius has another string to his bow. On p. 8 of his article he makes a claim not about authority in general nor about political authority, but about legal governments. He follows H. L. A. Hart in identifying such a government as a body acting according to complex social practices whose acceptance does not involve moral approval by those who accept them. I have argued against Hart on this point before. See *The Authority of Law*, pp. 28, 155, and elsewhere. Hart replies to this criticism in his *Essays on Bentham*, pp. 153–61, and 264–8. For my rejoinder see 'Hart on Moral Rights and Legal Obligations' *Oxford Journal of Legal Studies*, 4 (1984), 123.

The arguments of this section do not affect those who hold that 'has a duty' and all other normative terms just mean 'has been threatened', etc. They do not refute those willing to endorse the semantic view that normative terms generally are to be explained in terms of threats and coercion. Such a reductionist semantic view, though wrong, does not concern us here for it does not challenge the relation between a right to rule and an obligation to obey.

right to impose duties, we should consider some of the alternatives. One conception, which I shall call the recognitional conception, holds that to accept an utterance as authoritative is to regard it as a reason to believe that one has a reason to act as told. On this account authoritative utterances are reasons, but they are reasons for belief, not for action. Therefore, regarding someone as an authority does not entail a belief that one has a reason to obey him, since reasons for obedience are reasons for action. The account applies to theoretical authorities as well as to practical ones. But we will examine its success in explaining practical authority only.

This explanation regards practical authorities as theoretical authorities of a special kind. Practical authority is authority affecting what is to be done. According to the recognitional conception, the utterances of legitimate authorities do not affect the halance of reasons. They are not themselves reasons for action, nor do they create any such reasons. They merely provide information about the balance of reasons as they exist separately and independently of such utterances. Suppose that the question is whether to make a particular contract in writing or be satisfied with an oral agreement. There are reasons for and against each course. The right decision is that which is supported by the better reasons. Let us assume that Parliament, whose authority we acknowledge, has decreed that it is an offence to make such contracts, except in writing. The recognitional conception denies that this law is a reason for making such contracts in writing. It is said to be a reason for believing that there are (other) reasons for making a written contract. Authoritative utterances, you may say, are held not to affect the balance of reasons on the main issue (what to do) but on the subsidiary issue of the evidence concerning the main issue (they are reasons to believe in reasons for action).

This is not to make light of the importance of authority as interpreted by this conception. After all, people act not on the reasons there are but on those they believe there are (in so far as they act on reason at all). Therefore, the recognitional conception has an explanation to offer as to how it is that authoritative utterances, though not themselves reasons for

action, can affect one's reasoning about practical problems. Practical authority is reinterpreted as theoretical authority concerning belief in deontic propositions. The authoritative utterances of practical authorities are reasons to believe that one ought to do that which the utterance says one is to do.

Such an account of practical authority is fundamentally flawed. It leads to the *no difference thesis*, i.e. the view that authority does not change people's reasons for action. There is nothing which those subject to authority ought to do as a result of the exercise of authority which they did not have to do independently of that exercise, they merely have new reasons for believing that certain acts were prohibited or obligatory all along. I shall return to the no difference thesis in the next chapter where a relatively detailed examination of its shortcomings will help explain the conception of authority which I will defend. For the moment it is enough to point to one central function of authority which the recognition conception cannot explain.

It fails, for example, to explain the role of authority in the solution of co-ordination problems. Those are problems where the interests of members of the group coincide in that, among a set of options, the members prefer that which will be followed by the bulk of the members of the group above all else. One does not mind whether one drives on the left or the right provided everyone else does the same. There are many such problems of great importance to the orderly conduct of any society. A wise man can tell me which options belong to that set, but he cannot tell me which of the options to choose before it is known what others will do. Sometimes that can be known on the basis of existing facts. Many people are likely to believe that many will choose a particular option and therefore they will choose it themselves; hence one has reason to follow them and choose it as well. Sometimes, however, there is no option in the designated set that will be the obvious choice. In such cases, what one needs is something that will make a particular option the one to follow.

This is something practical authorities often do (or attempt to do). They designate one of the options as the one to be chosen and, if their action is regarded as a reason to adopt that course of action, then a successful resolution of

the problem is found. Since solving co-ordination problems is one of the important tasks of political and many other practical authorities, and as their relative success in it can only be explained by regarding authoritative utterances as reasons for action, one must reject the recognitional account of practical authority.[1]

3. *The Inspirational Conception*

The conception that I will call inspirational is perhaps marginal, but presents interesting features. It can best be introduced by reflecting on the well-known apparent dilemma in explaining the moral authority of God. Either the moral law is valid because it emanates from God's will or its validity is independent of God. If the latter is the case, then God is not the ultimate moral authority. His own goodness and the justice of His commands has to be tested by the independent criterion of their conformity to the moral law. Morality is independent of belief in God, since agnostics and atheists can accept the independently valid moral law. God is irrelevant to morality.

On the other hand, how can the fact that the moral law is God's will endow it with validity? Why should one obey God's will? Admittedly He is omnipotent and can punish those who disobey Him. It may therefore be prudent to obey Him, but this can hardly endow His command with moral character. To reply that His will is to be obeyed because it is good is to presuppose an independent moral standard by which God's will is measured. To do this is to return to the first horn of the dilemma. Therefore, on either possibility God is irrelevant to morality. His will and command provide people neither with a standard that one has any reason to call moral nor with a motive for action that can be regarded as a moral motive.

There are various traditional ways of struggling with the dilemma. I shall not examine them, for my interest is not theological. One answer, which I think is the best and most promising one, is of present interest for the light it sheds on authority generally. According to it, all who know God love

[1] See further the arguments against the no difference thesis in the next chapter.

Him. It is possible to doubt or even to deny God's existence. Those who do so obviously do not love Him. Given human nature, however, it is impossible for those who believe in His existence not to love Him. Loving Him includes wanting to do His will. This is a purely non-self-interested motivation and therefore a moral one. According to this view, God's will sets moral standards; it does not merely reflect independently valid standards. They are valid because they express His will. There is, however, no difficulty concerning the motivation to obey. The love that He inevitably inspires in all who believe in Him is that motivation. (This does not mean that those who love Him will always obey Him, for they may be overcome by other motives.) The unselfish, non-self-interested character of the motivation assures both it and the command toward which it is directed of a moral character.

This is inspirational authority, for the reason we ought to obey it is that we want to and the wish to do so is not preconceived, is not derived from our other interests and needs. It is inspired by the recognition of the nature of the person or body in authority. If this is the character of God's authority, is it the model on which all human authority should be understood?

Similar attitudes are found in human relations. As we all know from our experience, affection for another often leads people to conceive desires and wishes, because the person toward whom they have the affection would be pleased if they had such wishes and tastes or acted on them. The appearance of such desires is one necessary mark for affection to count as love. The desires I have in mind are to he strictly distinguished from desires to do certain things in order to please the other person. Obviously lovers want to please their loved ones and sometimes act for that reason. This is common in all friendly relations between people. I am referring to a much rarer phenomenon existing paradigmatically in loving relations, and not very frequently even there, in which one comes to desire something for its own sake because one knows that this will please the loved one.

One may, for example, come to enjoy Byrd's music because one's lover does and would be pleased if this taste were

shared. The point is that one comes to enjoy Byrd's music in itself. One does not merely like to listen to it because one's desire to listen to it pleases the loved one. On the other hand, the pleasure in Byrd's music was induced neither suggestively by one's trust in one's friend's musical taste nor subconsciously. The 'because he would have wanted me to' is not merely a non-reason-giving explanation. It is a reason, but a reason for liking Byrd's music in itself, a reason for wanting to listen to it because one enjoys it. For it is only this that the loved person wishes.

He may be pleased that I want to listen to Byrd to please him, but he does not want me to listen to Byrd for that reason. He simply wants me to listen to Byrd, and since doing so to please him is doing it, it pleases him. On the other hand, he has another wish, namely that I should like Byrd. It is a wish that I should like listening to Byrd in itself, for the pleasure it gives. Here he wishes me to do it for a particular reason. Doing it for another reason would not be doing as he wishes. The fact that I love him and that he wishes it is for me a second-order reason—a reason to act for that reason.

That second-order reason is not a desire to please him but a desire to have the desires and tastes that it would please him for me to have, because I love him. It does not matter whether doing so would please him. It may not please him, for he may never know of it. Indeed, often people are motivated in the way I have described after the death of a person they love. It is rare to find such wishes and desires even in love. This rarity does not, however, diminish the importance of the phenomenon to our understanding of love. It seems to me to represent the spiritual aspect of the image of the lovers merging to become one. Aspiring to such fusion includes the desire to have one will, not only through gradual adaptation, but also by the more immediate transformation of the will through love.

What are the implications of this to our understanding of authority? Do the led love their leaders? A charismatic leader inspires enthusiasm and devotion, which can take many practical and psychological forms that are often combined. Among these, the one sometimes called blind devotion is

characteristic. It is the feeling that one will follow one's leader to the end of the world. This attitude often involves unbounded trust, namely confidence that the leader knows best and that he has the right goals at heart. But it does characteristically involve more—the feeling that he is so unique and outstanding that one wants to do as he commands, because then one would be at one with him. Since charismatic leaders often influence masses of people, there is often the additional feeling of being united with one's community by embracing the leader's will. In such cases I feel no hesitation in saying that the attitude of the people to their leader is one of love or devotion reinforced by love of the community that he represents. (None of this is meant to suggest that there is no more to love than the desire to unite one's will with that of the loved one. I am only suggesting that when this desire is present so are, in the normal case, the other elements of love.)

I said that this attitude is often regarded as blind devotion. My explanation of it makes it appear no blinder than any other love. It is not inherently irrational, as one is often inclined to think. If it is generally undesirable, this could only be because one's attitude to one's leaders and community should not be one of love, because love is appropriate in personal relations but not in politics, or because all-embracing love is out of place in politics. Be that as it may, since not all authority is political, there may be proper room for inspirational authority in other contexts. Could it be, for example, that parental authority is sometimes quite properly of this kind? Here we face a major difficulty in the inspirational conception of authority.

First, even if some authorities are of this mould, it is clear that many are not, and it is arguable that many should not be. Most political authorities are not recognized through love and are not inspirational in character; perhaps none should be. Second, even when love and authority are combined, as in the case of some parental relations, the two are distinct and should not be confused. After all, parents' love of their children can be every bit as great as and of a similar character to children's love for their parents. Yet parents do not as a rule admit that their children have authority over

them. More generally, many loving relations involving the occasional transformation of the will that was described above do not involve any recognition of authority. It follows that even where, as in some cases of charismatic authority, the inspirational conception does illuminate an important aspect of the authority relation, it fails to explain why it is an authority relationship at all. It merely explains some features that may sometimes accompany its instantiation.

4. *Content-Independent Reasons*

If the harvest our inquiry has so far yielded is meagre, it is nonetheless of great importance. A person has (practical) authority, we have concluded, only if his authoritative utterances are themselves reasons for action. This is not enough to identify authoritative utterances, for many utterances which are not authoritative meet this condition. One important idea was suggested by H. L. A. Hart.[1] Authoritative utterances can be called 'content-independent' reasons.

A reason is content-independent if there is no direct connection between the reason and the action for which it is a reason. The reason is in the apparently 'extraneous' fact that someone in authority has said so, and within certain limits his saying so would be reason for any number of actions, including (in typical cases) for contradictory ones. A certain authority may command me to leave the room or to stay in it. Either way, its command will be a reason. This marks authoritative reasons as content-independent. By this feature they can be distinguished from many reasons, including various other kinds of utterances that are reasons.

There are, however, other content-independent reasons, and to be complete a characterization of authoritative utterances must distinguish them. One group, including promises and vows, is clearly different in that its members are reasons for the agent alone. It is interesting to compare threats and offers with authoritative utterances. Threats are meant to be taken as reasons and credible threats are reasons,

[1] In *Essays on Bentham*, ch. 10. I am indebted to Dr. L. Green whose paper on content-independent reasons helped clarify my thoughts on the subject.

and they are content-independent. They are reasons to believe that a certain unwelcome eventuality will come about, if something that the threatened person is alleged to have at least a chance of controlling will occur (the triggering event). It is the conditional occurrence of that unwelcome event, and not the threat, that is the reason for avoiding the condition that will bring it about. Threats differ from ordinary communications of information about undesirable future events conditional on the addressee's action, for it is alleged that the occurrence of the undesirable future event is under the control of the person making the threat (or at least that he has a chance of controlling it), that he has decided to prevent it only if the threatened person will prevent the triggering event, and that this decision was taken in order to try to get the threatened person to prevent the triggering event by threatening him. In the absence of the last condition the utterance is not a threat but a warning.

Threats (and, for similar reasons, offers) are content-independent reasons for belief. Hence one does not need practical authority to make them. Nor does one need to have theoretical authority. It is only metaphorically that a person is an authority regarding his own intentions.

Requests are another kind of content-independent reason. It would be wrong to regard requests as mere communication of information that the speaker, or someone else in whose interests the request is made, needs or wants something and that the speaker wants the addressee to help in getting it. Although every request at least implies such information, it is possible to communicate the information without requesting. This is admittedly rare, since understandably a conventional way of requesting is by telling a person that one would like him to do something. It is possible, however, to tell a person that, while I would like him to do something for me, I am not asking and am not going to ask him to do it. This may be said, for example, to a close friend with whom relations are temporarily somewhat strained. The point of the distinction thus drawn is that, while one would be pleased if one's need moves the friend into action, one would be displeased if it takes a request to do so. This presupposes that the request is intended to be

regarded as a reason over and above the need and the desire to be helped by a friend. This account explains why one might request even when one knows that the other person knows of one's need and of one's desire for help and that he and others know that one knows.

None of this is meant to deny that requesting involves stating or implying that there is a reason for the addressee to act as requested. But the specific quality of requests is that they are acts intended to communicate to their addressee the speaker's intention that the addressee shall regard the act of communication as a reason for a certain action. The speaker's intention is not to make the addressee act as requested, but merely to create a reason for such action. The speaker realizes that there may be overwhelming reasons against acceding to the request, and he does not wish the addressee to do as requested in such a case. The speaker leaves it to the addressee to judge what is right. He intends to influence him only by tipping the balance somewhat in favour of the requested act.

Orders and commands are among the expressions typical of practical authority. Only those who claim authority can command. As we saw, in requesting and in commanding the speaker intends the addressee to recognize the utterance as a reason for action. The difference is that a valid command (i.e. one issued by a person in authority) is a peremptory reason. We express this thought by saying that valid commands or other valid authoritative requirements impose obligations. The next chapter explores the special nature of these obligations.

3

The Justification of Authority

This chapter develops and defends the conception of the nature of practical authority outlined in the previous chapter, i.e. authority as involving essentially the power to require action. The explanation proceeds through normative theses of three kinds. One concerns the type of argument required to justify a claim that a certain authority is legitimate. The second states the general character of the considerations which should guide the actions of authorities. The last concerns the way the existence of a binding authoritative directive affects the reasoning of the subjects of the authority. The explanation and defence of the three theses is preceded by an introductory section defending the general approach to the analysis of authority adopted here, and introducing some of the themes which are explored in greater detail later in the essay.

1. *'Surrendering One's Judgement'*

How is authority to be related to the nebulous notion of a valid requirement for the obedience of one's subjects? As Richard Flathman disapprovingly remarked, 'There has been a remarkable coalescence of opinion around the proposition that authority and authority relations involve some species of "surrender of judgment" on the part of those who accept submit or subscribe to the authority of persons or a set of rules and offices. From anarchist opponents of authority such as William Godwin and Robert Paul Wolff through moderate supporters such as John Rawls and Joseph Raz and on to enthusiasts such as Hobbes, Hannah Arendt and Michael Oakeshott, a considerable chorus of students have echoed the refrain that the directives . . . of authority are to be obeyed by B irrespective of B's judgments of their merits'.[1]

[1] Richard E. Flathman, *The Practice of Political Authority*, Chicago 1980, p. 90.

But what is 'a surrender of judgment'? H. L. A. Hart, who has recently added his voice in support of this kind of analysis, provides the following explanation: 'The commander characteristically intends his hearer to take the commander's will instead of his own as a guide to action and so to take it in place of any deliberation or reasoning of his own: the expression of the commander's will . . . is intended to preclude or cut off any independent deliberation by the hearer of the merits pro and con of doing the act.'[1] Understood literally, this explanation is, however, implausible. Surely what counts, from the point of view of the person in authority, is not what the subject thinks but how he acts. I do all that the law requires of me if my actions comply with it. There is nothing wrong with my considering the merits of the law or of action in accord with it. Reflection on the merits of actions required by authority is not automatically prohibited by any authoritative directive, though possibly it could be prohibited by a special directive to that effect.

Richard Friedman offers an explanation aimed at the same target which avoids this objection:

> The idea being conveyed by such notions as the surrender of private judgment . . . is that in obeying, say, a command simply because it comes from someone accorded the right to rule, the subject does not make his obedience *conditional* on his own personal examination and evaluation of the thing he is being asked to do. Rather, he accepts as a sufficient reason for following a prescription the fact that it is prescribed by someone acknowledged by him as entitled to rule. The man who accepts authority is thus said to surrender his private or individual judgment because he does not insist that reasons be given that he can grasp and that satisfy him, as a condition of his obedience.[2]

Is this conception of authority correct? One point to remember (it is consistent with Friedman's account) is that a person may have limited authority (e.g., in matters concerning football only, or in military affairs but not in the

[1] H. L. A. Hart, *Essays on Bentham*, p. 253. I used to hold a similar view. See my 'Reasons, Requirements, and Practical Conflicts', in S. Korner (ed.), *Practical Reasoning*, Oxford 1974.

[2] R. B. Friedman, 'On the Concept of Authority in Political Philosophy', R. E. Flathman (ed.), *Concepts in Social and Political Philosophy*, Macmillan, NY, 1973, p. 129.

conduct of the economy). It should be noted that Friedman's explanation shows how misleading the metaphor of 'surrendering one's judgment' can be. Unlike Hart's, Friedman's explanation shifts the emphasis from the subjects' deliberations to their action. The subjects accept that someone has authority over them only if their willingness to do his bidding is not conditional on their agreement on the merits of performing the actions required by the authority.

This condition is open to two interpretations. The minimalist interpretation maintains that they are willing to obey if they have no judgment of their own on the merits of performing the required action. They will not then defer decision *until* they form their own judgment. The maximalist interpretation claims that the subjects accept that they should obey even if their personal belief is that the balance of reasons on the merits is against performing the required act.

The minimalist interpretation is too weak since it assumes that people are never bound by authority regarding issues on which they have firm views. The maximalist interpretation is more promising, and the views to be argued for in the rest of this chapter explore and develop it. Either way no surrender of judgment in the sense of refraining from forming a judgment is involved. For there is no objection to people forming their own judgment on any issue they like. Nor does one surrender one's judgment if that means acting against one's judgment. For an authority is legitimate only if there are sufficient reasons to accept it, i.e. sufficient reasons to follow its directives regardless of the balance of reasons on the merits of such action.

There are more ways than one in which a metaphor can mislead. It can sometimes mislead people who perceive clearly the fallacies the metaphor invites and therefore reject it altogether, turning a blind eye to the true insight it encapsulates. This has happened to the many theorists who thought they had a simple explanation for the confusion of thought which led to the surrender of judgment metaphor. According to them, to accept the legitimacy of an authority is simply to accept that whatever other reasons there may be for a certain action, its being required by the authority is

an additional reason for its performance. Inasmuch as that additional reason may tip the balance one can perhaps overdramatize the situation by saying that an authoritative requirement is a reason to act against the balance of reasons on the merits of the case. This means no more than that the authoritative requirement is an additional factor. Much the same can be said of any reason for action. The fact that it will rain tomorrow, for example, may mean that I should not go to London, even though the balance of reasons on the merits of my going (i.e. all the reasons pro and con but the rain) suggest that I should go.

This description of the relevance of authority to practical reasoning *is profoundly misguided. It is wrong not in* what it says but in what it leaves out and implicitly denies. To be sure, if a person accepts the legitimacy of an authority then its instructions are accepted by him as reasons for conforming action. But until we understand how and why they are such reasons and how they differ from ordinary reasons we will not begin to understand the nature of authority. Perhaps the point can be best brought out by considering first authority as it functions in one, not untypical, context.

Consider the case of two people who refer a dispute to an arbitrator. He has authority to settle the dispute, for they agreed to abide by his decision. Two features stand out. First, the arbitrator's decision is for the disputants a reason for action. They ought to do as he says because he says so. But this reason is related to the other reasons which apply to the case. It is not (like the rain in the example of my going to London) just another reason to be added to the others, a reason to stand alongside the others when one reckons which way is better supported by reason. The arbitrator's decision is meant to be based on the other reasons, to sum them up and to reflect their outcome. For ease of reference I shall call both reasons of this character and the reasons they are meant to reflect dependent reasons. The context will prevent this ambiguity from leading to confusion. Notice that a dependent reason is not one which does in fact reflect the balance of reasons on which it depends: *it is one which is* meant to do so.

This leads directly to the second distinguishing feature of

the example. The arbitrator's decision is also meant to replace the reasons on which it depends. In agreeing to obey his decision they agreed to follow his judgment of the balance of reasons rather than their own. Henceforth, his decision will settle for them what to do. Lawyers say that the original reasons merge into the decision of the arbitrator or the judgment of a court, which, if binding, becomes *res judicata*. This means that the original cause of action can no longer be relied upon for any purpose. I shall call a reason which displaces others a pre-emptive reason.[1]

It is not that the arbitrator's word is an absolute reason which has to be obeyed come what may. It can be challenged and justifiably refused in certain circumstances. If, for example, the arbitrator was bribed, or was drunk while considering the case, or if new evidence of great importance unexpectedly turns up, each party may ignore the decision. The point is that reasons that could have been relied upon to justify action before his decision cannot be relied upon once the decision is given. Note that there is no reason for anyone to restrain their thoughts or their reflections on the reasons which apply to the case, nor are they necessarily debarred from criticising the arbitrator for having ignored certain reasons or for having been mistaken about their significance. It is merely action for some of these reasons which is excluded.

The two features, dependence and pre-emptiveness, are intimately connected. Because the arbitrator is meant to decide on the basis of certain reasons, the disputants are excluded from later relying on them. They handed over to him the task of evaluating those reasons. If they do not then deny them as possible bases for their own action they defeat the very point and purpose of the arbitration. The only proper way to acknowledge the arbitrator's authority is to take it to be a reason for action which replaces the reasons on the basis of which he was meant to decide.

2. *The Dependence Thesis*

The crucial question is whether the arbitrator's is a typical authority, or whether the two features picked out above are

[1] In ch. 1 of *The Authority of Law* I explained some of the formal features of pre-emptive reasons. My analysis has been criticised by Flathman in *The Practice of Political Authority*, among others. It is not possible to reply to the criticism here.

peculiar to it and perhaps a few others, but are not characteristic of authorities in general. It might be thought, for example, that the arbitrator is typical of adjudicative authorities, and that what might be called legislative authorities differ from them in precisely these respects. Adjudicative authorities, one might say, are precisely those in which the role of the authority is to judge what are the reasons which apply to its subjects and decide accordingly, i.e. their decisions are merely meant to declare what ought to be done in any case.

A legislative authority on the other hand is one whose job is to create new reasons for its subjects, i.e. reasons which are new not merely in the sense of replacing other reasons on which they depend, but in not purporting to replace any reasons at all. If we understand 'legislative' and 'adjudicative' broadly, so the objection continues, all practical authorities belong to at least one of these kinds.[1] It will be conceded of course that legislative authorities act for reasons. But theirs are reasons which apply to them and which do not depend on, i.e. are not meant to reflect, reasons which apply to their subjects. A military commander should order his troops in the way best calculated to achieve victory at a minimal cost. If he wisely orders his men to occupy a certain hill it does not follow that they had reason to occupy that hill even before they were ordered to do so. Parliament is to distribute the burden of taxation in an equitable way, but it does not follow that the citizens had any reason to pay tax before the passing of the (just) tax law.

These are telling points. But the argument is by no means over. First, even if not all legislative authorities share the characteristics of dependence and pre-emptiveness we found in the arbitrator's case, it is plain that some do. Consider, for example, an Act of Parliament imposing on parents a duty to maintain their young children. Parents have such a duty independently of this Act, and only because they have

[1] This would be a very wide interpretation indeed. It would, for example, count my instruction to my son to be back by midnight as legislative, and the policeman's order to move on when a driver stops in a prohibited zone as adjudicative. But this liberality does not affect the argument.

it is the Act justified. Parliament, of course, is not limited to the enactment of laws where there is a prior obligation on the subjects to behave in the required way. But there can be, and perhaps there are, authorities which are so limited. Note that the decrees of such a body will be binding even if they in fact err as to what people's obligations are. The arbitrator's decision is binding even if mistaken and so are the decrees of our imagined legislator. Both are meant to decide on the basis of dependent reasons and their decisions are therefore pre-emptive.

The example shows that the objector's neat distinction between adjudicative and legislative authorities is mistaken. The mark of the adjudicator is simply that he is called upon to decide what parties in dispute should have done or should do in the circumstances of a particular case. Nevertheless, the objector may well remain convinced that many legislative authorities are not meant to act on dependent reasons and that their directives are not pre-emptive. So let us consider his examples with some care.

One simplifying assumption has to be explained before we proceed. We have been concerned with the authoritative imposition of duties. But authorities, even practical authorities, do much else besides. They can declare that a certain day shall be a national holiday, that a certain organization shall have legal personality, that a person shall be granted citizenship or shall be divorced or excommunicated, that certain land shall be dedicated to the public, or that some people shall have certain rights, and much else. Concentration on the imposition of duties does not, however, distort our understanding of authority since all the other functions authorities may have are ultimately explained by reference to the imposition of duties. The possession of citizenship, for example, is important because it confers rights (such as the right to vote in general elections) and duties (such as the duty of loyalty). Rights themselves are grounds for holding others to be duty bound to protect or promote certain interests of the right-holder. Legal personality is the capacity to have rights and duties. In every case the explanation of the normative effect of the exercise of authority leads back, sometimes through very circuitous routes, to the

imposition of duties either by the authority itself or by some other persons. Therefore, while it is impossible to 'reduce' rights, status, etc., to duties, it is possible to explain 'authority' by explaining the sense in which authorities can impose duties.

One difficulty is that prising apart the imposition of duties from other effects of the exercise of authority is far from straightforward. Consider a tax law again. It not only imposes a duty to pay, but also sets up (not necessarily in the same statute) the machinery for collecting and distributing the money. When the imagined objector said that there was no reason to pay the money now due as tax before the tax law was passed he was of course right. But is this because there was then no machinery for collecting and distributing the money or because there was no authority-imposed duty to pay it?

For the first two years of the First World War there was no conscription in Britain, but there was machinery to recruit volunteers. So this may be the sort of case we are looking for, a case in which the effect of the duty can be separated from the effect of other aspects of authoritative action. In this case at any rate the conclusion is clear. By and large, those who approved of conscription when it came did so because they believed that it was everyone's duty to serve in the armed forces in any case. They would have denied that the conscription law imposed a completely new duty. It merely declared what people ought to have done. Because the doubters were bound, by the fact that they were subject to the authority of Parliament, to follow Parliament's judgment as to what their duties were, its Act is not merely dependent on those duties but also pre-empts them.

We are to imagine a situation in which the State provides all the services it currently provides, let us say roads and a sewerage system, free education and a free health service, social security and unemployment benefits and the like. They are provided by raising money from the public for a state-run charity, contributions to which are voluntary but which publishes guidelines for self-assessment for those who wish to use them. I hope it will be agreed that those who think that the tax law is justified do so partly because they

believe that there is in the circumstances imagined a reason voluntarily to contribute a sum which is equivalent to a just tax.

Let us take stock of the argument so far. One thesis I am arguing for claims that authoritative reasons are pre-emptive: *the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.* It will be remembered that the thesis is only about legitimate authority. It is relevant for the explanation of the character of *de facto* authorities because every *de facto* authority either claims or is acknowledged by others to be a legitimate authority. But since not every authority is legitimate not every authoritative directive is a reason for action.

Furthermore, authoritative directives are not beyond challenge. First, they may be designed not finally to determine what is to be done in certain circumstances but merely to determine what ought to be done on the basis of certain considerations. For example, a directive may determine that from the economic point of view a certain action is required. It will then replace economic considerations but no others. Or the authority may direct that the final decision must be based on economic considerations only, thus replacing all but the economic factors. Even where an authoritative decision is meant finally to settle what is to be done it may be open to challenge on certain grounds, e.g. if an emergency occurs, or if the directive violates fundamental human rights, or if the authority acted arbitrarily. The non-excluded reasons and the grounds for challenging an authority's directives vary from case to case. They determine the conditions of legitimacy of the authority and the limits of its rightful power.

This point is worth emphasizing not only because of its importance in the developing argument to follow, but also because it marks the way in which my use of 'the limit of an authority's rightful power' differs from some common uses (though it conforms with others, including the legal usage). Sometimes authorities are understood to be limited by the kinds of acts which they can or cannot regulate (given some

restrictive ways of classifying acts). In this book authorities are said to be limited also by the kinds of reasons on which they may or may not rely in making decisions and issuing directives, and by the kind of reasons their decisions can pre-empt.

The argument for the pre-emption thesis proceeds from another, which I shall call the dependence thesis. It says: *all authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the cirumstances covered by the directive.* Such reasons I dubbed above 'dependent reasons'. The examples of conscription and taxation were intended to give the dependence thesis some plausibility, and in particular to disprove the suggestion that dependence is the mark of adjudication. But doubts are bound to linger and further clarifications are required to dispel them.

A few preliminary points. The dependence thesis does not claim that authorities always act for dependent reasons, but merely that they should do so. Ours is an attempt to explain the notion of legitimate authority through describing what one might call an ideal exercise of authority. Reality has a way of falling short of the ideal. We saw this regarding *de facto* authorities which are not legitimate. But naturally not even legitimate authorities always succeed, nor do they always try to live up to the ideal. It is nevertheless through their ideal functioning that they must be understood. For that is how they are supposed to function, that is how they publicly claim that they attempt to function, and, as we shall see below, that is the normal way to justify their authority (i.e. not by assuming that they always succeed in acting in the ideal way, but on the ground that they do so often enough to justify their power), and naturally authorities are judged and their performance evaluated by comparing them to the ideal.

Remember also that the thesis is not that authoritative determinations are binding only if they correctly reflect the reasons on which they depend. On the contrary, there is no point in having authorities unless their determinations are binding even if mistaken (though some mistakes may disqualify them). The whole point and purpose of authorities,

I shall argue below, is to pre-empt individual judgment on the merits of a case, and this will not be achieved if, in order to establish whether the authoritative determination is binding, individuals have to rely on their own judgment of the merits.

Nor does the thesis claim that authorities should always act in the interests of their subjects. Its claim is that their actions should reflect reasons which apply also to their subjects, but these need not be reasons advancing their interests. A military commander, for example, should put the defence of his country above the interests of his soldiers. He may therefore order them to act against their own interests. But then soldiers are supposed to put their country above their personal interests and but for this they would not have to obey their commander.

Much of the resistance to the dependence thesis comes from confusing it with a claim about what authorities do in fact, or with the view that requires authorities to act only in the interests of their subjects. But the most common confusion is between the dependence thesis and the no difference thesis, which was briefly discussed in the last chapter. The no difference thesis asserts that *the exercise of authority should make no difference to what its subjects ought to do*, for it ought to direct them to do what they ought to do in any event.[1] It may appear that the dependence thesis entails the no difference thesis, but this is not the case. There are at least three ways (others will be discussed in the next chapter) in which an authority acting correctly may make a difference to what its subjects ought to do, which are all consistent with the dependence thesis.

First, many aspects of every action we perform for a reason are not uniquely determined by reasons. I have a reason to buy a loaf of bread, but, let us assume, no reason to prefer a sliced loaf to an unsliced one or vice versa. Since I have a reason to buy a loaf of bread I have a reason to buy a sliced loaf, as well as a reason to buy an unsliced one. But I have no reason to get one rather than the other. Since there is no

[1] The no difference thesis is about what happens if authorities reach the right decision. Since their directives are binding even when mistaken, they do then make a difference.

other kind of bread, inevitably if I do as I have reason to and buy a loaf I will buy one or the other. That is, in acting on the best reasons I will also inevitably transcend reason and take a deliberate decision (e.g. to buy a sliced loaf) concerning some aspects of which reason is undetermined.

The same general considerations apply to directives issued by authorities. The legislator, for example, has reason to impose a certain tax. There are reasons showing that it is better to require that the tax due shall be paid either in quarterly or in monthly payments. These intervals are superior to all others. But while some reasons favour monthly payments and others favour quarterly ones, neither is sufficient to establish the superiority of doing it one way rather than the other. In this situation the authority may leave the choice to individuals. But sometimes there are decisive reasons against doing so. Then the authority has to decide for one of the two or more acceptable options.[1] When this happens the authoritative directive does make a difference. Without it individuals would have had a choice as to which of the acceptable solutions to adopt. The authority quite properly denies them the choice, and exercises it itself.

Second, as was mentioned in the last chapter, one important function of authoritative directives is to establish and help sustain conventions. Conventions are here understood in a narrow sense in which they are solutions to co-ordination problems, i.e. to situations in which the vast majority have sufficient reason to prefer to take that action which is (likely to be) taken by the vast majority. Where there is a co-ordination problem the issuing of an authoritative directive can supply the missing link in the argument. It makes it likely that a convention will be established to follow the authoritatively designated act. It is often the proper job of authorities to issue directives for this purpose. Such authoritative directives provide the subjects with reasons which they did not have before. They therefore make a difference to their practical deliberations, and serve to refute the no difference thesis.

[1] It would be a mistake to think of them as exactly tied options. All that is here assumed is that reasons are insufficient to establish the superiority of one option over the others.

It is true that once a useful co-ordinating convention is established every person has reason to adhere to it, a reason which is independent of the existence of the authority, a reason deriving entirely from the existence of the useful convention. The same is true where there is a good prospect that such a convention will emerge. The point of my argument is that sometimes authoritative intervention creates that prospect, and that it creates it because of its authoritativeness. Similarly, the existence of an authoritative directive may prevent or delay processes which, but for it, would have undermined the convention.

These cases are not only common, though hardly ever in the much over-simplified form we have considered, but also of some theoretical interest. Once the directive is issued, individuals have reasons to take the action it requires which they did not have before, because now there is ground to expect that a convention will be formed. But while this shows that the directive made a difference, it does not refute the dependence thesis. The authority took the action in order to help generate a convention. In so acting it acted for a dependent reason, for the assumption is that individuals have reason to wish for a convention and hence reason to take action to help form one. Every person in the group concerned has, before the directive is issued, a reason both to form a convention and to follow it once formed. This is the reason for which the legislation is adopted and it is, for the legislator, a dependent reason.[1]

Third, Prisoner's Dilemma type situations are another class of cases where authorities make a difference while conforming with the dependence thesis. In these cases while

[1] The importance of authorities for the generation and maintenance of conventions has led on occasion to ill-conceived attempts to explain the nature of authority exclusively by reference to conventions. Such accounts fail, as L. Green has shown in his 'The Authority of the State', a D.Phil. thesis approved by the University of Oxford 1984, to account for the pre-emptive force of authoritative directives. My account is consistent with Green's arguments on this point. The nature of authority is explained by the combination of the three theses we are discussing. Conventions are relevant only as one illustration of the non-equivalence of the dependence and the no difference theses. Conventions can arise in other ways and authorities can do other things. But one way of generating or protecting and stabilizing conventions is by authoritative intervention. Sometimes it is the best, or even the only feasible way. Even when it is not it is often a good way of generating conventions.

people have reason to act in a certain way, given the situation they are in, they also have reason to change the situation, though they are unable to do so by themselves. It is this feature, shared by cases where there are co-ordination problems, which enables authorities to make a difference while acting on dependent reasons. It should be remembered that many moral theories may land their adherents in Prisoner's Dilemma type situations. The problem does not arise merely through lack of moral fibre.[1]

Another source of doubt about the validity of the dependence thesis can be removed by eliminating an ambiguity in its formulation. It speaks of authoritative directives being based on or reflecting reasons which apply to their subjects in any case. This can be taken to mean that the one proper way for an authority to decide its actions is to ask itself what are the reasons which apply to its subjects and attempt to follow them. This is indeed a way of trying to meet the requirement of the dependence thesis. But it is not the only one, nor is it always the best. The dependence thesis does not exclude the authority from acting for other reasons which apply to it alone, and not to its subjects. All it requires is that its instructions will reflect the reasons which apply to its subjects, i.e. that they should require action which is justifiable by the reasons which apply to the subjects. Sometimes the best way to reach decisions which reflect the reasons which apply to the subjects is to adopt an indirect strategy and follow rules and considerations which do not themselves apply to the authority's subjects. Sometimes, in other words, one has to act for non-dependent reasons in order to maximize conformity to dependent reasons.

The clearest example of considerations which affect authoritative decisions but which do not apply to individuals acting on their own are considerations arising out of the needs and limitations of bureaucracies. Bureaucratic factors have to be considered alongside substantive considerations which do apply to the individual subjects of the law or any other

[1] For the relevance of Prisoner's Dilemmas to the study of authority see E. Ullman-Margalit, *The Emergence of Norms*, Oxford, 1980. For an analysis of the way Prisoner's Dilemmas arise within the bounds of various moral theories see D. Parfit, *Reasons and Persons*, Oxford, 1984.

authority. Bureaucracies, for example, are almost invariably forced to embrace a *de minimis* rule in order to be able to achieve their tasks where it really matters. The intrusion of the bureaucratic considerations is likely to lead to solutions which differ in many cases from those an individual should have adopted if left to himself. Reliance on such considerations is justified if and to the extent that they enable authorities to reach decisions which, when taken as a whole, better reflect the reasons which apply to the subjects. That is, an authority may rely on considerations which do not apply to its subjects when doing so reliably leads to decisions which approximate better than any which would have been reached by any other procedure, to those decisions best supported by reasons which apply to the subjects.

These considerations point to another way in which the no difference thesis distorts. Even while authoritative actions reflect the subjects' reasons, indeed in order that they should do so, they may well lead to different outcomes on particular occasions, and that without being in any way wrong or mistaken on those occasions.

I will return briefly to these considerations in the next chapter, where their importance in pointing to the source of doctrines of the authority of the State will appear. For the time being let me conclude by admitting that the considerations adumbrated in this section do not prove the dependence thesis. They adduce support for it mainly by removing misunderstandings and a few possible objections. Implicitly the argument appeals to our common understanding of the way authority should be exercised. The argument gains much strength by considering the case of theoretical authority, i.e. authority for believing in certain propositions. Nowadays it is not the fashion to talk of authorities in this context. Instead we have experts. But the notions are very similar, at least in all that matters to our concerns.

There is likely to be ready agreement that experts of all varieties are to give advice based on the very same reasons which should sway ordinary people who wish to form their minds independently. The expert's advantage is in his easy access to the evidence and in his better ability to grasp its

significance. But the evidence on which he should base his advice to me is the same evidence on which it would have been appropriate for me to form my own judgment. It is possible that practical and theoretical authorities have little in common. But it is more likely that, while they provide reasons for different things, they share the same basic structure. If so, the fact that a dependence thesis is true of theoretical authorities is strong evidence to suppose that it holds for practical authorities as well.

3. *The Justification of Authority*

The dependence thesis, it will be remembered, is a moral thesis about the way authorities should use their powers. It is closely connected with a second moral thesis about the type of argument which could be used to establish the legitimacy of an authority. I shall call it *the normal justification thesis*. It claims that *the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly*.

This way of justifying a claim that someone has legitimate authority, i.e. that those subject to his authority should acknowledge the authoritative force of his directives, is not the only one. It is, however, the normal one. Consider the case of a person whose reason for accepting his friend's advice is that the friend will be hurt if he does not. This may well be a perfectly good reason for accepting advice. But it is not the normal reason. It is regrettable that the friend will be hurt if his advice is not followed after it was given due consideration, or at least it is regrettable that he will be hurt to a degree which justifies this reaction. The friend himself does not intend his advice to be accepted for that reason, and is likely to be doubly hurt if he finds out that his advice was judged mistaken on its merits but was followed in order not to hurt him. The reason is that even when this is a good reason to accept advice it is not a reason to accept it as a

piece of advice. It is a reason to accept it as a way of being kind to a friend.

The normal reason for accepting a piece of advice is that it is likely to be sound advice. The normal reason to offer advice is the very same. It will be clear that these judgments of normality are normative. But the very nature of advice can only be understood if we understand in what spirit it is meant to he offered and for what reasons it is meant to be taken. The explanation must leave room for deviant cases, for their existence is undeniable. But it must also draw the distinction between the deviant and the normal, for otherwise the very reason why the 'institution' exists and why deviant cases take the special form they do remains inexplicable.

The example of advice is close to the case of authority. Indeed some, though not all, advice is authoritative advice. It is, for example, sometimes justifiable to accept someone's authority in order not to hurt his feelings. Many grown-up people feel obliged by such considerations to continue to acknowledge the authority of their parents over them. But just as in the case of advice, and for the very same reasons, such grounds for recognizing the authority of another, even though sometimes good, are always deviant grounds.

Slightly different considerations show that some reasons for recognizing the authority of another are secondary. To call them secondary means that they are valid reasons only if they accompany other, primary, reasons which also conform to the normal justification thesis (whereas deviant reasons may validly replace the normal reasons). Accepting the authority or leadership of a person or an institution is, for example, a way of defining one's own identity as a member of a nation or some other group, though needless to say it is unlikely to be the only way any person will express his identification with such a group. Such a reason can be a perfectly valid reason, but only if there are other reasons which, in accord with the normal justification thesis, support the authority of that person. The secondary reasons help to meet the burden of proof required to establish a complete justification, i.e. they may suffice in conjunction with the primary reasons in circumstances in which the primary

reasons alone will not be enough to establish the legitimacy of an authority. But reasons of identification and self-definition cannot by themselves establish the legitimacy of an authority.

Identification is a common and often proper ground for accepting authority. It is therefore important to establish the reasons why it is no more than a secondary justification dependent on the availability, at least to a certain degree, of another justification. Acceptance of an authority can be an act of identification with a group because it can be naturally regarded as expressing trust in the person or institution in authority and a willingness to share the fortunes of the group which are to a large extent determined by the authority.

But trust in the authority is trust that the authority is likely to discharge its duties properly. It therefore presupposes a principle which should govern its activities. Accepting the authority as a way of identifying with a group will be justified only if the trust is not altogether misplaced. Otherwise the odd situation may result that a person will quite properly express his identification with a group by supporting an institution which grossly betrays its duties to the group. For the same reasons one cannot properly express one's willingness to share the fortunes of a group by submitting to an authority which grossly betrays the trust it owes to the group. Identification with the group in such circumstances calls for the rejection of that authority.

The dependence and the normal justification theses are mutually reinforcing. If the normal and primary way of justifying the legitimacy of an authority is that it is more likely to act successfully on the reasons which apply to its subjects then it is hard to resist the dependence thesis. It merely claims that authorities should do that which they were appointed to do. Conversely, if the dependence thesis is accepted then the case for the normal justification thesis becomes very strong. It merely states that the normal and primary justification of any authority has to establish that it is qualified to follow with some degree of success the principles which should govern the decisions of all authorities. Together the two theses present a comprehensive view of the nature and role of legitimate authority. They articulate

the service conception of the function of authorities, that is, the view that their role and primary normal function is to serve the governed. This, to repeat a point made earlier, does not mean that their sole role must be to further the interest of each or of all their subjects. It is to help them act on reasons which bind them.

It will be noticed that the normal justification thesis identifies the case that must normally be established to show that a person has authority. It is not a matter of showing that he is entitled to have authority, but that he has it, that he is in authority, with all the consequences which follow from this fact. The main objection to this point revolves round the feeling that a person can have authority, or be in authority only if his authority is recognized by some people, whose identity varies with the nature of his authority. The difficulty in assessing this point is that in most cases the normal justification cannot be established unless the putative authority enjoys some measure of recognition, and exercises power over its subjects. There is a strong case for holding that no political authority can be legitimate unless it is also a *de facto* authority. For the case for having any political authority rests to a large extent on its ability to solve co-ordination problems and extricate the population from Prisoner's Dilemma type situations.

These considerations explain why to say of someone that he is entitled to have authority means that he should be in a position of real power and then he will have legitimate authority. They may be sufficient to account for the feeling that as a matter of meaning, recognition is a condition of possession of legitimate authority. If I am right then this is not a matter of meaning, but of normative justification.

The normal justification thesis allows for deviant reasons. Apart from these it is meant to account for all the reasons there can be for accepting authorities. But a complete justification of authority has to do more than to provide valid reasons for its acceptance. It has also to establish that there are no reasons against its acceptance which defeat the reasons for the authority. Because the reasons against the acceptance of authority vary it is not possible to discover in advance

how strong the reasons for acceptance of the authority need be to be sufficient.

Some reasons against the acceptance of authority pertain, with varying force, to many situations. One recurring kind of reason against accepting the authority of one person or institution is that there is another person or institution with a better claim to be recognized as an authority. The claim of the second is a reason against accepting the claim of the first only when the two authorities are incompatible, as are the claims of two governments to be legitimate governments of one country. Sometimes there are two compatible authorities whose powers overlap, as is the case with the authority of both parents over their children.

Another cluster of recurring considerations concerns the intrinsic desirability of people conducting their own life by their own lights. This obviously applies to some areas of life more than to others, to choice of friends more than to the choice of legal argument in a court case. The case for the validity of a claim to authority must include justificatory considerations sufficient to outweigh such counter-reasons. That is one reason why the case is hard to make. But if anarchists are right to think that it can never be made, this is for contingent reasons and not because of any inconsistency in the notion of a rational justification for authority, nor in the notion of authority over moral agents.

4. The Pre-emptive Thesis

From the dependence and normal justification theses it is but a short step to the pre-emption thesis. It turns on the general relation between the justification for a binding directive and its status as a reason for action, and more generally on the relation between rules as reasons for action and their justification. Consider the rule that, when being with one person and meeting another, one should introduce them to each other. The fact that this rule is a sound, valid or sensible rule is a reason for anyone to act in accordance with it. It is a sound rule because it facilitates social contact. But the fact that introducing people to each other in those circumstances facilitates social contacts is itself a reason for

doing so. Do we then have two independent reasons for introducing people? Clearly not. When considering the weight or strength of the reasons for an action, the reasons for the rule cannot be added to the rule itself as additional reasons. We must count one or the other but not both. Authoritative directives are often rules, and even when they are not, because they lack the required generality, the same reasoning applies to them. Either the directive or the reasons for holding it to be binding should be counted but not both. To do otherwise is to be guilty of double counting.

This fact is a reflection of the role of rules in practical reasoning. They mediate between deeper-level considerations and concrete decisions. They provide an intermediate level of reasons to which one appeals in normal cases where a need for a decision arises. Reasons of that level can themselves be justified by reference to the deeper concerns on which they are based. The advantage of normally proceeding through the mediation of rules is enormous. It enables a person to consider and form an opinion on the general aspects of recurrent situations in advance of their occurence. It enables a person to achieve results which can be achieved only through an advance commitment to a whole series of actions, rather than by case to case examination.

More importantly, the practice allows the creation of a pluralistic culture. For it enables people to unite in support of some 'low or medium level' generalizations despite profound disagreements concerning their ultimate foundations, which some seek in religion, others in Marxism or in Liberalism, etc. I am not suggesting that the differences in the foundations do not lead to differences in practice. The point is that an orderly community can exist only if it shares many practices, and that in all modern pluralistic societies a great measure of toleration of vastly differing outlooks is made possible by the fact that many of them enable the vast majority of the population to accept common standards of conduct.

More directly relevant to our case is the fact that, through the acceptance of rules setting up authorities, people can entrust judgment as to what is to be done to another person

or institution which will then be bound, in accordance with the dependence thesis, to exercise its best judgment primarily on the basis of the dependent reasons appropriate to the case. Thus the mediation of authorities may, where justified, improve people's compliance with practical and moral principles. This often enables them better to achieve the benefits that rules may bring as explained above, and other benefits besides.

These reflections on the mediating role of authoritative directives and of rules generally explain why they are reasons for actions. Ultimately, however, directives and rules derive their force from the considerations which justify them. That is, they do not add further weight to their justifying considerations. In any case in which one penetrates beyond the directives or the rules to their underlying justifications one has to discount the independent weight of the rule or the directive as a reason for action. Whatever force they have is completely exhausted by those underlying considerations. Contrariwise, whenever one takes a rule or a directive as a reason one cannot add to it as additional independent factors the reasons which justify it.

Hence the pre-emption thesis. Since the *justification* of the binding force of authoritative directives rests on dependent reasons, the reasons on which they depend are (to the extent that the directives are regarded simply as authoritative) replaced rather than added to by those directives. The service conception leads to the pre-emption thesis. Because authorities do not have the right to impose completely independent duties on people, because their directives should reflect dependent reasons which are binding on those people in any case, they have the right to replace people's own judgment on the merits of the case. Their directives preempt the force of at least some of the reasons which otherwise should have guided the actions of those people.[1]

[1] A. M. Honoré pointed out that even if an (informal) arbitration conluded in my favour, if I later become convinced that my original claim was mistaken I should acknowledge the claim of the other litigant rather than rely on the arbitrator's decision. Here it seems as if, contrary to the pre-emption thesis, the *original reasons are not pre-empted by the arbitrator's decision.* Nevertheless one's duty undergoes a complete change in such circumstances. I may rely on the arbitrator. I may say that we both agreed that our relations will be governed by his

The pre-emption thesis helps explain one additional respect in which the no difference thesis is wrong. The three respects surveyed in Section Two above depended on the difference that the existence of a legitimate authority makes to what one ought to do. The pre-emption thesis shows how its existence makes a difference to the reasons why one ought to do what one ought to do. In a sense this point is a trivially obvious one. If one ought to act because of an authoritative directive one's reasons are different than if one ought to perform the same act for other reasons. The non-trivial point I am making is that the difference is not in the presence of an additional reason for action, but in the existence of a pre-emptive reason. That is why what is validly required by a legitimate authority is one's duty, even where previously it was merely something one had sufficient reason to do. Authoritative directives make a difference in their ability to turn 'oughts' into duties.[1]

The pre-emption thesis will be readily accepted inasmuch as it concerns successful authoritative directives, i.e. those which correctly reflect the balance of reasons on which they depend. But, a common objection goes, the thesis cannot justify pre-empting reasons which the authority was meant to reflect correctly and failed to reflect. Successfully reflected reasons are those which show that the directive is valid. They are the justification for its binding force. Therefore, either they or the directive should be relied upon, but not both, that is not if relying on both means adding the weight of the directive to the force of the reasons justifying it when assessing the weight of the case for the directed action. Reasons that should have determined the authority's directive but failed to do so cannot be thought to belong to the justification of the directive. On the contrary they tell against it. They are reasons for holding that it is not binding. The

decision, that I would have gone along with it had he made a mistake which harmed me. I would be rather ungenerous and unfriendly but nevertheless formally correct. The situation is the same as in cases of agreement. I buy a chest from you and a price is agreed. It then transpires that the chest is a valuable antique and the price I paid is ludicrously low. If I ought to pay a fair price for what I buy then I ought to come back and add to the agreed price.

[1] On the pre-emptive character of duties see my 'Promises and Obligations', *Law, Morality and Society*, ed. by P. M. S. Hacker and J. Raz, Oxford, 1977.

pre-emption thesis is wrong in claiming that they too are pre-empted.

So much for the objection. It fails because its premiss is false. Reasons which authoritative directives should, but fail to, reflect are none the less among the reasons which justify holding the directives binding. An authority is justified, according to the normal justification thesis, if it is more likely than its subjects to act correctly for the right reasons. That is how the subjects' reasons figure in the justification, both when they are correctly reflected in a particular directive and when they are not. If every time a directive is mistaken, i.e. every time it fails to reflect reason correctly, it were open to challenge as mistaken, the advantage gained by accepting the authority as a more reliable and successful guide to right reason would disappear. In trying to establish whether or not the directive correctly reflects right reason the subjects will be relying on their own judgments rather than on that of the authority, which, we are assuming, is more reliable.

These reflections suggest another objection to the pre-emption thesis. It says that in every case authoritative directives can be overridden or disregarded if they deviate much from the reasons which they are meant to reflect. It would not do, the objection continues, to say that the legitimate power of every authority is limited, and that one of the limitations is that it may not err much. For such a limitation defeats the pre-emption thesis since it requires every person in every case to consider the merits of the case before he can decide to accept an authoritative instruction.

The objection does not formally challenge the pre-emption thesis. It does not claim that the reasons which are supposed to be displaced by authoritative instructions are not replaced by them but should count as additional independent reasons alongside the instructions. Its effect is to deny that authoritative instructions can serve the mediating role assigned them above. That role is to enable people to act on non-ultimate reasons. It is to save them the need to refer to the very foundations of morality and practical reasoning generally in every case. But as the directives are binding only if they do not deviate much from right reason and as we should act on them only if they are binding, we

always have to go back to fundamentals. We have to examine the reasons for and against the directive and judge whether it is justified in order to decide whether its mistake, if it is not justified, is large or small. The mediating role is unobtainable.

The failure of this objection stems from its confusion of a great mistake with a clear one. Consider a long addition of, say, some thirty numbers. One can make a very small mistake which is a very clear one, as when the sum is an integer whereas one and only one of the added numbers is a decimal fraction. On the other hand, the sum may be out by several thousands without the mistake being detectable except by laboriously going over the addition step by step. Even if legitimate authority is limited by the condition that its directives are not binding if clearly wrong, and I wish to express no opinion on whether it is so limited, it can play its mediating role. Establishing that something is clearly wrong does not require going through the underlying reasoning. It is not the case that the legitimate power of authorities is generally limited by the condition that it is defeated by significant mistakes which are not clear.

The pre-emption thesis depends on a distinction between jurisdictional and other mistakes. Most, if not all, authorities have limited powers. Mistakes which they make about factors which determine the limits of their jurisdiction render their decisions void. They are not binding as authoritative directives, though the circumstances of the case may require giving them some weight if, for example, others innocently have relied on them. Other mistakes do not affect the binding force of the directives. The pre-emption thesis claims that the factors about which the authority was wrong, and which are not jurisdictional factors, are pre-empted by the directive. The thesis would be pointless if most mistakes are jurisdictional or if in most cases it was particularly controversial and difficult to establish which are and which are not. But if this were so then most other accounts of authority would come to grief.

5. *Objections*

I will conclude this chapter by considering a few objections to the account of authority suggested above which challenge its general orientation. I shall start with a misunderstanding which the method of explanation adopted here is likely to give rise to among readers used to philosophical explanations of concepts such as authority being presented as accounts of the meanings of words.

Three theses were presented as part of an explanation of the concept of authority. They are supposed to advance our understanding of the concept by showing how authoritative action plays a special role in people's practical reasoning. But the theses are also normative ones. They instruct people how to take binding directives, and when to acknowledge that they are binding. The service conception is a normative doctrine about the conditions under which authority is legitimate and the manner in which authorities should conduct themselves. Is not that a confusion of conceptual analysis and normative argument? The answer is that there is an interdependence between conceptual and normative argument.

The philosophical explanation of authority is not an attempt to state the meaning of a word. It is a discussion of a concept which is deeply embedded in the philosophical and political traditions of our culture. The concept serves as an integral part of a whole mesh of ideas and beliefs, leading from one part of the net to another. There is not, nor has there ever been, complete agreement on all aspects of the concept's place and connections with other concepts. But there is, as part of our common culture, a good measure of agreement between any two people on many, though frequently not the same, points. Accounts of 'authority' attempt a double task. They are part of an attempt to make explicit elements of our common traditions: a highly prized activity in a culture which values self-awareness. At the same time such accounts take a position in the traditional debate about the precise connections between that and other concepts. They are partisan accounts furthering the cause of certain strands in the common tradition, by developing and producing new or newly recast arguments in their favour. The very activity is also an expression of faith in the tradition, of a willingness to understand oneself and the world in its terms

and to carry on the argument, which in the area with which we are concerned is inescapably a normative argument, within the general framework defining the tradition. Faithfulness to the shape of common concepts is itself an act of normative significance.

Since this chapter is meant as a normative-explanatory account of the core notion of authority, it can be extended to explain reference to authority in various specific contexts. But such extensions are neither mechanical nor automatic. For example, the three theses apply in the most straightforward way to discourse of people being in authority or having authority over others. It is an account of authority relations between a legitimate authority and those subject to it. How does it help to understand discourse of someone being an authority? It is false that only a person in authority is an authority. There are various contexts in which we speak of a person or institution being an authority. Consider as an example cases where a person (but only exceptionally an institution) is said to be an authority on a certain matter, as in 'John is an authority on Chinese cooking' or 'Ruth is an authority on the stock exchange'. Neither John nor Ruth has authority over me, even though my Chinese cooking and my financial affairs will prosper if I follow their advice rather than trust my own judgment.

One may say that to be an authority on a certain matter is to be an authority about what to believe rather than about what to do. While generally true this does not solve the difficulty in the case of John and Ruth since each of them may claim to be both a theoretical and a practical authority. They do not have authority over me because the right way to treat their advice depends on my goals. If I want nothing but to prepare the best Chinese meal I can manage then I should just follow John's instructions. If I want to maximize my savings I should follow Ruth's advice. But if I wish to enjoy myself dabbling in cooking or in playing the stock exchange then I should try and form my own judgment. I should not yield to theirs unless I see its point and come to agree with them. Here the normal justification thesis establishes the credentials of John and Ruth as authorities in their fields. But whether or not there is a complete justification for me to regard their advice or instructions as guides to my conduct in the way I regard a binding authoritative directive depends on my other goals. In such cases while talking of a person as being an authority one refrains from talking of him as in authority over oneself, and avoids regarding his advice or instructions as binding, even when, given one's goals, one ought to treat it in exactly the same way as one treats a binding authoritative directive.

My proposed account of authority is not even an account of the meaning of the phrase 'X has authority over Y'. It is an account of legitimate authority, whereas the phrase is often used to refer to *de facto* authorities. There is no purely linguistic way of generally marking the intended use. As indicated above, the notion of a *de facto* authority depends on that of a legitimate authority since it implies not only actual power over people but, in the normal case, both that the person excercising that power claims to have legitimate authority and that he is acknowledged to have it by some people. In some unusual cases one is willing to apply the term when only one of these conditions obtains.

What is it to claim authority or to accept that someone has authority over one? It means to believe that one has legitimate authority, or that that person has authority over one. Here we encounter one of the main differences between normative-explanatory accounts such as the ones offered here of authority or the later account (in Chapter 7) of rights, and the purely linguistic explanations often advocated by analytic philosophers. A purely linguistic account of authority claims to yield a simple explanation of what people believe who believe that someone has legitimate authority. Had the above account been a linguistic account, an explanation of the meaning of 'legitimate authority', it would have followed that anyone who believes of a person that he has legitimate authority believes that that person satisfies the condition set by the justification thesis. This implication does not hold for a normative-explanatory account. In being normative it avows that it does not necessarily conform to everyone's notion of authority in all detail. It does claim to be an explanatory account in singling out important features of people's conception of authority. It helps explain what

they believe in when they believe that a person has authority. But some people's beliefs may not conform to the account here given in all respects.

This is a key to the difference between linguistic and explanatory-normative accounts. The latter, while providing a crucial guide for the understanding of the way terms are used in different contexts, does not allow for a simple explanation based on substitutivity. This might have been a drawback of such accounts but for the fact that linguistic accounts understood in accord with the current consensus among analytic philosophers either are not possible or lack any philosophical interest. But that is a matter for an extensive argument which will have to wait another occasion.[1]

How can the account of authority here offered be thought to represent important strands in Western thought? If there is a common theme to liberal political theorizing on authority, it is that the legitimacy of authority rests on the duty to support and uphold just institutions, as, following Rawls, the duty is now usually called. But that duty is of course dependent on a prior understanding of which institutions are just. The account here offered is meant as a beginning of an answer to that question. Or rather it contributes by setting the question in a certain way. One has a duty to uphold and support authorities if they meet the conditions of the service conception as explained above.

Furthermore, the duty to uphold and support just institutions is, in some respects, wider than the duty which devolves on one as a result of the fact that someone has legitimate authority over one, in three different ways. First, there are just institutions which neither possess, nor claim to possess, any authority. Think of the British Council, or the BBC, for example. One owes them the duty to uphold and support them. But this has nothing to do with any issue concerning authority. Second, the duty involves more than a duty of obedience. One may be obligated to help fight opponents of the institution or help overcome obstacles to its successful operation in ways which one is not required

[1] For an incisive critique of much of the current consensus regarding language among analytic philosophers see G. Baker and P. M. S. Hacker, *Language, Sense and Nonsense*, Oxford, 1984.

by its laws to do. Third, the duty is owed to institutions which may have authority but only towards other people. For example, one may owe the duty to the just government of foreign countries. We must conclude, therefore, that the duty to support just institutions, where it has to do with just authorities, is parasitical on the normal justification thesis, and not an alternative to it. In other ways the duty to uphold and support just institutions is narrower than the duty corresponding to the right of a legitimate authority. One has a duty to obey those in authority over one even in circumstances in which disobedience does not imperil their existence or functioning.

To the extent that legitimate authorities have power over us, the pre-emption thesis governs our right attitude to them. The duty to uphold and support just institutions does not come into play. It is primarily an other-regarding duty. I have a duty to support just governments in foreign countries, even though they have no legitimate power over me. I have reason to support the authority of my neighbours over their children, etc. In other words, the duty to uphold and support just institutions comes into play when the conditions of legitimacy implied by the service conception of authority are satisfied. It then supplements the pre-emption thesis by showing that we should be concerned not merely to have the proper attitude to those in authority over us, but also to those in authority over others.

Finally, let us return to our starting point. What is wrong with regarding an authoritative directive as one additional prima facie reason for the action it directs, which supplements, rather than supplants, the other reasons for and against that action? The service conception establishes that the point of having authorities is that they are better at complying with the dependent reasons. Take a simplified situation. I regularly confront a decision, for example, whether or not to sell certain shares, in varying circumstances. Suppose that it is known that a financial expert reaches the 'right' decision (whatever that may be) in 20% more cases than I do when I do not rely on his advice. Should I not, when confronting such decisions, carry on as before

but take his advice as a factor counting in favour of the decision he recommends?

Perhaps I should always take the case for his solution as being 20% stronger than it would otherwise appear to me to be. Perhaps some other, more complicated formula should be worked out. In any case would not the right course require me to give his advice prima facie rather than pre-emptive force? The answer is that it would not. In cases about which I know only that his performance is better than mine, letting his advice tilt the balance in favour of his solution will sometimes, depending on my rate of mistakes and the formula used, improve my performance. But I will continue to do less well than he does unless I let his judgment pre-empt mine.

Consider the case in a general way. Suppose I can identify a range of cases in which I am wrong more than the putative authority. Suppose I decide because of this to tilt the balance in all those cases in favour of its solution. That is, in every case I will first make up my own mind independently of the 'authority's' verdict, and then, in those cases in which my judgment differs from its, I will add a certain weight to the solution favoured by it, on the ground that it, the authority, knows better than I. This procedure will reverse my independent judgment in a certain proportion of the cases. Sometimes even after giving the argument favoured by the authority an extra weight it will not win. On other occasions the additional weight will make all the difference. How will I fare under this procedure? If, as we are assuming, there is no other relevant information available then we can expect that in the cases in which I endorse the authority's judgment my rate of mistakes declines and equals that of the authority. In the cases in which even now I contradict the authority's judgment the rate of my mistakes remains unchanged, i.e. greater than that of the authority. This shows that only by allowing the authority's judgment to pre-empt mine altogether will I succeed in improving my performance and bringing it to the level of the authority. Of course sometimes I do have additional information showing that the authority is better than me in some areas and not in others. This may be sufficient to show that it lacks authority over me in those other areas. The argument about the pre-emptiveness of authoritative decrees does not apply to such cases.

This way of reasoning is unrealistically simple even in the relatively straightforward circumstances of simple stock selling decisions. But it helps to illustrate the general lesson. If another's reasoning is usually better than mine, then comparing on each occasion our two sets of arguments may help me detect my mistake and mend my reasoning. It may help me more indirectly by alerting me to the fact that I may be wrong, and forcing me to reason again to double check my conclusion. But if neither is sufficient to bring my performance up to the level of the other person then my optimific course is to give his decision pre-emptive force. So long as this is done where improving the outcome is more important than deciding for oneself this acceptance of authority, far from being either irrational or an abdication of moral responsibility, is in fact the most rational course and the right way to discharge one's responsibilities.

II

ANTI-PERFECTIONISM

The stage is set for the examination of our main topic. Having established the kind of considerations which justify the setting up and guide the conduct of political authorities, we can now ask which of these protect individual freedom. That is, the first part explained the framework within which the normative examination of political authorities must be conducted. The rest of the book applies this framework to the consideration of the political protection and promotion of individual liberty.

In outlining the main features of a theory of authority much attention was given to the necessity of a piecemeal approach, allowing that just governments (and often unjust ones as well) have varying degrees of authority over different people. It remained an open question whether there are principled general limits to all political authorities. One interpretation of the value of political liberty is that it sets such limits to the power of governments. On this interpretation liberalism is the doctrine of limited government. Two important and influential doctrines which espouse this interpretation of liberalism are to be examined in this book. The better known one, that the power of governments is limited by human rights which they must respect, will be examined in Part Three. Part Two is devoted to the currently very popular anti-perfectionist doctrine.

It is natural to think of a limitation on the power of government as consisting in a delimitation of an area of individual activity into which governments may not step. Such conceptions of individual freedom as consisting in an inner sanctum immune from public interference will be briefly examined in Part Three of the book. The discussion of authority has already prepared us for the existence of boundaries of a different kind. This part is concerned with two

forms of restriction both inspired by the same intuition, both seeking to capture one truth. One is the view that governments should be blind to the truth or falsity of moral ideals, or of conceptions of the good. That is, that neither the validity, cogency or truth of any conception of the good, nor the falsity, invalidity or stupidity of any other may be a reason for any governmental action. The other, related, view is that governments must be neutral regarding different people's conceptions of the good. That is, that governments must so conduct themselves that their actions will neither improve nor hinder the chances individuals have of living in accord with their conception of the good.

Both doctrines are inspired by the thought that people are autonomous moral agents who are to decide for themselves how to conduct their own lives and that governments are not moral judges with authority to force on them their conceptions of right and wrong. That is why anti-perfectionism is often regarded as being a doctrine of political freedom. When comparing theocratic states, communist or fascist states, and similar regimes with the liberal democracies of the West it appears plausible to maintain that the difference is not that the liberal states promote different ideals of the good, but that they promote none. Unlike illiberal states, which regard it as a primary function of the state to see to the moral character of society, liberal states shun such activities. They reject the idea that the state has a right to impose a conception of the good on its inhabitants, and this self-restraint forms the foundation of political liberty under liberal regimes.

Therefore, when anti-perfectionist principles are used to provide the foundation of a political theory they can be regarded as attempts to capture the core sense of the liberal ethos. Not all the supporters of the various principles of neutral political concern advance them as interpretations of liberalism, but their nature and the culture that produces them endow them with that character.

Since the distinction between neutrality and the exclusion of ideals is rarely drawn by supporters of either, the discussion in the next two chapters is closely interdependent. Though the spotlight will be on neutrality in Chapter Five,

and on the exclusion of ideals in Chapter Six, many of the points made about one doctrine apply to the other as well, and no final conclusions concerning anti-perfectionism generally can be reached until both are examined. In examining both doctrines and their common source we shall come to realize the importance of coercion to this strand of liberal thought. For to the question of why governments are so limited a common answer, though not the only one, is that governments wield coercive power. The relevance of coercion will occupy much of Chapter Six.

fectionism would not lead to the suppression of forms of life which are not practised by those in power.

Even if the anti-perfectionist worry about people imposing their conceptions of the good on others suffers from exaggeration for the reasons just described, is there not a simple argument supporting its conclusion? Perfectionism assumes that some people have greater insight into moral truth than others. But if one assumes that all stand an equal chance of erring in moral matters should we not let all adult persons conduct themselves by their own lights? Whatever else can be said about this argument one point is decisive. Supporting valuable forms of life is a social rather than an individual matter. Monogamy, assuming that it is the only morally valuable form of marriage, cannot be practised by an individual. It requires a culture which recognizes it, and which supports it through the public's attitude and through its formal institutions. Much more will be said on this point later in the book. The short summary is that perfectionist ideals require public action for their viability. Anti-perfectionism in practice would lead not merely to a political stand-off from support for valuable conceptions of the good. It would undermine the chances of survival of many cherished aspects of our culture.

The sources of the appeal of anti-perfectionism are sound. It stems from concern for the dignity and integrity of individuals and a revulsion from letting one section of the community impose its favoured way of life on the rest. These concerns are real and important. They do not, however, justify anti-perfectionism. This part of the book must end with a negative conclusion. The exploration of the sources of anti-perfectionism in revealing genuine causes for concern does, however, point the way to the positive conclusions which will be developed in Part Five.

III

INDIVIDUALISTIC FREEDOM: LIBERTY AND RIGHTS

This part concerns the view that the principles which protect individual liberty are principles asserting the existence of inviolable rights. By being bound to protect these rights governments are bound to respect individual freedom. That is, the freedom to which individuals are entitled is defined by their fundamental rights. Chapter Seven explains the nature of rights in general. Chapter Eight considers the possibility that rights provide the very foundation of morality. The arguments which refute that position also refute the right-based conception of freedom. They point to a relatively modest, though practically very important, role to rights in morality and politics. These conclusions are reinforced in Chapter Nine which evaluates the proposition that a fundamental right to equality is the basis of the liberal doctrine of liberty. Finally, Chapter Ten follows with a rough outline of the constitutional role of fundamental civil liberties.

7

The Nature of Rights

To prepare for the examination of doctrines which hold individual freedom to be based on rights, this chapter examines the nature of rights. It starts by a sketch of an account (Section 1), followed by an explanation of some of its technical points (Sections 2–5). Sections 6–8 touch on the philosophically significant aspects of the account: the capacity to have rights and the relations between rights, duties and interests. Finally Section 9 introduces the next chapter by considering the importance of rights, and raising the question whether rights can be morally fundamental.

1. *Rights: The Main Features*

One danger of prefacing a discussion of the importance of rights with a definition of the concept is that one may end with a definition according to which rights are not important, but which is not acceptable to those who claim that they are. An opposite danger is of proving their importance by calling anything of value a right. Both dangers result from the fact that a philosophical definition of 'a right', like those of coercion, authority and many other terms, is not an explanation of the ordinary meaning of a term. It follows the usage of writers on law, politics and morality who typically use the term to refer to a subclass of all the cases to which it can be applied with linguistic propriety.

Philosophical definitions of rights[1] attempt to capture the way the term is used in legal, political and moral writing and discourse. They both explain the existing tradition of moral and political debate and declare the author's intention of carrying on the debate within the boundaries of that tradition. At the same time they further that debate by sing-

[1] I refer of course to what philosophers most commonly do, whether they know it or not. I do not wish to deny that some understand their enterprise in other ways.

ling out certain features of rights, as traditionally understood, for special attention, on the grounds that they are the features which best explain the role of rights in moral, political, and legal discourse. It follows that while a philosophical definition may well be based on a particular moral or political theory (the theory dictates which features of rights, traditionally understood, best explain their role in political, legal and moral discourse), it should not make that theory the only one which recognizes rights.[1] To do so is to try to win by verbal legislation. A successful philosophical definition of rights illuminates a tradition of political and moral discourse in which different theories offer incompatible views as to what rights there are and why. The definition may advance the case of one such theory, but if successful it explains and illuminates all. In this spirit I shall first propose a definition of rights and then explain various features of the definition and criticise some alternative definitions.

Definition: 'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.[2]

Capacity for possessing rights: An individual is capable of having rights if and only if either his well-being is of ultimate value or he is an 'artificial person' (e.g. a corporation).

Note that since 'a right' is a very general term, one rarely asserts that someone has a right without specifying what rights he has, just as one does not normally mention that a person is subject to a duty without saying something more about what duty it is. Sometimes one may state of another that he has rights in order to indicate that he is the kind of

[1] Though a consideration of notions such as 'chastity', 'honour', 'chivalry' shows that not all political or moral theories have room for all normative concepts. Some theories may not recognize rights.

[2] The definition draws on several elements of analyses of rights which stem from Bentham's beneficiary theory. It shares some features of R. M. Dworkin's explanation in *Taking Rights Seriously*, London, 1977, p. 100 (but not of his better known 'trump' theory), and has much in common with D. N. MacCormick's 'Rights in Legislation' in *Essays in Social Democracy*. Most of all I have been influenced by K. Campbell's ideas in his 'The Concept of Rights', 1979, an Oxford D.Phil. thesis.

creature who is capable of having rights. For example, one may say that slaves have (legal or moral) rights, or that partnerships have rights, or that foetuses have them. (Similarly one may say that monarchs have duties, etc.) The fact that assertions of rights *tout court* are rare does not invalidate the definition, nor does it detract from its value as the key to the explanation of all rights. It is true that there is much about statements of rights which cannot be learned from my definition alone. One needs to distinguish a right to perform an act from a right in an object, and that from a right to an object, and that from a right to a service or a facility, and that again from 'a right to. . .' where the dots stand for an abstract noun. A right to use the highway, for example, is a liberty right to use the highway or a right to have that liberty. A right in a car may be a right of ownership in the car, or some other right in it. Detailed explanations of rights are in part linguistic explanations (a right in a car differs from a right to a car) but in part they depend on political, legal or moral arguments (does a right to free speech include access to the mass media or to private premises?) The proposed definition is meant to be neutral concerning all such detailed questions. At the same time it aims to encapsulate the common core of all rights, and thus to help to explain their special role in practical thought.

The definition is of rights *simpliciter*. Some discourse of rights is of rights as viewed from the point of view of a certain system of thought, as when one compares Kantian rights with utilitarian rights. Prefixing an adjective to 'rights' is one way to indicate that the speaker does not necessarily accept the existence of the right and is merely considering the implications of a system of thought. (On other occasions such adjectives identify the contents of the rights, e.g. economic rights, or their source, e.g. promissory rights, or both.)

Rights are grounds of duties in others. The duties grounded in a right may be conditional.[1] Consider the duty of an employee to obey his employer's instructions con-

[1] Throughout I draw no distinction between duties and obligations. Nor will I indicate how to distinguish a future duty which will exist if a condition is satisfied (If . . . then one has a duty to . . .) from a presently existing conditional duty (One has a duty to . . . if . . .). I will assume that only conditional duties can be conditioned on the exercise of powers to impose them.

cerning the execution of his job. It is grounded in the employer's right to instruct his employees. But it is a conditional duty, i.e. a duty (in matters connected with one's employment) to perform an action if instructed by the employer to do so. When the condition which activates the duty is an action of some person, and when the duty is conditional on it because it is in the right-holder's interest to make that person able to activate the duty at will, then the right confers a power on the person on whose behaviour the duty depends.[1] Thus the employer's right over the employees is a ground for his power to instruct them. This power is one aspect or one consequence of his right. But the very same right also endows him with a power to delegate his authority to others. It can, if he chooses to delegate authority, become a source of a power in one of his subordinates. In that case the employee will have a duty to obey the person in whom power was vested and that duty as well as the power of the delegated authority is grounded in the right of the employer. To simplify I shall not dwell specifically on rights as the grounds of powers.

2. *Core and Derivative Rights*

Some rights derive from others. Just as rights are grounds for duties and powers so they can be for other rights. I shall call a right which is grounded in another right a derivative right. Non-derivative rights are core rights. The relation between a derivative right and the core right (or any other right) from which it derives is a justificatory one. The statement that the derivative right exists must be a conclusion of a sound argument (non-redundantly) including a statement entailing the existence of the core right. But not every right thus entailed is a derivative one. The premisses must also provide a justification for the existence of the derivative right (and not merely evidence or even proof of its existence). To do so their truth must be capable of being established without relying on the truth of the conclusion. An example may illustrate the point.

[1] For a clarification of the notion of a normative power cf. my *Practical Reasons and Norms*, London, 1975, section 3.2. By extending the same reasoning rights can be shown to be grounds of immunities and liberties: they are reasons for not subjecting individuals to duties or to the power of others.

Let us assume that I own a whole street because I bought (in separate transactions) all its houses. My ownership of a house in the street does not derive from my ownership of the street as a whole, even though the statement that I own a house in the street is entailed by the statement that I own the street. For in attempting to provide a normative justification for my rights I have to refer to the individual transactions by which I acquired the houses. Therefore my right in the street derives from my rights in the houses and not the other way round. Had I inherited the whole street from my grandfather the situation would have been reversed.

Without grasping the relation between core and derivative rights one is liable to fall into confusion. My right to walk on my hands is not directly based on an interest served either by my doing so or by others having duties not to stop me. It is based on my interest in being free to do as I wish, on which my general right to personal liberty is directly based. The right to walk on my hands is one instance of the general right to personal liberty. The right to personal liberty is the core right from which the other derives. Similarly my right to make the previous statement is a derivative of the core right of free speech, and my right to spoil the cigarette I am holding at the moment derives from my ownership in it, and so on. Often right-holders have a direct interest in that to which they have derivative rights. But those do not always ground their rights. A right is based on the interest which figures essentially in the justification of the statement that the right exists. The interest relates directly to the core right and indirectly to its derivatives. The relation of core and derivative rights is not that of entailment, but of the order of justification. The fact that a statement that everyone has a right to freedom of expression appears to entail the statement that everyone has a right to free political expression does not establish that the first is the core right and the second its derivative. It may well be that freedom of political speech is justified by considerations which do not apply to other kinds of speech. If it is also the case that, while separate independent considerations justify freedom of commercial

speech, and others still freedom of artistic expression, scientific and academic communications, etc., there are no general considerations which apply to all of the protected areas of speech, then the general right to freedom of expression is a derivative right. It is a mere generalization from the existence of several independent core rights.

Furthermore, a general right statement does not entail those statements of particular rights which are instances of it. I may have a right to free speech without having a right to libel people. In matters of libel, the right to free expression may be completely defeated by the interests of people in their reputation. I will return to this point later.

3. *The Correlativity of Rights and Duties*

It is sometimes argued that to every duty there is a corresponding right. It is evident from the proposed definition that there are no conceptual reasons for upholding such a view. Some moral theories may yield such a correlativity thesis as a result of their moral principles, but this possibility cannot be explored here.[1] A more popular thesis maintains that to every right there is a correlative duty. Since a right is a ground for duties there is a good deal of truth in this kind of correlativity thesis. Yet most of its common formulations are very misleading. R. Brandt's definition can serve as an example of many: 'X has an absolute right to enjoy, have or be secured in Y' means the same as 'It is someone's objective overall obligation to secure X in, or in the possession of, or in the enjoyment of Y, if X wishes it.'[2] He proceeds to define prima facie rights in terms of prima facie obligations. First, note that Brandt misleadingly suggests that to every right there corresponds one duty, that that duty is to guarantee the enjoyment or possession of the object of the right, and that it is conditional on the desire of the right-holder. All three points are mistaken. A right to education grounds a duty to provide educational opportunities to each individual, whether he wishes it or not. Many rights ground duties which fall short of securing their object, and they may

[1] It will be rejected in the next chapter. See also Ch. 10.

[2] Richard Brandt, *Ethical Theory*, Englewood Cliffs, NJ, 1959, p. 438.

ground many duties not one. A right to personal security does not require others to protect a person from all accident or injury. The right is, however, the foundation of several duties, such as the duty not to assault, rape or imprison the right-holder.

Secondly, and more importantly, Brandt fails to notice that the right is the ground of the duty. It is wrong to translate statements of rights into statements of 'the corresponding' duties. A right of one person is not a duty on another. It is the ground of a duty, ground which, if not counteracted by conflicting considerations, justifies holding that other person to have the duty.

Thirdly, there is no closed list of duties which correspond to the right. The existence of a right often leads to holding another to have a duty because of the existence of certain facts peculiar to the parties or general to the society in which they live. A change of circumstances may lead to the creation of new duties hased on the old right. The right to political participation is not new, but only in modern states with their enormously complex bureaucracies does this right justify, as I think it does, a duty on the government to make public its plans and proposals before a decision on them is reached, as well as a duty to publish its reasons for a decision once reached (except in special categories of cases such as those involving defence secrets). This dynamic aspect of rights, their ability to create new duties, is fundamental to any understanding of their nature and function in practical thought. Unfortunately, most if not all formulations of the correlativity thesis disregard the dynamic aspect of rights. They all assume that a right can be exhaustively stated by stating those duties which it has already established.[1] This objection to the reduction of rights to duties does not rule out the possibility that 'A has a right to X' is reducible to 'There is a duty to secure A in X'. But since this duty can be based on grounds other than A's interest, the two statements are not equivalent.

4. *Holding Individuals to be Under a Duty*

The proposed definition states that if an individual has a right then a certain aspect of his well-being is a reason for

[1] Needless to say core rights can lead also to new derivative rights.

holding others to be under a duty. I used this phrase advisedly to preserve the ambiguity between saying that rights are a reason for judging a person to have a duty, and saying that they are reasons for imposing duties on him. They are in fact reasons of both kinds, but primarily of the first. Let me explain. Rights are (part of) the justification of many duties. They justify the view that people have those duties. But as has already been noted, they justify such a view only to the extent that there are no conflicting considerations of greater weight. Within certain institutional settings there are weighty reasons not so much against allowing rights to generate new duties as against allowing official action on the basis of new duties unless they are recognized by the appropriate institutions. Institutions such as universities, states, trade unions and foothall clubs are based on a concentration of power in certain bodies and a division of labour between officials whose duties are the execution of the institutions' policies and rules, and those who make and change those policies and rules. In such an institution it may be proper to say that rights are grounds not so much for judging that certain duties exist as for imposing them.

The right to political participation is a legal right in English law. But though in contemporary societies this right justifies holding the government to be under a duty to publicize its plans and the reasons for its decisions, there is no such legal duty on the government in English law. The duty is purely a moral duty. Nevertheless, the existence of a moral right to political participation, i.e. the fact that this right is given legal recognition and is already defended hy some legal duties, is a ground for the authorized institutions (Parliament or the courts) to impose such a duty on government officials. If and when they do so, they will be making new law. But they will do so on the ground that this is justified and required by existing law. By the same token the legal right to political participation is a reason for investing people with a legal right to free information. It cannot he used to establish that they already have such a right.[1]

[1] These points are developed in my 'Legal Rights', *Oxford Journal of Legal Studies*, 4 (1984), 1, and 'The Internal Logic of the Law', *Materiali per Una Storia della Cultura Giuridica*, 14 (1984), 381.

5. *Promises and Agreements*

Some of the points made in the previous sections can be illustrated and clarified by using them to explain the rights involved in promises and agreements. These are two. There is the right to promise which a promisor must have if his promise is to be binding. And there is the right conferred on the promisee by the promise. I will examine them in that order.

The right to promise is based on the promisor's interest to be able to forge special bonds with other people.[1] The right is qualified. Not everyone has it. Small children and some mentally deranged people lack it. Furthermore, if it is not permissible to have bonds based on immorality, one's right to promise does not include the right to promise to perform immoral acts. The right to promise is no doubt further qualified. Since we are not here concerned with any of these qualifications I will from now on disregard them.

Those who assign sufficient importance to the interest people have in being able to impose on themselves obligations to other people as a means of creating special bonds with other people believe in a right to promise. But why is it a right? The interest on which it is based validates the promising principle, namely:

> If a person communicates an intention to undertake by that very act of communication a certain obligation then he has that obligation.

The promising principle establishes that if we promise we are obligated to act as we promised. It also establishes a present obligation to keep our promises, i.e. we are obligated to perform action X, if we promised to perform X. This is a conditional obligation. The condition is an act of the promisor and his obligation is conditional on his action because it is desirable that he should be able to bind himself if he so wishes. It follows that people's interest in being ahle to bind themselves is the basis of a power to promise which they

[1] I am here summarizing some of the points made in my 'Promises and Obligations', in P. M. S. Hacker and J. Raz (eds.), *Law, Morality and Society*, Oxford 1977; and in 'Promises in Morality and Law', *Harvard Law Review* 95 (1982) p. 916.

possess and of an obligation to keep promises they make. But neither the power nor the obligation point to a right to promise.

The right exists because the very same interest on which the power to promise and the duty to keep promises are based is also the ground for holding others to be subject to a duty not to interfere with one's promising. The duty requires one not to prevent a person from promising (e.g. by denying him the means of communicating an intention to undertake by that very communication an obligation, or by stopping others from receiving such communications). It also requires one not to force people to promise nor to induce them improperly to promise or not to promise. (Again I avoid examining the way these duties are qualified.) Violation of the duty not to interfere with a person's promising will frustrate his right to promise and the interest on which it is based, either by preventing the person from exercising his rights or by perverting the considerations on which he decides whether to promise or not. The fact that such interferences with the right are infrequent is reflected by the fact that the right to promise is rarely invoked in ordinary practical discourse. To conclude, the power to promise and the right to promise are distinct notions. But both stem from a common core, i.e. the interest of persons to be able to forge normative bonds with others. That is why they coexist, and one has the power to promise if and only if one has the right to do so.

The right to make a particular promise (e.g., to visit my aunt next weekend) is a derivative right of the general right to promise. One such derivative right is the right to make a conditional promise. Two kinds of conditional promises are of interest here:

First a promise made conditional on an action by the promisee (e.g., 'I will give you ten pounds if you give me the book').

Second (which is in fact a special case of the above), a promise made conditional on a promise to be given by the promisee (e.g., 'I will give you ten pounds if you promise to give me the book').

Whenever such a promise is made and the condition is fulfilled, there is an agreement between the promisor and the promisee. The right to make such promises is therefore a right to enter into agreements. There are other ways of making agreements but their analysis does not matter for our purpose.

So far we have discussed the right to promise. The right which the promise confers on the *promisee* does not derive from the right to promise which is a right of the *promisor*. Many writers on promises insist that the promised act must be or at least must be thought to be in the interest of the promisee. Elsewhere I have challenged this view and I will not return to the controversy here.[1] But it is interesting to relate this issue to the question of the promisee's right created by the promise.

One view regards the promisee's right under any particular promise as a core right based on his interest in the promised act (and the intention of the promisor to be obligated to perform the act). On this view, if there could be binding promises which do not benefit the promisee (and are not intended to do so) then there are promises which do not create rights in the promisee.

Such a consequence seems at odds with the conventions of discourse concerning promises. I therefore favour a second view (which complements the first) according to which each person has an interest that promises made to him will be kept. Of course, he might lose interest in the specific content of some promises, and keeping some of them may even work against his overall interest. But invariably he has a *pro tanto* interest that promises given to him be kept. This interest is the very one which is reflected in his right to promise. Namely, it is the interest to have voluntary special bonds with other people. We should remind ourselves that while the promisee may not be the initiator of the bond of which the promise is the whole or a part, he is not entirely passive either. It is always up to him to waive his right under the promise and thus terminate the binding force of the promise. It is this general interest which explains why every promise, and not only those performance of which is to the

[1] See 'Promises and Obligations', op. cit.

specific advantage of the promisee, creates a right in the promisee.

6. *Capacity for Rights*

The definition of rights does not itself settle the issue of who is capable of having rights beyond requiring that right-holders are creatures who have interests. What other features qualify a creature to be a potential right-holder is a question bound up with substantive moral issues. It cannot be fully debated here. But the special role of statements of rights in practical thought cannot be elucidated and the significance of the definition cannot be evaluated without a brief explanation of the conditions for the capacity for having rights.

There is little that needs be said here of the capacity of corporations and other 'artificial' persons to have rights. Whatever explains and accounts for the existence of such persons, who can act, be subject to duties, etc. also accounts for their capacity to have rights. Whether certain groups, such as families or nations, are artificial or natural persons is important for determining the conditions under which they may have rights. But we need not settle such matters here.

There is a view, which I shall call the reciprocity thesis, that only members of 'the same moral community' can have rights. This is narrowly interpreted when the same moral community is a community of interacting individuals whose obligations to each other are thought to derive from a social contract or to represent the outcome of a fair bargaining process or if morality is conceived of in some other way as a system for the mutual advantage of all members of the community. Wider conceptions of the moral community extend it to all moral agents and regard anyone who is subject to duties as being capable of rights.

The principle of capacity for rights stated at the beginning of the chapter is not committed to the reciprocity thesis but is consistent with it. Since by definition rights are nothing but grounds of duties, if duties observe a reciprocity condition and can be had only towards members of the (same) moral community then the same is true of rights. Alternatively, the reciprocity thesis obtains even if one can have duties towards non-members of the (same) moral community provided those are not based on the interests of the beneficiaries of those duties. For example, if my duties to (non-human) animals are based on considerations of my own character (I should not be a person who can tolerate causing pain, etc.) and not on the interests of animals, then animals do not have rights despite the fact that I have duties regarding them.

The merits of the reciprocity thesis will not be examined here. The problem to which the principle of capacity for rights is addressed is different. Often we ought to or even have duties to act in ways that benefit certain things, and often we ought so to act because of the benefit our action will bring those things. For example, I have a duty to water certain plants because I promised their owners to look after them while they are away on holiday. My gardener has a duty to look after my garden because his contract of employment says so. Some scientists have a duty to preserve certain rare species of plants because they are the only source of a medicine for a rare and fatal disease. In all these cases the people who have duties to act in certain ways have them because it benefits plants. Yet in none of them is it true that the plants have a right to the benefits. The reason is that in all these cases the benefit is to be conferred on a thing whose existence and prosperity are not of ultimate value.

Being of ultimate, i.e. non-derivative,[1] value is being intrinsically valuable, i.e. being valuable independently of one's instrumental value. Something is instrumentally valuable to the extent that it derives its value from the value of its consequences, or from the value of the consequences it is likely to have, or from the value of the consequences it can be used to produce. Having intrinsic value is being valuable even apart from one's instrumental value. But not everything which is intrinsically valuable is also of ultimate value.

Consider a man who has a deep attachment to his dog. I share many people's feeling that the relationship is valuable

[1] To say that something is of ultimate value is not to claim that one cannot justify the statement that that thing is valuable. It merely indicates that its value does not derive from its contribution to something else.

and the man's life as richer and better because of it. Many feel that the relationship is intrinsically valuable. Its value is not just that of a cause of a feeling of security and comfort in the man. Such feelings may be produced by tranquillizers. The relationship is not valued just as a tranquillizer. Its value is in its being a constitutive part of a valuable form of life. Those who share these views believe that the existence of the dog is intrinsically valuable. It is a logically necessary condition of the relationship and one which contributes to its value (it is the more valuable for being a relationship to a living—rather than a dead—dog). But so far as the story goes the intrinsic value of the dog is not ultimate for it derives from the dog's contribution to the well-being of the man. The man's well-being is here taken as the ultimate value. The dog non-instrumentally contributes to it. Hence his existence is intrinsically but derivatively valuable.

Some people are willing to go further and to hold that the value of the relationship between the man and the dog derives equally from its contribution to the well-being of the dog and that the dog's well-being is not merely derivatively important because of its contribution to the man's well-being. They hold it to be ultimately valuable. They regard the relationship between man and dog in the same way as they and most others regard a relationship between two persons.

My proposed principle of capacity for rights entails that those who regard the existence and well-being of (some) dogs as merely derivatively valuable (even if they believe them to be intrinsically valuable) are committed to the view that dogs can have no rights though we may have duties to protect or promote their well-being. For such people dogs have the same moral standing that many ascribe to works of art. Their existence is intrinsically valuable inasmuch as the appreciation of art is intrinsically valuable. But their value is derivative and not ultimate. It derives from their contribution to the well-being of persons.

It seems plausible to suppose that just as only those whose well-being is of ultimate value can have rights so only interests which are considered of ultimate value can be the basis of rights. But there are plenty of counter-examples

demonstrating that some rights protect interests which are considered as of merely instrumental value. All the rights of corporations are justified by the need to protect the interests of these corporations but these are merely of instrumental value. The rights of journalists (however qualified) to protect their sources are normally justified by the interest of journalists in being able to collect information. But that interest is deemed to be worth protecting because it serves the public. That is, the journalists' interest is valued because of its usefulness to members of the public at large. The rights of priests, doctors and lawyers to preserve the confidentiality of their professional contacts are likewise justified ultimately by their value to members of the community at large.

Furthermore, some people, and this seems to be the general view of the English Common Law, regard the interests on which a right as fundamental as freedom of speech is based as instrumentally valuable. Scanlon[1] distinguishes between three kinds of interest on which the right of free speech is based: (1) speaker's interest, (2) audience interest, and (3) third party interest. Only the first is the interest of the right-holder, the interest of a person to be able to communicate with others. The second (the interest of persons that others will be free to communicate with them) and third (the interest of people to live in a society in which communication is free—even if they personally do not wish to communicate with others) are interests of people other than the right-holder in his right.

In the Common Law freedom of expression is regularly defended, where it is defended, on grounds of the public interest, that is on the interests of third parties. The right-holder's interest itself, conceived independently of its contribution to the public interest, is deemed insufficient to justify holding others to be subject to the extensive duties and disabilities commonly derived from the right of free speech.[2]

We must conclude that (apart from artificial persons) only

[1] See T. M. Scanlon, Jr., 'Freedom of Expression and Categories of Freedom', *University of Pittsburgh Law Review*, (1979), 519.

[2] Two typical English cases are A.-G. v Jonathan Cape Ltd. [1976] Q.B. 752; Home Office v Harman [1982] 1 All E.R. 532.

those whose well-being is intrinsically valuable can have rights. But that rights can be based on the instrumental value of the interests of such people.

7. *Rights and Interests*

According to the definition, rights-discourse indicates a kind of ground for a requirement of action. To say that a person ought to behave in a certain way is to assert a requirement for action without indicating its ground. To assert that an individual has a right is to indicate a ground for a requirement for action of a certain kind, i.e. that an aspect of his well-being is a ground for a duty on another person. The specific role of rights in practical thinking is, therefore, the grounding of duties in the interests of other beings.

Rights ground requirements for action in the interest of other beings. They therefore assume special importance in individualistic moral thinking. But belief in the existence of rights does not commit one to individualism. States, corporations and groups may be right-holders. Banks have legal and moral rights. Nations are commonly believed to have a right of self-determination, and so on.

Though rights are based on the interests of the right-holders, an individual may have rights which it is against his interest to have. A person may have property which is more trouble than it is worth. It may be in a person's interest to be imprisoned, even while he has a right to freedom. The explanation of this puzzle is that rights are vested in right-holders because they possess certain general characteristics: they are the beneficiaries of promises, nationals of a certain state, etc. Their rights serve their interests as persons with those characteristics, but they may be against their interests overall.

Some rights are held by persons as the agents, or organs of others. Thus company directors have rights as directors of the company. In such cases it is the interest of the principal which the right reflects. The same applies to rights held by persons *qua* guardians, trustees and the like.

The proposed definition of rights identified the interest on which the right is based as the reason for holding that

some persons have certain duties. Later on I referred to the rights themselves as being the grounds for those duties. The explanation is simple. The interests are part of the justification of the rights which are part of the justification of the duties. Assertions of rights are typically intermediate conclusions in arguments from ultimate values to duties. They are, so to speak, points in the argument where many considerations intersect and where the results of their conflicts are summarized to be used with additional premisses when need be. Such intermediate conclusions are used and referred to as if they are themselves complete reasons. The fact that practical arguments proceed through the mediation of intermediate stages so that not every time a practical question arises does one refer to ultimate values for an answer is, as we saw when discussing rules in Chapter Three, of crucial importance in making social life possible, not only because it saves time and tediousness, but primarily because it enables a common culture to be formed round shared intermediate conclusions, in spite of a great degree of haziness and disagreement concerning ultimate values.

For example, many who agree that people have a right to promise will disagree with my view, expressed above, of the interest on which it is based and will justify it only by reference to some other interests of the right-holders. The importance of intermediate steps like rights, duties, rules and the like to a common culture explains and justifies the practice of referring to them as reasons in their own right, albeit not ultimate reasons.

An interest is sufficient to base a right on if and only if there is a sound argument of which the conclusion is that a certain right exists and among its non-redundant premisses is a statement of some interest of the right-holder, the other premises supplying grounds for attributing to it the required importance, or for holding it to be relevant to a particular person or class of persons so that they rather than others are obligated to the right-holder. These premisses must be sufficient by themselves to entail that if there are no contrary considerations then the individuals concerned have the right. To these premisses one needs to add others stating or establishing that these grounds are not altogether defeated by

conflicting reasons.[1] Together they establish the existence of the right.

One result of the fact that a right exists where the interests of the right-holders are sufficient to hold another to be obligated should be noted. Sometimes the fact that an action will serve someone's interest, while being a reason for doing it, is not sufficient to establish a duty to do it. Different moral theories differ on this point. Some utilitarian theories deny that there is a useful distinction between moral reasons for action and duties. Some moral views confine duties to matters affecting human needs, or human dignity, etc. Be that as it may, it is in principle possible that a person should not have a right that others shall act to promote a certain interest of his simply on account of the fact that while they should do so, while it is praiseworthy or virtuous of them if they do, they have no obligation so to act.

These considerations help to explain how it is that even if a person has a right, not everyone is necessarily under an obligation to do whatever will promote the interest on which it is based. Rights are held against certain persons. Some rights are held against the world at large, i.e. against all persons or against all with certain specified exceptions. Thus the right to personal security is the ground of a duty on everyone not to assault, imprison or rape a person. Other rights are held against certain persons in virtue of a special relation they have to the right-holder. Thus children have a right to be maintained by their parents. The reasons many rights are against some definite people are varied. Sometimes the interests on which they are based can be satisfied only by some people and not by others. For example, since contractual rights are based on an interest in being able to create special relations, they give rise to rights against other parties to the agreement as they are the only ones who can satisfy that interest on that occasion. In other cases, even though

[1] One case deserves special attention: if B's interest does not justify holding A to be under a duty to do X then B has no right that A shall do X even if A has a duty to do X based on the fact that the action will serve the interest of a class of individuals of whom B is one. Thus a government may have a duty to try to improve the standard of living of all its inhabitants of the country even though no single inhabitant has a right that the government shall try to improve his standard of living. This point will be developed in the next chapter.

many can satisfy the interests of the right-holder, these interests may be sufficient to establish a duty on some people and not on others.[1]

Just as rights may impose duties on some persons and not on others, so they can impose a duty to do certain things but not others. The right to life may impose a duty not to kill or endanger the life of another without imposing a duty to take whatever action is necessary to keep him alive. Which duties a right gives rise to depends partly on the basis of that right, on the considerations justifying its existence. It also depends on the absence of conflicting considerations. If conflicting considerations show that the basis of the would-be right is not enough to justify subjecting anyone to any duty, then the right does not exist. But often such conflicting considerations, while sufficient to show that some action cannot be required as a duty on the basis of the would-be right, do not affect the case for requiring other actions as a matter of duty. In such cases, the right exists, but it successfully grounds duties only for some of the actions which could promote the interest on which it is based.

8. *Rights and Duties*

Rights are the grounds of duties in the sense that one way of justifying holding a person to be subject to a duty is that this serves the interest on which another's right is based. Regarded from the opposite perspective the fact that rights are sufficient to ground duties limits the rights one has. Only where one's interest is a reason for another to behave in a way which protects or promotes it, and only when this reason has the peremptory character of a duty, and, finally, only when the duty is for conduct which makes a significant difference for the promotion or protection of that interest does the interest give rise to a right. Naturally there may be other grounds for not holding a person to be subject to such a duty. The definition requires that the right is a sufficient

[1] The fact that rights may be held against some persons only is compatible with the principle that everyone ought to respect everyone's rights. That principle asserts that all persons have a reason (not necessarily a conclusive one) to avoid action which will make it more difficult for those subject to duties towards right-holders to fulfil their obligations.

reason for a duty. Hence, as we saw, where the conflicting considerations altogether defeat the interests of the would-be right-holder, or when they weaken their force and no one could justifiably be held to be *obligated* on account of those interests, then there is no right. Where the conflicting considerations override those on which the right is based on some but not on all occasions, the general core right exists but the conflicting considerations may show that some of its possible derivations do not.

There is a necessary conflict between free speech on the one hand and the protection of people's reputation or the need to suppress criticism of the authorities in time of a major national emergency on the other. (I assume that in both cases the reasons for suppressing libellous or critical expression are also reasons for not holding individuals to have a duty to protect the freedom to express such views.) If in these circumstances the reasons against free expression override those in favour of free expression, then while it is true that one has a right to free expression, one does not have a right to libel or to criticise the government in an emergency. A general right is, therefore, only a prima facie ground for the existence of a particular right in circumstances to which it applies. Rights can conflict with other rights or with other duties, but if the conflicting considerations defeat the right they cannot be necessarily co-extensive in their scope.[1]

These remarks help explain one sense in which rights ground duties. Two further points are, however, crucial to the understanding of the priority of rights to the duties which are based on them (and not all duties are based on rights). First, one may know of the existence of a right and of the reasons for it without knowing who is bound by duties based on it or what precisely are these duties. A person may know that every child has a right to education. He will, therefore, know that there are duties, conditional or unconditional, to provide children with education. But he may have no view

[1] Conflicts of rights are possible if conflicts of duties are. If considerations against requiring an action defeat the right-based reasons for requiring it on all the occasions to which tbey apply, then the rigbt does not create a duty for that action. If, however, they defeat the right-based reasons on some occasions only, then the right-based reasons create a duty which is sometimes defeated.

on who has the duty. This question involves principles of responsibility. It is part of the function of such principles to determine the order of responsibility of different persons to the right-holder. Does the primary responsibility rest with the parents, with the community stepping in only if they cannot or will not meet their obligations? Or does the primary responsibility rest with the community? The issue is of great importance. If it is the parents' duty then there is no duty on the community to provide free education to all. And yet one may be in a position to assert that there is a right to education without knowing the solution to such a problem, or to whether the communal responsibility is local or national, whether it extends only to primary education or beyond and so on.

In a sense such ignorance shows that the person's knowledge of the precise content of the right to education is incomplete. But this merely means that he does not know all the implications of the right to education (given other true premisses). It does not mean that he does not understand the statement that every child has a right to education. Furthermore it is reflection on the right to education, its point and the reasons for it, which helps, together with other premisses, to establish such implications. If a duty is based on a right, on the other hand, then it trivially follows that one cannot know the reasons for it without knowing of the right (or without knowing that the interest which it protects is sufficient to be the ground of a duty—which is the definition of a right).

The second point to bear in mind is that the implications of a right, such as the right to education, and the duties it grounds, depend on additional premisses and these cannot in principle be wholly determined in advance. At least, if it is true in principle that the future cannot be entirely known in advance, then there may be future circumstances which were not predicted and which, given the right to education, give rise to a new duty which was not predicted in advance. Even if no such duty is unpredictable, the total implications of the right to education are in principle unpredictable. Because of this rights can be ascribed a dynamic character.

They are not merely the grounds of existing duties. With changing circumstances they can generate new duties.

9. *The Importance of Rights*

Let us recap. Rights ground duties. To say this is not to endorse the thesis that all duties derive from rights or that morality is right-based. It merely highlights the precedence of rights over some duties and the dynamic aspect of rights, their capacity to generate new duties with changing circumstances. Notice that because duties can be based on considerations other than someone's rights the statement (1) 'Children have a right to education' does not mean the same as statement (2) 'There is a duty to provide education for children.' (1) entails (2) but not the other way round. (1) informs us that the duty stated in (2) is based on the interests of the children. This information is not included in (2) itself.

The connection between rights and duties establishes that rights are special considerations, since duties are. But just as there are trivial duties so there are trivial rights. And not only derivative rights: core rights can also be of little consequence. The reason is the one remarked on in the first section of this chapter. Duties are special in the role they assume in practical reasoning. Their role cannot be captured by the usual weighing metaphor which applies to the evaluation of ordinary reasons. The have pre-emptive force. The point is seen clearly when we consider again the duty to obey a legitimate authority.[1] It is special since being pre-emptive it replaces rather than competes with (some of) the other reasons which apply in the circumstances. But the authority may have power over a trivial matter, and the importance of its directives relative to other considerations, those which they do not displace, need not be very great. It is not part of the very notion of a right that rights have great weight or importance. Some rights may be absolute, others may have little importance.

Are rights 'trumps', the expression given wide currency by Dworkin?[2] It all depends on what is meant by 'trumps'.

[1] This point is developed in my 'Promises and Obligations', op. cit..

[2] Dworkin, *Taking Rights Seriously*, London 1977, ch. 4. I have criticised Dworkin's account in 'Prof. Dworkin's Theory of Rights', *Political Studies*, 26 (1978) 123.

Given that rights are based on people's interests it cannot be claimed that they are trumps in the sense of overriding other considerations based on individual interests. Moreover, in the discussion of collective rights in the next chapter we will see that collective or group rights represent the cumulative interests of many individuals who are members of the relevant groups. It follows that there is nothing essentially non-aggregative about rights. Nor are rights necessarily agent-relative considerations. Some rights and some duties are or may be agent-relative, but there is no reason to think that all are nor do I know of anyone who has argued that. Some people regard rights as the non-utilitarian component of morality. But one has to be at least a partial utilitarian to accept that. Furthermore, if one is a utilitarian at least in part one may well wish to argue that some rights are based on utilitarian considerations.[1]

Some have suggested that rights are distinctive in that, while being based on individual interests, they are given greater weight than is due to that interest.[2] But if rights are given greater weight than is warranted by the interest they protect considered in itself, this is presumably due to considerations which do not derive from concern for the well-being of the right-holder. Such considerations do exist. I may have a moral reason against killing a person who deserves to die, or who wishes me to kill him and whose suffering will make his death a blessing. But such reasons turn on my well-being or that of others. I may be the wrong person for the job, or I may refuse to defile my hands with his blood, or be a person whose life is committed to ways of

[1] See my argument to that effect in 'Hart on Moral Rights and Legal Duties', *Oxford Journal of Legal Studies*, 4 (1984), 123. The point has often been argued. See for another example, J. Gray 'Indirect Utility and Fundamental Human Rights' in E. F. Paul, F. D. Miller, Jr., J. Paul (eds.), *Human Rights*, Oxford 1984. For powerful, though ultimately unsuccessful, arguments that Utilitarianism is incompatible with rights see H. L. A. Hart, *Essays on Bentham*, ch. 4, Oxford, 1983; and D. Lyons, 'Utility and Rights', in J. Waldron (ed.), *Theories of Rights*, Oxford, 1985.

[2] This view is said by D. Regan, 'Glosses on Dworkin: Rights, Principles and Policies' in M. Cohen (ed.), *Dworkin and Contemporary Jurisprudence*, London 1984, to be the better interpretation of Dworkin's position. It is also apparently A. Sen's view. See his 'Rights and Agency', *Philosophy & Public Affairs*, 11 (1982), 3.

relating to other people which is inconsistent with killing, even a justified killing, or perhaps others may misinterpret my action with, given my position in life, undesirable consequences.

Many other, and more subtle, considerations may be adduced in such cases. They show that we have reasons to act in ways which benefit others, and reasons which depend on the fact that our action (or inaction) will benefit the other, but where the fundamental concern reflected in the reasons is not for the well-being of that other person. His well-being is merely instrumentally invoked. My definition of rights allows for such cases, provided that they amount to duties, and not merely to ordinary reasons for action. But it would be wrong to elevate them into a universal rule and claim that rights exist only when such considerations apply. Moreover, emphasizing the importance of these, generally marginal, factors obscures the fundamental role of rights in practical reasoning as representing concern for the interest of the right-holder sufficient to hold another subject to a duty.

Some will argue that the distinction between the interests of the (putative) right-holder and those of others misses a consideration which is central to the conception of rights as trumps. The duties one owes a right-holder derive from or express respect for him as a person. Rights, one may say, are based neither on the right-holders' interest, nor on that of others. Rather they express the right-holders' status as persons and the respect owed to them in recognition of that fact.

This may be a verbal disagreement. For it may be dissolved by responding that a person has an interest in being respected as a person. That shows that rights grounded in respect are based on interests. Whether or not the response dissolves the disagreement, it seems to me that people have such an interest. Yet logically it is a special kind of interest. It is not just one interest people have alongside others. Respecting a person consists in giving appropriate weight to his interest. The interest in being respected is but an element of the interest one has in one's interest. If respecting people is giving proper weight to their interests, then clearly we respect people by respecting their rights. But this is so precisely because their rights are based on their interests whose

claim on us is sufficient to subject us to duties to respect them.[1] Since we respect others by giving proper weight to their interests, neither the duty of respect nor the interest in being respected can show that rights deserve greater weight than the interest they are based on.

Still, is it not open to argument that while respect for a person consists in giving due weight to his interest, the reasons for respecting him need not be to serve his interest? One may be duty-bound to respect a person just because one is a person oneself. Such a duty may defy consequentialist interpretation. On this interpretation it is not so much that rights have a force greater than the one justified by the interest they serve. At bottom their force is independent of that interest. That John's action will serve Judy's interest shows that it is an action which respects Judy. But John is obligated to perform it not in order to promote or defend Judy's interest. He may have a separate, independent reason to do that. The reason, the only one, on which Judy's right is based is that John, as a person, owes respect to all other persons.

Considerations of this kind do indeed exist, and will be discussed in the next chapter as well as in Part Four. They are what are traditionally known as deontological considerations. They have always been regarded, by those who believe in their validity, as establishing the existence of duties, rather than of rights. That attitude is captured and reflected in the explanation of rights advanced here. According to it rights must be based on the fact that the interest of the right holder is sufficient reason to hold another to be subject to a duty. The deontological view sketched above does not regard the interest of the alleged right-holder as the reason for the duty. It is, therefore, at best an argument for the existence of a duty with no corresponding right.

I believe that, whatever the general case for deontological

[1] The argument above disregards the possibility that personal autonomy is not to be counted among people's interests. The argument in Chs. 13 and 14 is designed to establish this point, among others. I do agree, however, that not everyone has an interest in personal autonomy. It is a cultural value, i.e. of value to people living in certain societies only. This denies the equation between respect for people and respect for personal autonomy. There is, however, no need to develop this point here.

duties, there are no good grounds for conceiving the duty of respect for persons along the lines suggested in the preceding two paragraphs. It is, as was indicated before, the duty to give due weight to the interests of persons. And it is grounded on the intrinsic desirability of the well-being of persons. To that extent it can give rise to rights: it serves as the basis of people's right that others shall give due weight to their interest. Being a very abstract right, nothing very concrete about how people should be treated follows from it without additional premisses. This explains why it is invoked not as a claim for any specific benefit, but as an assertion of status. To say 'I have a right to have my interest taken into account' is like saying 'I too am a person.' This may perhaps explain its 'deontological' flavour.

Not surprisingly, those who see rights as grounded on respect for persons deny that respect for persons consists in giving due weight to their interests. The reason is clear. Combining the claim that respect for persons consists in having due regard for their interests with the claim that rights rest on respect for persons leads to the conclusion that a person has a right that his interests will be duly respected. There is no apparent way by which this line of thought could explain the distinction between a person's interests which are protected by rights and those which are not. Instead, one may claim that respect for persons consists in respecting some of their interests only. In particular, it may be said, it consists in respecting their interest in being free to choose do and to live as they like. This may be thought to explain why some interests people have are not protected by rights. Rights protect not their interests generally but only their interest in freedom. The capacity to be free, to decide freely the course of their own lives, is what makes a person. Respecting people as people consists in giving due weight to their interest in having and exercising that capacity. On this view respect for people consists in respecting their interest to enjoy personal autonomy.

This argument calls for careful scrutiny. The claim, made above, that respecting people means giving proper weight to their interests is not a devious way to justify wholesale paternalism, at least not for those who believe in the value

of personal autonomy. Since, as will be argued in Part Four, people's well-being is promoted by having an autonomous life, it is in their interest not to be subjected to the kind of oppressive paternalism which consists in running their lives for them allegedly in their own best interest. Therefore, the view that personal autonomy is an important element in people's well-being means that respect for people if understood as giving due consideration to all their interests leads to respect for their autonomy. It is true that on this view of respect it does not serve as a foundation of a theory of rights. But this is as it should be since one can, and people often do, show disrespect to others, including disrespect which amounts to denying their status as persons, by acts which do not violate rights. Each one of us can think of appropriate instances of insulting behaviour which illustrate the point.

It may be claimed that by defining rights as based on the well-being of individuals I have ruled out of court the view that morality is rights-based. By definition rights are not fundamental but derive from interests. If true this is a damaging criticism. As explained in the first section the account of rights aims to make sense rather than nonsense of rival theories about the role of rights in morality. The view that rights are fundamental can, however, be explained in terms of the proposed definition.

All rights are based on interests. Some rights may be based on an interest in having those same rights.[1] No vicious circularity is involved in the claim that X has a certain right because it is his interest to have it. It is no more circular than the statement that Jack loves Jill because she needs his love. In many cases an individual's interest in a right does not justify holding him to have it unless it serves some other worth-while interest of his (or of others). My son's interest in a right to education justifies holding him to have it only because the right will serve his interest in education.

[1] One may think that one's right to X always derives from one's interest in X. If so then one's interest in having a right to X yields at best a right to have a right to X. It does not yield the right to X itself. This objection is based on a misunderstanding. While rights are based on interests of the right-holder, these need not be his interests in the object of the right. They can be any interests which can be served by the possession of the right. Since an interest in having a right can be served by having it, it can be the foundation of such a right.

If school places were saleable I would have had an interest in having a right to education even if further education were not in my interest. Such a right would serve my interest in my economic welfare since it would add to my disposable assets. Such an interest would not, of course justify holding me to have the right.

A right is a morally fundamental right if it is justified on the ground that it serves the right-holder's interest in having that right inasmuch as that interest is considered to be of ultimate value, i.e. inasmuch as the value of that interest does not derive from some other interest of the right-holder or of other persons.

Thus the proposed account of rights allows for the existence of fundamental moral rights. It has to be admitted though that it makes it unlikely that morality is rights-based. It is after all very unlikely that all moral considerations derive from people's interests in having rights. Are not their interests in avoiding starvation, in being adequately educated, and other similar interests of moral relevance as well? According to our account the special features of rights are their source in individual interest and their peremptory force, expressed in the fact that they are sufficient to hold people to be bound by duties. In these ways rights have a distinctive and important role in morality. But it is also a specialized role, not a comprehensive one. They contribute their share as a distinctive type of moral consideration, *not* as the foundation of all moral considerations. The next chapter points to some of the considerations omitted by those who concentrate on rights to the exclusion of all else.

8
Right-Based Moralities

Any moral theory allows for the existence of rights if it regards the interests of some individuals to be sufficient for holding others to be subject to duties. Some writers on morality and politics have suggested that rights are the foundation of political morality, or even morality generally. R. M. Dworkin has suggested that

> political theories differ from one another. . . not simply in the particular goals, rights, and duties each sets out, but also in the way each connects the goals, rights, and duties it employs. It seems reasonable to suppose that any particular theory will give ultimate pride of place to just one of these concepts; it will take some overriding goal, or some set of fundamental rights, or some set of transcendent duties, as fundamental, and show other goals, rights, and duties as subordinate and derivative.[1]

Dworkin expressed the view that political morality is right-based. J. L. Mackie, adopting this classification, applied it to moral theories generally and claimed that morality is right-based (or rather that we should invent a morality which is).[2]

This chapter argues that neither morality nor political morality is right-based: that if morality has a foundation it includes duties, goals, virtues, etc. The argument presupposes certain moral views which will not here be defended. They introduce some of the main themes of the rest of this book: the rejection of moral individualism, and a moral outlook resting on the twin ideas of the constitutive role of a common culture on the one hand, and of individual action on the other hand, in the shaping of the moral world.

We are to envisage a moral theory the fundamental principles of which state that certain individuals have certain

[1] R. M. Dworkin, *Taking Rights Seriously*, p. 171.

[2] J. L. Mackie, 'Can There be a Right-Based Moral Theory?', *Midwest Studies in Philosophy*, 3 (1978), 350.

tarianism. To the extent that other diminishing principles lie at the foundation of morality they equally leave no room for egalitarianism. It is hard to think of a fundamental principle which is non-diminishing.

10
Liberty and Rights

It is time to pull all the threads together and draw some general conclusions regarding the relationship between freedom and rights. It may appear that the two preceding chapters were myth-exploding, clarifying discussions. They exposed the fallacies of the adherence to equality as a fundamental value, and the inadequacies of rights as a foundation for morality or for political morality. In their course, however, much was established which leads to a clearer view of the role of rights in the protection of freedom. The first section of this chapter sums up and further defends the doubts whether the protection of liberty rests primarily on respect for individual rights. Section 2 proceeds to argue that the liberal tradition is not unequivocally individualistic, and that some of the typically liberal rights depend for their value on the existence of a certain public culture, which their protection serves to defend and promote. The third section presents a sketch of an alternative picture of the justification of providing entrenched constitutional protection for the typical liberal rights. According to this picture their role is not in articulating fundamental moral or political principles, nor in the protection of individualistic personal interests of absolute weight. It is to maintain and protect the fundamental moral and political culture of a community through specific institutional arrangements or political conventions.

1. *Is Liberty Based on Rights?*

Not surprisingly, few believe in the simple view that the doctrine of liberty consists in the justification of a right to liberty. Such a right, if it exists, cannot capture our concern for liberty because it is indiscriminate. It protects equally

the liberty to eat green ice-creams and to religious worship.[1] Two avenues suggest themselves. The one proceeds to claim that political liberty consists in rights to certain basic liberties, such as freedom of expression, of political participation, of occupational choice, the freedom to establish a family by mutual agreement with a partner of one's choice, etc. The other seeks to establish an ideal of the free person. That ideal, often referred to as the ideal of the autonomous person, gives substance to the notion of worthwhile freedom. It allows discrimination between valuable and worthless or even detrimental freedoms, according to their contribution to the ideal of personal autonomy. It can then be asserted that political freedom is a right to personal autonomy.

The second avenue has the advantage of preserving the unity of the ideal of political freedom. If this ideal consists in a right to personal autonomy it may be manifested in so many derivative rights to basic liberties. They can then be seen to be united by a common concern for personal autonomy, which explains their pre-eminent status and determines what does and what does not belong with them. The first avenue, while possibly capable of justifying its list of basic liberties, is liable to provide disparate justifications for the varying liberties. The list of basic liberties is a matter of contention, but any list which is faithful to the Western liberal tradition will include widely diverse rights such as the right to be elected to parliament and the right to become a parent. Are both, when understood as core rights rather than as derived from another more fundamental right, motivated by a common core, a concern for liberty understood in a unitary, coherent way?

Further doubts about the cogency of the first avenue will emerge in the course of this chapter. In the main this book pursues the second course, but only half way. Its last part is dedicated to the political consequences of a doctrine of liberty based on an ideal of personal autonomy. But that ideal is not protected by a right to autonomy. The argument to that effect was set out in Chapter Eight. It rests on the fact

[1] Cf. the analogous point in the discussion of a presumption of liberty in chapter 1. The point is essentially that made by R. M. Dworkin in ch. 9 of *Taking Rights Seriously*.

that autonomy is possible only if various collective goods are available. The opportunity to form a family of one kind or another, to forge friendships, to pursue many of the skills, professions and occupations, to enjoy fiction, poetry, and the arts, to engage in many of the common leisure activities: these and others require an appropriate common culture to make them possible and valuable.

A right to autonomy can be had only if the interest of the right-holder justifies holding members of the society at large to be duty-bound to him to provide him with the social environment necessary to give him a chance to have an autonomous life. Assuming that the interest of one person cannot justify holding so many to be subject to potentially burdensome duties, regarding such fundamental aspects of their lives, it follows that there is no right to personal autonomy. Personal autonomy may be a moral ideal to be pursued by, among others, political action. It serves to justify and to reinforce various derivative rights which defend and promote limited aspects of personal autonomy. But in itself, in its full generality, it transcends what any individual has a right to. Put it another way: a person may be denied the chance to have an autonomous life, through the working of social institutions and by individual action, without any of his rights being overridden or violated.

One might say that this argument shows the force of the analysis of rights in Chapter Seven, on which it is based. It vindicates the observation made there that the analysis of moral concepts is itself a move in the argument about substantive moral conclusions. Can this strength turn into a weakness? Can one reject the analysis of rights precisely because it leads to such substantive moral conclusions, and replace it with another which will legitimate the claim that there is a right to autonomy? Such a move might be supported by the claim that my analysis is hanging by a thread. It requires that a right be justified by the service it does to the interest of the right-holder but it allows that the value placed on that interest may derive from its usefulness to others.

Contrast the case of the right of journalists to protect their sources and the right of self-determination. The journalist's

interest is served by the right. But it would not deserve our respect, it would not have the weight it has, but for the fact that through protecting his interest one serves the interest of all in the free circulation of information which is of public interest. A Frenchman, on the other hand, does not have a right to the self-determination of the French nation even though it serves his interest. The fact that it serves his interest does not help it serve the interests of all the other Frenchmen. The right serves their interests severally, not by promoting the interests of their neighbours. Each Frenchman would benefit from the fact that the French enjoy the right even if none of the others were to benefit from it.

Is not that distinction too thin to bear the weight of such important conclusions? If it is admitted that a right may exist because it serves the interests of people other than the right-holder does it matter if their interests are served independently of or through the service that respect for the right renders to the interest of the right-holder? Fine as the distinction may be there is no way round it. Consider the consequences of dispensing with it. It will mean, for example, that each member of a nation has a right to the self-determination of the nation. It is his personal right. It will also mean that as each of us has an interest in an environment in which promises are kept and people do not deceive each other, I, as well as everyone else, have a right that you shall keep your promises and that you shall not deceive other people. Any wrong (of the appropriate kind) done to any one of us offends us all—as one might put it in a romantic moment. The fact that we do not hold people to have such rights shows that only if their own interest is sufficient to hold others bound by duties do they have such a right.

The interest of John in the actions which promote Mary's well-being is relevant if it is served through the fact that Mary's interest is thereby served. But it does not establish a separate right of John to such actions unless it is itself sufficient to justify the duty. Otherwise it becomes part of the case for Mary's right. If an interest of John, which is itself insufficient to establish any rights of his, is served by the actions which protect Mary's interests in a way which is

independent of the benefit such acts bring her then it cannot be aggregated with Mary's interest to show that John too has a right.

To dispense with the condition that rights are based on the interests of the right-holder itself may appear at first as a heightening of moral sensitivity, or as an extension of fellow feeling. But it turns out to be a runaway inflation which debases the currency. It is not to be confused with the conceptually respectable, though morally dubious, claim that my interest that you shall not deceive your mother is indeed so great as to justify by itself, regardless of any other interests your promise-keeping will serve, holding you bound to do so. Were this true it would have established that I have such a right.

It is a concomitant of the view that analysing the terms of moral discourse is itself part of the moral argument, a taking of position in the moral debate, that the use and meaning of these terms change with changes in the climate of opinion. This happened to 'rights' as used in moral, legal and political writings. The analysis of Chapter Seven assigns the term a much wider sense than that allowed by most theorists some thirty or forty years ago.[1] The more liberal use of 'rights' notwithstanding, the concept preserves a special role in the moral and political spectrum. My analysis explains its uniqueness as a combination of two elements. First, rights have a special force which is expressed by the fact that they are grounds of duties, which are peremptory reasons for action. Second, rights express what is owed to the right-holder in virtue of the respect due to to his interest (albeit sometimes because of the benefits which may accrue to others if his interest is respected). If we waive the last condition we lose the distinctiveness of rights. The very point which those who favour the more extensive use of rights wish to make by insisting that individuals have a right to autonomy is thereby lost.

The special importance of rights is emphasized by moral

[1] Cf. D. D. Raphael (ed.), *Political Theory and the Rights of Man*, London, 1967; H. L. A. Hart 'Definition and Theory in Jurisprudence', *Essays in Jurisprudence*, and contrast his more recent statement on the subject in 'Legal Rights', in *Essays on Bentham*.

individualists who regard them as a protective shield against moral demands in the name of the well-being of others.[1] The idea of a right to personal autonomy, for example, is attractive partly because such a right establishes a limit to what can be demanded of an individual in the name of collective goals and of communal welfare. But if rights do not represent the special force of the interest of the right-holder then they cease to capture the idea of a protective shield against the claim of the well-being of others. The well-being of the community is then also a matter of rights, rights to a decent standard of living, to a fulfilling and enriching employment, to communal amenities, to the conservation of the environment, and so on. There is nothing wrong with any of these ideals. The point I am making is that if 'rights' comes to acquire such a weak meaning then it loses its ability to mark matters which are of special concern because of their importance to the right-holder, and which give the right-holder's interest special weight when it conflicts with other interests of other members of the community.

The argument of Chapter Eight did not rest on the definition of rights offered in the previous chapter. It rests on the belief, to be defended in the last part of the book, that personal autonomy depends on the persistence of collective goods, and therefore that the notion of an inherent general conflict between individual freedom and the needs of others is illusory. Though an individual's freedom, understood as personal autonomy, sometimes conflicts with the interests of others, it also depends on those interests and can be obtained only through collective goods which do not benefit anyone unless they benefit everyone. This fact, rather than any definition, undermines the individualist emphasis on the importance of rights.

2. The Collective Aspect of Liberal Rights

The liberal tradition was always ambivalent on the role and justification of fundamental rights. Some of the greatest liberal philosophers, such as J. S. Mill, whose analysis of

[1] The popularity of moral theories emphasizing the importance of rights led to attempts to assimilate them into a non-individualist perspective. See, e.g., Tom Campbell, *The Left and Rights*, London, 1983, and cf. S. Lukes' criticism of Marx's failure to do justice to rights in *Marxism and Morality*, Oxford, 1985.

rights is insightful and proved very influential, did not assign them a foundational role in their moral or political theory. Others, like Locke, did. It is true that rights loom large in some liberal writings, and when they do they are commonly pressed into service in the interest of an individualistic moral outlook. Liberal practical politics, however, is much more ambiguous. Many rights were advocated and fought for in the name of individual freedom. But this was done against a social background which secured collective goods without which those individual rights would not have served their avowed purpose. Unfortunately the existence of these collective goods was such a natural background that its contribution to securing the very ends which were supposed to be served by the rights was obscured, and all too often went unnoticed.

Religious toleration may have been defended in the name of individual conscience, but it served communal peace. More to my point, inasmuch as religion is and was a social institution embracing a community, its practices, rituals and common worship, the right to free religious worship, which stood at the cradle of liberalism, is in practice a right of communities to pursue their style of life or aspects of it, as well as a right of individuals to belong to respected communities. Thus while religious freedom was usually conceived of in terms of the interest of individuals, that interest and the ability to serve it rested in practice on the secure existence of a public good: the existence of religious communities within which people pursued the freedom that the right guaranteed them. Without the public good the right would not have had the significance it did have. Furthermore, the existence of the right to religious freedom served in fact to protect the public good. I venture to surmise that but for that it would not have acquired the importance that it did.

It is possible to argue that religious freedom deserves our respect and protection regardless of the accidental fact that in human history religions have been social institutions. My only point is that that would have been, despite the identity of its formal definition, a different right with vastly different implications. I for one find it difficult to know what im-

portance it would have deserved in a world so different from our own. In any case the right which is so intimately tied to the early growth of liberal ideals was bound up with the existence of a public culture in which religion was a social institution. In interpreting the history of liberalism this fact is of great importance.

The right of conscientious objection, when recognized, was traditionally associated with religious objection to military service, and itself served to protect members of religious communities, as well as the communities of which they were members. Membership in a socially recognized community served as a test of sincerity. People enjoyed the right only if they shared the style of life of a known social group. Most commonly they enjoyed it only if they participated in the life of the group. It was unlikely that people would change their whole way of life just in order to avoid service. I am not expressing here any view regarding the rights and wrongs of extending the right to members of a recognized religion only. My purpose is merely to point to the non-individualistic elements in the right as traditionally recognized. Any genuinely individualistic conception of the right to conscientious objection encounters difficulties of establishing the genuineness of the objection which the traditionally communitarian approach to the right escaped.[1]

The struggle for the right of freedom of contract, and more generally for the freedom of all economic activity, was conducted against a background which set limits to the market which were taken for granted by almost all liberals. Citizenship was not up for sale. One's right to life could not be disposed of for money. Sexual services were not exchangeable against appointments to the civil service. Furthermore, not only was freedom of contract conceived to apply within vaguely defined bounds, its own value presupposed the existence of collective goods. There was great concern to establish the conditions which were deemed necessary for the optimal operation of a free market. As has

[1] In referring to the rights benefiting and protecting communities I do not mean only communities of people living in close proximity. Those living far apart may form a single community, known by its common and distinguishing traditions, practices and beliefs.

been often remarked, the free market is a normative social institution consisting not only in individual rights, but also in a network of practices and conventions relating to the conduct of negotiations, the communication of information, the avoidance of actions in restraint of trade, etc. The existence of that institution is a collective good. It benefits all who are subject to it and none of them can be excluded. The right to economic freedom, or the right to freedom of contract, does not exist in opposition to collective goods. Far from its purpose being to curtail the pursuit of collective goods, it presupposes and depends for its value on the existence of at least one collective good: the free market.

Much the same is true of other civil rights, be they traditional ones like freedom of speech or more modern ones like the right against discrimination. As was noted above, some aspects of freedom of speech cannot be explained at all except as protecting collective goods, i.e., preserving the character of the community as an open society. The freedom of the press illustrates the point. In most liberal democracies the press enjoys privileges not extended to ordinary individuals. Those include protection against action for libel or breach of privacy, access to information, priority in access to the courts or to Parliamentary sessions, special governmental briefings, and so on. They are sometimes enshrined in law, sometimes left to conventions. The justification of the special rights and privileges of the press are in its service to the community at large. The interest of individuals in living in an open society is not confined to those who desire to benefit from it as producers or consumers of information or opinion. It extends to all who live in that society, for they benefit from the participation of others in the free exchange of information and opinion.

What is true of freedom of the press is also true of many other aspects of freedom of speech. The precise boundaries of freedom of speech are notoriously controversial, but its core is and always was the protection of political speech and of the free exchange of information which is of public interest. It benefits all those who are subject to that political system. Thus while political theorists often highlight the protection for the individual dissident which it provides, in

practice its primary role has been to provide a collective good, to protect the democratic character of the society.

It is significant that most rights against discrimination deal with discrimination on religious, ethnic and racial grounds, all of which are associated with membership of groups with their own distinctive culture. (They also include sexual discrimination, to which my comments do not apply.) Admitting that decisions adversely affecting individuals because of their race, religion or ethnic identity are very often wrong and unjust, it remains a puzzle which individualistic liberals find difficulty in solving why there is not a similar right against discrimination on grounds of height, one's sense of humour, etc. Decisions adversely affecting individuals because they are too tall, or lack a sense of humour, are as likely to be misguided and unjust as those based on religion or race. In part the answer does rest on pragmatic considerations. Race and religion are more common grounds of unjust discrimination. But at least in part the answer lies elsewhere. Discrimination on grounds of religion, nationality or race affects its victim in a more fundamental way. It distorts their ability to feel pride in membership in groups identification with which is an important element in their life.

It is true that these rights against discrimination are as helpful to those who wish to escape their ethnic, religious or racial identity as to those who identify with the group to which they belong. But my point is not that the right is meant to perpetuate the separateness of the group. The important point is that the right is meant to foster a public culture which enables people to take pride in their identity as members of such groups. Yet again we find that fundamental moral rights cannot be conceived as essentially in competition with collective goods. On examination either they are found to be an element in the protection of certain collective goods, or their value is found to depend on the existence of certain collective goods. To be sure, fundamental rights are often in competition with other collective goods, just as they may conflict with other rights. The aim of this section was not to suggest that such conflicts do not arise, nor to argue that when they do rights should always give

way. The conclusion of this section is the more modest one: rights are not to be understood as inherently independent of collective goods, nor as essentially opposed to them. On the contrary, they both depend on and serve collective goods. Hence there is no general rule giving either rights or collective goods priority in cases of conflict.

3. An Alternative View of Constitutional Rights

The rejection of the view that individual liberty rests primarily on the existence of fundamental moral rights, while out of sympathy with an important individualistic strand in the liberal tradition, is not inherently at odds with that tradition which incorporates other strands which assign a humbler role to rights. Moreover, the insistence on the importance of civil rights is consistent with the rejection of moral individualism. The emerging view of morality is not one which denies rights a significant role. On the contrary, it is one in which rights play a central role as important ingredients in a mosaic of value-relations whose significance and implications cannot be spelled out except by reference to rights.

This way of viewing the role of rights does not assign them a privileged status in the moral firmament. It is inconsistent with any general thesis of the priority of rights over other considerations. Does it leave any room for the privileged position of civil rights in many constitutions? Or does it compel one to reject root and branch the doctrine of the constitutional protection of fundamental rights, and of their privileged position in international law? Every moral theory worthy of serious consideration allows for property and consensual rights, for rights of personal security and probably many more. These may well be fundamental rights in the sense that they are part of the deepest level of moral thought. It does not follow, of course, that they are either inalienable or of absolute or near absolute weight. The examination of such personal moral rights cannot and need not be pursued here. They are not specifically liberal rights. All humanist moralities tend to recognize them in one form or another. Our interest is in two other questions. First, are there speci-

fically liberal human rights which also belong to the foundations of morality? Second, is there a fundamental moral case for the entrenchment of any rights, including the personal moral rights such as the right to personal security, in a rigid constitution, i.e. one which is immune from change in the normal political process?

The answer to the first of these questions was outlined above. It was there suggested that rights such as freedom of expression, association and assembly, freedom of the press, and of religion, the right to privacy and the right against discrimination rest on the importance of the interest of the right-holder which they serve. It was further suggested that the importance we attribute to the protection of those interests results from their service to the promotion and protection of a certain public culture. That culture is in turn valued for its contribution to the well-being of members of the community generally, and not only of the right-holders. The importance of liberal rights is in their service to the public good. That answer will be further reinforced through an examination of the second question to which we must now proceed. Why should the typically liberal rights, or any moral rights, be regarded as demanding special constitutional protection?

One view regards these rights as marking the boundary between the private and the public, between matters which are subject to political regulation and those which are, that is should be, beyond the reach of politics. The latter, designated as matters protected by constitutional rights, are left to individual decision and no political action may interfere with the sovereignty of individuals regarding them.[1] I doubt the cogency of this view, at least when applied to all constitutional rights. The doubt applies in particular to those rights, of which freedom of expression, privacy, freedom of religion, and the right against racial discrimination are examples, where one reason for affording special protection to individual interests is that thereby one also protects a collective good, an aspect of a public culture. The fact that

[1] The popularity of this picture is attested by the fact that it is shared by writers of such diverse views as R. Nozick (in *Anarchy, State and Utopia*) and R. M. Dworkin (in ch. 9 of *Taking Rights Seriously*).

those rights protect collective goods and are assigned their special importance because they do so is reason to think that they concern matters which are a legitimate subject of political action. The provision of public goods is a paradigm case of what governments are there for. This does not mean that they ought to be subjected to much or to any governmental intervention. It means that the reasons governing the degree of political intervention or of political restraint are contingent ones, depending on the conditions of particular societies at particular times.

If so, in what sense are they constitutional rights? Why should they be accorded a different status from any other moral rights, or from moral rights which merit legal protection? One may approach this question from the institutional angle. In general no questions concerning the appropriate institutions to implement moral and political principles are considered in this book. But given the widespread assumption that the special status of constitutional rights must be explained by their special moral force, it is worthwhile pointing out that there are well-known alternative arguments in favour of entrenched constitutional rights, namely arguments based on institutional considerations. In particular constitutional rights are devices for effecting a division of power between various branches of government.

The most visible fact about constitutional rights is that they are subjected to special institutional treatment. Matters which affect them are taken away from the exclusive control of ordinary legislative and administrative processes and subjected to the jurisdiction of the courts (or of special constitutional courts). The effect is that the current extent of, say, the legal right of free expression is a combined result of both legislation and judicial action, in circumstances in which the judiciary is acknowledged to have a right to modify the effect of legislative and governmental actions.

I should make it clear that the above remarks do not refer to the existence of written, entrenched bills of rights. They apply wherever there is a legal tradition which views the defence of civil rights as a special charge of the judiciary. This is the case in, for example, the United Kingdom, de-

spite the absence of a written constitution or an entrenched bill of rights. It would be rash to assume that in countries with an entrenched constitution and a doctrine of judicial constitutional review the courts are necessarily more powerful or more active in controlling either the administration or the legislature than in countries lacking a written constitution. The English docrine of parliamentary sovereignty sometimes blinds people to the extent to which, through their powers to interpret Acts of Parliament, the courts can and not all that infrequently do exercise *de facto* judicial review over parliamentary legislation. Interpretative presumptions, such as a presumption that parliament does not intend to derogate from people's civil rights, are as powerful a tool in the hand of a judiciary keen on fulfilling a role in the protection of human rights as an entrenched bill of rights.[1] Much depends on the actual traditions and practices of the judiciary. The existence of a formal constitution may contribute to the formation and to the political defence of those traditions. But this depends on its use rather than on its existence.

At least some constitutional rights are primarily means of formal or informal institutional protection of collective goods. They protect these collective goods inasmuch as damage to them is caused by harming the interests of identifiable individuals. This explains why these aspects of the protection of collective goods are a matter of individual rights. Where harming an individual seriously jeopardizes the maintenance of a public good that harm is also a cause of a harm to the community. Therefore, there is in such cases an adequate instrumental justification for holding others to be subject to duties to refrain from such harm. It also explains why their protection can be entrusted to the hands of the judiciary. Courts are particularly suitable for dealing with disputes in which an individual has a special standing, and which relate to a limited, self-contained set of facts. They

[1] Presumptions, it will be remembered from ch. 1, are at home in institutional contexts. One of their roles is to justify decisions which will not be justified by the canons of reasons. The brief discussion that follows concentrates on the way the constitution is used to divert power to the courts. No comment is made on the existence of special provisions for amending the constitution, by parliamentary or other action. Their existence only serves to reinforce my conclusions.

are not particularly apt at dealing with issues determination of which depends on the way different alternatives affect whole communities over long periods.[1] Determining liability for an accident, rather than devising a pension scheme for the old, is their natural area of operation.

Why should one use constitutional rights as a means of dividing political power between the different organs of government? Why should they be used as part of a checks and balances mechanism? Many countries have found it expedient to provide different procedures for deciding different classes of issues. A common example is the creation of special procedures for changing the balance of powers between the states and the federal government in a federal state. Federal states distinguish between ordinary political action, which takes place within the existing framework of political institutions, and political action which changes that very framework. They tend to endorse special procedures for the second, procedures which have a built-in conservative bias in them, that is a bias which make constitutional changes more difficult to effect than ordinary political action.

In a similar way one may distinguish in every country between the basic political culture of that country, and its more detailed and transient arrangements. The basic political culture usually includes both ways of deciding political issues (such as a federal system) and some substantive principles concerning the rights and duties of governments and of individuals. The distinction between basic framework and transient regulation is one of degree, and is not susceptible to precise description. It does not coincide with any distinction of issues. Some aspects of the decision-making procedure belong to the transient part of the political arrangements of the country, others to its basic framework, etc. The distinction is one of stability and importance in the eyes of those who participate in the political process.

In the nature of things features of the basic political culture are less liable to change than its transient arrangements.

[1] None of the above is meant to deny that in certain countries during some periods courts are encouraged, or give themselves the courage to deal with the type of question they are not best suited to deal with.

It is sometimes advisable, and it is usually perceived to be advisable, to protect the stability of the basic political culture by institutional arrangements which isolate it to some extent from the pressures of day to day politics. This can be done by a two-chamber legislature with appropriate guidelines specifying the protection of the fundamentals of the political culture as part of the role of the second chamber. It can be done by the adoption of entrenched constitutions, or of presumptions of interpretation of legislative and administrative action which authorize the courts to modify their provisions inasmuch as they may affect basic aspects of the political culture. Constitutional rights contribute to this process. They are part of the institutional protection of the basic political culture of a society.

It is a commonplace of political life that entrenchment of a right in a special legislative or constitutional measure does not remove it from political strife. It merely leads to a greater role for the courts in determining the matter. The courts themselves are sensitive to political factors, and their decisions are based on political considerations. The slogan that the courts are, or should be, above politics is not necessarily wrong. It merely refers to a narrow conception of politics. The courts are, or at least they should be, above the rough and tumble of everyday political pressures. They should be relatively immune to passing fashions. In constitutional matters they may succeed in representing a lasting general consensus, even at times when prevailing trends disguise its existence from the majority of the public, and even in the face of a government whose reforming zeal blinds it to the need to preserve the fabric of the political culture. To the extent that the courts are able to act in these ways they fulfil an invaluable function in assuring society of the measure of continuity which is so essential to its well-being.

Continuity is not to be confused with stagnation. The special protection which the courts give to the constitution is not meant to stop it from changing. It is merely designed to make it change in response to different social processes from those which determine ordinary political change. In the wider sense of the political, the sense in which it encompasses all decisions by authoritative state organs, constitutional issues are, and should be, subject to change through the political process. The fact that the constitution affects the existence of the basic political culture, which is—if a good at all[1]—a collective good, is a prima facie reason for holding it to be a proper subject for political action, even though sometimes the only right political action is to take no action and to leave a certain area free from political interference.

The argument for the entrenchment of liberal constitutional rights derives therefore from several sources. First, there is the interest of the right-holder which the right serves. If its protection were not a valid reason for action then we would not be speaking of rights in these cases. But the interest of the right-holder in itself, in the case of many of the rights which were used as examples above, is insufficient to justify that degree of protection. It gets it because it is instrumentally useful to the preservation of a certain political culture, to the protection of various public or even collective goods. Finally, in various countries, due to their circumstances and to other features of their political institutions, the best way to ensure that people act as they should, i.e. that they show due respect for these interests, is by a division of labour which restricts the right of most people and of some political institutions to judge for themselves what precise duties those interests justify. The best way to secure the proper recognition for those interests is to confine the decision about their proper weight to a few specialist institutions, whose composition and mode of operation make them most suitable for the task.

This last point is, of course, common to the justification of all institutional rights. That is, it applies to the explanation of all legal rights, rights under the rules of voluntary associations, etc. All institutional rights are subject to the mediation of an authority whose task it is, in accordance with the dependance thesis, so to act that people will conform to reasons which apply to them better than if they were to

[1] In considering the position sketched in this section it is important to remember that its subject is the proper justification of the entrenchment of fundamental rights in societies where the legal system does give them proper weight. Nothing is here implied as to the proper response to a mildly or grossly unjust constitution.

decide independently of the authority's intervention. In those instances in which the authority attempts to secure behaviour which respects moral rights by giving them, say, legal recognition, the authoritative intervention puts a distance between the right and the interest it serves. One has a legal right because the authority declared that one has an interest which justifies holding others to be subject to duties. One has that legal right even if the authorities' declaration is mistaken. But the authority is a legitimate one, and the legal rights it decreed are (morally) valid, only if recognizing its decree is likely to improve one's conformity with right reason.

This gap between the interests justifying institutional rights and the institutional rights they justify, may have been misperceived by some. It may explain why some people were attracted to the view that rights, while serving interests, have force over and above that of the interests they serve. They thought that the weight of rights is greater. In fact rights should have precisely the force which the interest has. But being institutionalized one is not at liberty, assuming that the institution is based on legitimate authority, to act on one's own judgment as to the proper weight of the interest where it differs from that of the authority, for if one did one would be wrong more often than if one did not.

Fundamental liberal rights deserve special protection and recognition: that is, they are valid moral rights deserving legal-institutional protection over and above the normal legal protection, because they express values which should form a part of morally worthy political cultures; and they deserve such protection to the extent that the circumstances of the country concerned make it appropriate to create special procedures for the regulation of matters covered by those rights, for the preservation and the gradual development of these aspects of the political culture.[1]

[1] Our concern was with the rights the defence of which is one of the distinguishing marks of a liberal political morality. In part the same arguments can be extended to lay the foundations of an account of where and when it is right to give special constitutional protection to personal rights. Up to a point these differ from the typical liberal rights in being more individualistic. They are justified primarily by the protection they give to the interest of the right-holder which is intrinsically valuable, and not, or not to the same degree as are liberal rights, by their service to a public culture. But they too are to be entrenched constitutional rights only in countries where the institutions likely to deal with the greatest success with the protection of these rights are the courts. That is, even in the case of these fundamental moral rights, their constitutional prominence, where justified, is due only in part to their moral importance. To a very large extent it is a matter of political expediency.

This conclusion is not a theory of human rights. It is merely a statement of the perspective which should dominate such a theory. Is this the exclusive way in which fundamental rights should be understood? Every legal institution once it exists may be justifiably used on occasion for purposes which do not justify its creation or perpetuation. The practice of entrenching certain rights may sometimes be legitimately used to achieve incidental goals which do not belong the the justification of the practice itself. The hard question is whether the very existence of the practice of according preferred position to certain rights can be justified on additional grounds, independent of the considerations so far canvassed. One possible source of disquiet about the way the argument of this book has been developed so far is that it seems imbued with a strong consequentialist spirit and inimical to the view that there are absolute rights and duties based on non-consequentialist considerations. To the examination of this issue we must now turn.

IV

SOCIETY AND VALUE

Several attempts to develop a doctrine of political freedom have been examined and found wanting. Their examination yielded a variety of leads, concerning, among others, coercion and our sensitivity to it, the nature of rights, the value of some collective goods, and the relation between wide and narrow morality. The last part of this book will pull them all together and draw some conclusions concerning the value of political freedom, and its proper role in our society. The view to he explained there is a familiar one. It is a perfectionist view of freedom, for it regards personal political freedom as an aspect of the good life. It is a view of freedom deriving from the value of personal autonomy and from value-pluralism. Freedom is valuable because it is, and to the extent that it is, a concomitant of the ideal of autonomous persons creating their own lives through progressive choices from a multiplicity of valuable options. The perception of freedom as constituted by the ideals of personal autonomy and value-pluralism is familiar and used to be very popular. It would not qualify as an interpretation of liberalism if it were not. But in recent times trends in moral philosophy which, to those who come under their influence, make it all but incomprehensible, have gathered force and extended their popularity. Theories of instrumental rationality and of consequentialist morality impose a regimented and impoverished range of concepts which are supposed to be the only ones used in practical thought. To be able to appreciate the traditional strand of liberal thought which rests on pluralism and autonomy it is necessary to shake free of the shackles imposed by those theories. This task helongs to Part Four. It raises some basic issues concerning practical rationality. In particular it provide a description of some aspects of personal well-being, aiming to show that practical

thought is either non-consequentialist or consequentialist in an attenuated sense only, and that it depends on a balance between personal choice and social forms.

11

Consequentialism: an Introduction

There are two reasons for engaging in an extended discussion of the merits and failings of consequentialism. Utilitarianism, the only extensively explored consequentialist morality, has come to be identified in some circles with the growth of state intervention, and its ever increasing encroachment on individual freedom. It is true that utilitarianism stood at the cradle of English liberalism. But it is an abstract moral theory which may well, given different social circumstances, lead to anti-liberal conclusions. If so, and if utilitarianism is sound, then liberalism stands condemned as unsuitable for our day and age. Several liberal writers base their trust in liberalism on the rejection of utilitarianism and of consequentialist moralities in general. In particular, the rejection of consequentialism is sometimes associated with a rights-based liberalism. Thus the exploration of the controversy about the credentials of consequentialism is directly relevant to the project of this book.

Beyond this lies the fact that consequentialism or its rejection has far-reaching consequences for any moral or political argument. The implications of the conclusions to be reached here concerning the limits of consequentialism will reverberate through the arguments of the last part of the book.

There is, therefore, ample reason to confront the problem. The confrontation leads, in the next two chapters, to an examination of some aspects of our conception of value generally. Morality is thought to be concerned with the advancement of the well-being of individuals. The defence of pluralism and autonomy calls for an explanation of our notion of individual well-being. Only through examining these issues can we see clearly the degree to which consequentialism provides an adequate framework for morality. The present chapter does little more than set the scene.

1. *Consequentialism: Some Common Themes*

To reject consequentialism is not to claim that the consequences of an action are not among the reasons for or against its performance. It means that some valid reasons for action are not susceptible to a consequentialist interpretation, and therefore cannot be accommodated within a consequentialist theory of practical reason. This is, however, not as straightforward a matter as it seems. There is no one single idea which forms the core of consequentialism, none that is universally agreed upon to be an inescapable part of the consequentialist outlook. Talk of a rejection or a refutation of consequentialism has, therefore, to be understood in a qualified sense. All that those who criticise consequentialism can usually legitimately claim is the whittling away of several of the doctrines generally associated with it. I will list seven of the more common features associated with consequentialism. Some may wish to add to the list. Others may prefer to analyse consequentialism's leading ideas into different building blocks. Most consequentialists accept fewer than the listed features, but they disagree as to which to omit and which to add. The list is, however, a reasonably comprehensive enumeration of the ideas which were historically associated with consequentialism. Furthermore, this way of identifying the leading ideas helps with the argument that follows.

1. *Strict Consequentialism*: The only reasons for or against the performance of any action are the consequences that its performance or non-performance will or may have. The weight of reasons for and against an action is a function of the value of its consequences.

2. *Comparability*: All reasons are comparable in strength (or weight or importance—these terms will be used interchangeably). They and any of their combinations can be ranked by weight.

3. *Agent-Neutrality*: The evaluation of all possible consequences is agent-neutral. That is, the comparable value of any two states of affairs is the same from the point of view of all agents.

4. *Maximization*: An action is right if and only if its performance maximizes value (or expected value), i.e. if and only if it has at least as high an (expected) value as any of the alternative actions open to the agent.

5. *Transparency*: Intrinsic values are transparent. That is, (i) the features of a state of affairs which make it intrinsically valuable are features which make it good for some agent or other, and (ii) a feature is intrinsically good only if, under normal conditions, the person (or other animal) for whom it is good is content with its presence and prefers it to its absence.

6. *Negative Responsibility I*: The foreseen consequences of an action and its intended consequences are equally relevant to its evaluation.

7. *Negative Responsibility II*: In evaluating an action the consequences of the agent's (possible and actual) omissions count for just as much as the consequences of his (possible and actual) commissions.

The last three features may be thought not to belong to a characterization of consequentialism. They concern not the structure of reasoning about what is best but the character of value and the conditions of responsibility. But their general acceptance by many consequentialists and the fact that many do not distinguish between them and other consequentialist features makes it useful to include them here.

Reflection on the term 'consequentialism' may make one feel that it is to be identified with the first of our features only. Most consequentialists agree, however, in abandoning this condition. They have sound reasons for doing so. The first condition leads to the denial that any action or omission can be intrinsically good or bad, except inasmuch as it is the consequence of some other action. Such a view cannot be sustained. Attempting to defend it leads to distorting our conception of agency. Is not destroying humanity intrinsically bad? To allow that it is and yet continue to hold to the first feature requires a denial that destroying humanity is a (possible) action. Only things like pressing buttons, or perhaps only moving muscles, or even only willing or forming intentions, will be allowed to count as possible actions. It is unlikely that, quite apart from the violence thus done to our understanding of agency, these desperate devices will

succeed in saving the first condition. Even if one does not believe that only a good will is good in itself, one may accept that sometimes forming good intentions is intrinsically valuable.

These and similar problems induced many to abandon the first feature on our list by adopting a simple fiction, that of regarding the fact or the state of affairs that one performed an action as a consequence of one's performing it. This enabled some philosophers to maintain the appearance of a belief that only consequences count, while avoiding its substance. On occasion this fostered unnecessary verbal disagreement. Others endorsed reformulations of the first condition which achieve the same effect by different verbal means. But by and large it matters not whether one abandons the first condition in favour of a reformulation which allows that the intrinsic value of actions can be a reason for their performance or keeps it with the help of the simple fiction.

Another feature abandoned by many, though by no means all, consequentialists is maximization as described in the fourth principle above. Let me refer to it as naive maximization. The move away from it has been in two mutually compatible directions. One is towards the introduction of an independent distributive component, so that maximizing value, while a good in itself, which has to be pursued, other things being equal, has to compete with aims such as equalizing the distribution of value, improving the lot of the worse off, etc. Distributional principles can, however, be interpreted as concerned with the protection and promotion of certain relational states. They are then taken to presuppose the intrinsic goodness of relational states of equality of wealth, status, or whatever one is concerned to see distributed in the preferred pattern. Thus understood they are compatible with naive consequentialism. The second direction away from (naive) maximization is towards indirect maximization. The rightness of action is judged not by its expected value, but by its conformity to a rule of action which is itself judged as being the best of a range of alternatives determined by their ability effectively to serve as practical guides to action, and judged by whether faithful

adherence to them, or whether the likely adherence to them, will achieve the best maximizing (and distributive) results.

More radically, it has been argued that sometimes, or even always, while one is permitted to act in the maximizing way, it is also permissible not to do so. Instead one may act in ways which promote a subclass of all desirable states of affairs, or which meet certain threshold conditions (they avoid worsening the situation, etc.).[1]

Many of those who declare themselves to have rejected consequentialism have concentrated primarily on criticizing agent-neutrality. Others have focused mainly on the doctrine of negative responsibility. The focus of the discussion in the next two chapters will be different. They concentrate on value-transparency and on comparability. It seems to me that many of the concerns which led people to embrace agent-relative principles are in fact fully met within an agent-neutral morality once it is realized how widespread is the breakdown of comparability, and how misconceived is the transparency thesis. I shall not, however, explore either the consequences of abandoning these principles for agent-neutrality nor their implications, which seem to be significant, for the debate about negative responsibility. To set the stage for the discussion of commensurability and value-transparency we will now turn to a review of some of the more powerful arguments which have been advanced against consequentialism.

2. *Separateness of Persons: Trade Offs*

Rawls was, to the best of my knowledge, the first to raise the objection that utilitarianism disregards the separateness of persons.[2] The aspect of utilitarianism he seems to object to concerns its balancing feature, i.e. its willingness to take from one person and give to another, depending on who will derive the greater net benefit from the allocation. This shows

[1] Both my 'Permission and Supererogation', *American Journal of Philosophy*, 12 (1975), 161, and S. Scheffler, *The Rejection of Consequentialism*, Oxford, 1983, support the case for permissions not to maximize in appropriate circumstances. M. Slote's *Common Sense Morality and Consequentialism*, London, 1985, advocates a form of threshold maximization.

[2] In *A Theory of Justice*, pp. 27, 29.

that the objection is not specifically against utilitarianism but is directed against a class of consequentialist theories, those which subscribe to the comparability and agent-neutrality assumptions, and do not add an independent distributive principle.

Yet it is not clear in what sense comparability and agent-neutrality disregard the separateness of persons. It is true that they require balancing the good of one person against that of another. But if the result is that the good of one person is sacrificed, it is sacrificed for the good of another. It is said that this equates a trade-off by giving a good to one person at the cost of depriving the same person of another good (e.g. he will get a refrigerator, but will lose his TV), with taking a good from one person in order to give it to another (taking one person's TV in order to give a refrigerator to another), without noticing that in the second case we trade across the boundaries between people. These boundaries, so the claim goes, drop out of the consequentialist reckoning.

To this the consequentialist can reply with justice that the fact that trade-offs are between persons is taken into account. The presentation of the two examples above made them appear misleadingly similar, and disguised a big difference between them. The value of, say, a refrigerator to a person depends on his general situation. In comparing the value of a refrigerator and of a TV to one person one takes his situation into account. Hence the comparison is mindful of the fact that either way he will have something. When judging the value of the goods to two people one determines the value of each of the goods to each person in light of that person's general situation. In their case it is a choice between something and nothing, and this would affect the consequences of the reallocation to them. So the fact that the trade-off is across personal boundaries is reflected in the way that the value of the goods is judged in the second example. It is calculated from the perspective of two people and not one, as in the first.

This reply seems to meet Rawls' principal objection. Some will feel that it is nevertheless inadequate. They will admit that this reply shows a formal difference between intra-

personal and inter-personal trade-offs which is captured by consequentialist reckoning. Yet they will contend that this difference does not account for all our intuitions about the difference between such trade-offs. The difficulty is that one can assess such intuitions only in the light of some theoretical account of their justification and of their place in practical thought. No such account is provided by Rawls. Perhaps his whole theory of justice is such an acount. But it is too remotely and indirectly related to the intuitions to serve as an explanation of their sources or as an assessment of their role or validity.

Nozick, however, seems to have additional reasons to support the charge that consequentialists disregard the separateness of persons. He invokes the 'Kantian principle that individuals are ends and not merely means; they may not be sacrificed or used for the achieving of other ends without their consent.'[1] This appears to block the possibility of imposing sacrifices on one person for the benefit of any other. A person may voluntarily make sacrifices for the sake of others. He may do so because he believes that that is morally the best thing to do. And he may be right in so thinking. Even so, no one is entitled to compel him to make the sacrifice. To do that is to treat him as a means to the end of benefiting another. That one may never (barring major catastrophes) do.

Why not? One may say that the Kantian principle is itself the answer. Nozick goes one step further in elucidating the scope of the principle. In particular, he indicates that it applies to autonomous creatures in the following sense: 'A person's shaping his life in accordance with some overall plan is his way of giving meaning to his life; only a person with the capacity to so shape his life can have or strive for meaningful life.'[2] Nozick indicates that it is to such persons that the Kantian principle applies, and that it applies to them because they are such persons.

The difficulty with Nozick's position is that any sacrifices such persons are compelled to make are in favour of other persons who are equally striving for a meaningful life. That

[1] *Anarchy, State and Utopia*, p. 31.
[2] Ibid., p. 50.

is presumably why it may be right, indeed obligatory, for an agent to sacrifice some of his interests, even his life, for the sake of another. But is he not then treating himself as a means for the end of protecting or promoting the interests of others? If Julia may so treat herself why cannot an outsider, say Rachel, treat her in the same way for the same reason? Why is Rachel not allowed to make Julia do what is morally right, on the ground that this would be to sacrifice Julia's interests for the sake of another, and thus to treat her as a means only, given that Julia herself is allowed, is indeed required, to treat herself as a means for the sake of others? Nozick's answer is of course that Rachel may get Julia to act against her (Julia's) own interest, so long as she gets Julia to behave in this way voluntarily. It is permissible, for example, to induce in a person desires which can only be satisfied by doing the morally decent thing. These can be induced by exploiting a person's envy of his successful neighbours, his weakness for sex, etc. But coercion, deceit and similar means are excluded as violating his rights. We do not find in this book, nor in any of Nozick's writings, much of an explanation as to why some means of getting people to act are allowed, while others are not.

The Kantian tradition suggests an answer which does not appear to be endorsed by Nozick. Perhaps the only way one is allowed to get another to perform or to avoid an action is by convincing him that that is the right way to act. According to this line of thought, the position of the agent himself is identical to that of the outsider. An agent who does what he ought for the wrong reasons is abusing himself, and is not obeying the moral law. At the same time inducing desires in another by exploiting a person's sexual appetite, or his envy of his neighbours, is wrong, even though it does not coerce him. One difficulty with such a position is that it provides immoral people with an immunity from outside restraint. It may be right to punish a murderer, for, according to Kantian principles, he deserves to be punished. But one cannot restrain him from murder, if he fails to be convinced of the evil character of his acts or intentions.

A simple way round that difficulty is to hold that the person who commits a moral wrong, or violates his moral duty, has thereby forfeited his rights, or some of his rights, against outside interference. This view radically transforms the whole picture. The limitations imposed on the way persons may be treated are now understood to be conditional on compliance with the moral law (or with parts of it). If so then the disagreement we identified between the consequentialist and the Kantian is largely dissolved. People should make sacrifices for the sake of others. If they do not do so voluntarily they are in the wrong, and the sacrifices may be forced on them. Neither will regard any moral violation, however petty, as justifying forfeiture of all the offender's rights. Neither will regard the offender as preserving all his rights intact whatever the offence. They may disagree about the details. But there is nothing in the consequentialist creed of the one nor in its rejection by the other to lead to such a disagreement.

Even though Nozick does not pursue the Kantian-inspired line of thought explained above, his view has to cope with the same charge of providing the would-be murderer with an immunity. His solution is rather like the simple solution just mentioned. He declares the murderer to have forfeited some of his rights through his actual or intended violation. The same applies to theft, trespass, etc. Nozick's theory does not entail, as it appears to do in the first quotation from him above, that a person cannot be compelled to sacrifice his interest in favour of that of another. He may be so compelled if that second person has a right that the first shall serve his interest, and therefore, the first has a duty to do so. It is the substantive theory of the moral responsibility of one person to another that determines how much of a person's interest we may compel him to sacrifice for the benefit of others. Nozick said enough to make it clear that he does not think that extant consequentialist theories contain an adequate account of responsibility to others. But he gave us little reason for sharing his judgment.

The argument so far did not, nor was it meant to, establish that there are no non-consequentialist implications to whatever valid content there is in the notion of separateness of persons. It merely showed that the Kantian maxim as invoked by Nozick does not reveal such implications, for it

means no more than that one may not be compelled to sacrifice one's interest for the sake of another unless one has a moral duty to do so.

Perhaps we should make a fresh start by considering some of the sources for moral disquiet with consequentialism. One is disquiet about the comparability assumption on the ground that it leads to absurdities such as the approval of the murder of an innocent healthy person in order to obtain ice-cream. The value of one cone of ice-cream to one person will not justify murder, nor would the value of two cones for two people. But the more people there are the more value is secured by getting one cone for each of them. Consequentialist logic, so the argument goes, is committed to the view that at some point it will be justifiable, indeed required, to commit murder if that is the only way to get the ice-cream. The only escape route is to assign the life of an innocent person absolute weight, so that it will never be outweighed by any number of refreshing cones of ice-cream. Since similar chains of reasoning will lead one to assign infinite weight to grievous bodily harm, rape, the betrayal of friends and of one's country (if it is morally decent), and to much else, this escape route is equally unpalatable (to the consequentialist). It denies the possibility of trade-offs between any of those. The result is equivalent to abandoning consequentialism in all but name.

To overcome such objections it has been suggested[1] that benefits and harms should be classified into levels of urgency, so that each one belonging to one level shall be lexically prior to any combination of lower level benefits, while being subject to trade-offs against benefits belonging to its own level, and lexically inferior to higher level benefits. The success of this device is in its ability to cope with all the difficulties of the sort mentioned, without generating new paradoxes of its own. It has been persuasively argued that that cannot be done, i.e. that many of our reasonable weighting decisions defy such a systematization.[1] Such arguments are, of course, merely persuasive. Greater imagination may defeat them. To strengthen their force we need an explanation of why our judgments defy such structuring, an explanation which will also validate those judgments, and remove the suspicion that they are merely the fruits of ignorance, irrationality, or moral insensitivity.

[1] T. Scanlon, 'Preference and Urgency'. The outlandish character of the ice-cream example opens it to the charge that it is not a proper test of our moral intuitions. These, it may be claimed, can be relied upon only when they concern real life situations, which mine does not. Whatever the fate of this objection it can be by-passed by relying on real life examples. Consider the following simplified case adapted from one by Sen: a gang of ten bashers plans to beat up Ali. Donna can warn him, but is aware that though his pain will be five time as great as the satisfaction each of them will derive from the attack, given that there are ten bashers and one victim their total satisfaction is greater than his pain. Side effects can be evenly balanced in many cases. See Sen, 'Rights and Agency', *Philosophy & Public Affairs*, 11 (1982), 8-9.

These doubts undermine belief in the availability of a correct consequentialist moral strategy, be it a maximizing one or not. They may also weaken one's faith in the comparability assumption which is presupposed by the search for a general moral strategy. In itself the undermining of the comparability assumption does little to illuminate the moral intuition about the separability of persons. The connection is through the content of those judgments which resist explanation consistent with comparability. They concern moral problems which, in their common manifestations both in peoples' actual experiences and in their imaginative thinking (shaped by history and fiction), concern balancing the interests of one person against another, rather than, as they may in principle, involve balancing different interests of a single person. They are cases of betraying a friend to make money, or to help the right party win the election in order to improve the lot of many; cases of victimizing an innocent person for the common good, i.e. for the welfare of many, and similar cases. It is the character of the intuitively picked examples which suggests that a correct explanation of the breakdown of comparability is connected with the features which led to the as yet obscure unease about the separability of persons.

3. *Separateness of Persons: Agent-Neutrality*

The challenge to comparability may explain one source of dissatisfaction with consequentialism, namely its handling

[1] J. Griffin, 'Are There Incommensurable Values', *Phil. & Public Affairs*, 7 (1977), 39.

of the balancing of people's interests. It is this source of discontent which encouraged a revival of interest in fundamental moral rights. Rights are grounds for duties on others, and duties are not just ordinary reasons to be aggregated and halanced in the ordinary way. Since rights are the grounds of duties, and not merely of ordinary reasons for action, they have peremptory force. This may suggest that they can do justice to the separability of persons in ways which consequentialism overlooks. We saw reason to doubt whether rights are the whole answer. They seem neither sufficient nor necessary for the purpose. But an analysis of the relations between separability and rights has to wait for an account of the intuitions about separability.

Whatever our ultimate verdict, it is evident that at least Nozick's reason for erecting rights as side-constraints derives from additional sources besides the doubts about comparability, if indeed these worried him at all.[1] The other intuition at work challenges agent-neutrality. Consider the moral prohibition on deceit. It is normally taken to mean that regarding each person, that person should not deceive. But this is an agent-relative interpretation. The consequentialist interpretation is that each person should so act that the number of deceits is as small as possible. The difference is made clear in a case in which Debbie is asked for information by Ellis, knowing that it will then be used to deceive two other people, each on a different occasion (and not necessarily by Ellis or through his fault). If the agent-relative interpretation is right Debbie should not deceive. She should, if there is no other way out, give away the correct information. On the agent-neutral interpretation this would be the wrong course of action. Debbie can, by deceiving, make it so that there will be only one deception rather than two. So that is what she should do. Our ordinary morality, so the argument goes, is agent-relative.

Before we go any further we should ward off one possible misunderstanding. One may say that the difference between those who believe that I should not deceive even if this is the only way to avoid two deceptions, and those who say that I should, is not of an agent-neutral v. an agent-relative

[1] The same is true of C. Fried's approach in *Right and Wrong*, Cambridge Mass,. 1978.

interpretation of the prohibition of deceit. Rather it has to do with whether one is concerned about the the person deceived, or about the act of deceiving. We followed Parfit[1] in distinguishing between action and outcome reasons. Action reasons are those where the value (be it instrumental or intrinsic) is in the performance of an action, i.e. where there is intrinsic value in certain agents performing actions of a certain kind. Outcome reasons are those where the value of the action is in its outcome or consequences (where neither the action itself nor the fact that it leads the same or other agents to perform some actions counts as an outcome).

It is tempting to think that if the reason for not deceiving is an outcome reason, that is if its purpose is to protect the potential victims of deception, then one should, other things being equal, deceive one person to save two from deception. If the reason is an action-reason then one should not, as that is one's way of avoiding the act of deceiving. A little reflection shows, however, that that is not what is at stake. The example is not one in which Ellis, or whoever is the would-be deceiver, will try to deceive the two victims whatever Debbie does. It is of a case where if deceived he will not even try to deceive them. (One may deceive him out of the opportunity to deceive.) Therefore those who take the reason to be an action reason would still think that Debbie should deceive, because that way that action reason is complied with to a higher degree. That way there will only be one act of deception, rather than two. If one thinks that Debbie should not deceive that is because one denies agent neutrality.[2]

Nozick's rights are side constraints, i.e. they are agent-relative reasons of absolute weight. Their absolute weight makes them appear counter-intuitive.[3] It seems safe to say that not all rights are side constraints, and perhaps, as was

[1] Cf. Parfit's *Reasons and Persons*, Oxford 1984, e.g. p. 104. These distinctions were introduced in ch. 6.

[2] Another unsuccessful attempt to avoid this conclusion is through relying on principles of responsibility which deny one's responsibility for consequences of one's action which are mediated in some ways by other people's choices. There is no doubt that in such cases the choosers are responsible. But does that absolve one of responsibility? Is not one responsible for a murder if one acted as a weapons consultant with the intention of bringing about the murder?

[3] See, e.g., Sen's construction of the Donna and Ali example in 'Rights and Agency', op. cit.

suggested in Chapter Seven, none are. But even so Nozick's theory attests to a widespread sense of unease with consequentialism. It not only reflects a sense of unease with the assumption of comparability. His side-constraint view of rights also demonstrates the allure of an agent-relative approach.

Nagel classifies agent-relative reasons into two categories, deontological restraints and personal goals, commitments, projects or relationships. Nozick's concern was with deontological restraints.[1] But one has to agree that people's ordinary practical judgment appears to display agent-relativity in connection with their own and other people's projects and relationships. That is, people normally agree that their own projects and relationships and those of other people are, when judged 'objectively', of comparable value. Yet they commonly maintain that sometimes one is entitled to pursue one's own goals, rather than promote the cause of other people's goals, even when doing the latter will have better consequences from an 'impartial' or 'objective' point of view.

One may well claim that these features of human judgment are so universal and inerradicable as to require no justification. But they are in need of an explanation. Furthermore, one needs a rebuttal of the possible consequentialist attempt to show that common judgment only appears, but in reality is not, inconsistent with agent neutrality. First, there is the familiar claim that since people are better at looking after their own projects than after those of others, it is best to inculcate in them a preference for their own projects and relationships. This indirect consequentialist strategy, (i.e. one which rejects direct maximization as described in our fourth listed feature) will admit ground-level agent-relativity, and justify it by higher level agent-neutral considerations, which make allowances for human nature.

This claim seems, however, to miss the point. It is precisely because people already care more about their own

[1] Though Nozick's ethical teachings in *Philosophical Explanations*, Oxford, 1981, cf. esp. pp. 294–300, suggest that he may agree with Nagel in holding projects and relationships to be equally agent-relative. For T. Nagel's classification see 'The Limits of Objectivity' in *The Tanner Lectures on Human Values*, vol. i, ed. S. McMurrin, Cambridge 1980, p. 120.

projects and relationships that they are better at looking after them. That is the feature to be explained. Why is it that human practical thought appears to be inescapably agent-relative? If it is indeed inevitable is it a manifestation of human imperfection? (Cannot one have the personal goal of promoting the goals of all without fear or favour? Will that too be agent-relative? Perhaps not, but it is no accident that that cannot be the main goal of more than a few.)

Secondly, and more seriously, the consequentialist will point out that all action reasons can only be satisfied by the person whose reasons they are. That is, if I have a reason to earn a living, my reason may be an outcome reason, a reason which is satisfied if I have enough for my needs. You can have that as your reason as well, that is you may have a reason to see to it that I have enough for my needs. But my reason may be, is often thought to be, an action reason. It may be a reason for me to earn a living by my own efforts. If so it is a reason which you cannot satisfy. All you can do is to help put me in a situation in which my efforts may bear fruit. Of course the reason may exclude even that possibility. My son has a reason to prepare his homework himself. This, much to my frustration, means not only that he himself should prepare it, but that he should do so unaided. Still, even here there are some forms of help (e.g. providing him with a quiet room) which are allowed.

The point the consequentialist is making is that some of what appears agent-relative is not. The appearance is simply a reflection of the fact that some reasons are action reasons. They should be given their agent-neutral weight hy all. But since only some people can pursue them directly (i.e. actually satisfy them and not merely help others to do so), whereas outcome reasons can be directly pursued by all (in the normal case at any rate), those who can pursue them directly should, according to agent-neutral reasoning, dedicate a substantial proportion of their time to their pursuit. Projects, commitments and personal relations are (the source of) action reasons. That is why what appears agent-relative is agent-neutral, or at least is consistent with agent-neutrality.

Just as the earlier argument against Nozick's invocation of the Kantian maxim did not show that the moral views he

is advocating are compatible with consequentialism, so the argument against Nagel's interpretation of personal projects and relationships is not meant to show that he is mistaken in claiming that they are irreconcilable with an agent-neutral view of practical reason. In both cases it seems likely that the authors do endorse non-consequentialist views, that they uphold the validity of moral views not susceptible to a consequentialist interpretation. Both my arguments rely on a similar strategy. They show that some of the constraints advocated by Nozick, and much of the partiality to one's own projects and relationships relied upon by Nagel, appear to be reconcilable with consequentialism. These authors did not point to a reason for thinking that all these cases are inconsistent with a consequentialist interpretation. This suggests that it is possible that where Nagel and Nozick endorse non-consequentialist moral views they are not backed by the intuitions which make their current statement of their position so appealing.

To illustrate this possibility consider the following passage by Nagel, in which he supports and illustrates the distinction between the agent-relative reason an agent has because he chooses to pursue a certain goal, and other agent-neutral reasons which are related to it.

> Someone's having the freedom and the means in a general way to lead his life is not a good that can be appreciated only through the point of view of the particular sets of concerns and projects he has formed. It is a quite general good, like the goods of health, food, physical comfort, and life itself, and if agent-neutral value is going to be admitted at all, it will naturally attach to this. . . . This is not equivalent to assigning agent-neutral value to each person getting whatever he wants.[1]

Indeed not. But the reference to enabling people to develop projects and relationships, by providing them with the general means for doing so, suggests that the disagreement may be narrower than Nagel makes it appear. Many of the more important goals people adopt are important to them, at least in part, because they are things for *them* to do and to achieve. We want to be good parents, not only to have healthy, well developed children. We want to cultivate friendships, not merely to be spontaneously loved and cherished by others through no deeds of our own. We want to have successful careers, not merely to have lots of money and a reputation of success. We want to enjoy the games we play, the books we read, the sights we see, the music we listen to, not merely to be in a state of contentment one would be in if one had all these pleasures (assuming that there is such a state).

[1] Nagel, ibid., p. 124.

All these are action reasons. Their existence and prevalence among our goals, projects, relationships and commitments may give the appearance of agent relativity where none exists. Nagel may have in mind further cases as well. Consider Jane and Jerry, who both have the freedom and the adequate means to develop their lives (which are insufficient to enable them to take their holidays in the Bahamas). Nagel may think that the fact that Jerry will enjoy spending a week in the Bahamas is no reason at all for Jane to give him a week there. If he also assumes at the same time that if Jane will enjoy a holiday in the Bahamas she has a reason to secure for herself the means for such a holiday, then he is committed to a view which is incompatible with agent neutrality. But it is doubtful whether that is a view that Nagel holds. For he thinks that each of us 'has reason to give significant weight to the simple sensory pleasures and pain of others as well as to his own'.[2] He will admit that in some sense there are non-sensory pleasures which are more valuable than sensory ones—the pleasure of seeing again a city one had a memorable experience in as a child compared with the cool satisfying texture and taste of ice-cream. The only reason he mentions for not extending the same treatment to non-sensory pains and pleasures is that they are reasons for the agent because he wants them, and that is no reason for anyone else.

This is a false premiss. It is not the case that non-sensory pains and pleasures are reasons for the agent because he wants them. Much of my pleasure in a holiday in the Bahamas will be non-sensory. It will be pleasure in knowing how lucky I am to be there, relaxation from the tensions of

[2] Ibid., p. 121.

ordinary life, diversion from troublesome thoughts, and the like. I therefore have reason to take a holiday there. But I did not choose to be a person who will enjoy a holiday in the Bahamas. If Nagel does believe that there are no agent-neutral reasons in cases such as this or others where the reason is not an action reason, then he is committed to an agency-relative view of sound practical reasoning, but it is less clear that he has ordinary intuitions and common human experience on his side.

4. *Separateness of Persons: Integrity*

We need an explanation of the way projects and relationships figure in practical reasoning which, if it is to serve as an argument against consequentialism, ascribes to them special features, other than that they are action reasons. Bernard Williams offers such an explanation, and it suggests another way of interpreting our concern for the separateness of persons. Williams is criticising utilitarianism. But his point holds, if at all, against all consequentialists. He describes how a utilitarian, taking his own as well as everyone else's projects and interests into account, reaches a conclusion as to which action will maximize desirable outcomes. Then he raises the question, what if that action conflicts with the agent's own projects which are central to his life?

> The point is not, as utilitarians may hasten to add, that if the project or attitude is that central to his life then to abandon it would be very disagreeable to him and great loss of utility will be involved. . . [O]nce he is prepared to look at it like that, the argument in any serious case is over anyway. The point is that he is identified with his actions as flowing from projects and attitudes which in some cases he takes seriously at the deepest level, as what his life is about. . . . It is absurd to demand of such a man, when the sums come in from the utility network. . . that he should just step aside from his own project and decision and acknowledge the decision which utilitarian calculation requires. It is to alienate him in a real sense from his actions and the source of his actions in his own convictions. It is to make him into a channel between the input of everyone's projects, including his own, and an output of optimific decision; but this is to neglect the extent to which his actions and his decisions have to be seen as the actions and decisions which flow from the projects and attitudes with which he is most closely identified. It is thus in the most literal sense an attack on his integrity.[1]

Nozick's concern for the separability of persons revolved round persons as impacted upon by others, as patients of others' actions. He wishes to limit the degree to which one may be compelled to make sacrifices for the sake of others, without limiting one's moral obligation voluntarily to make sacrifices for the sake of others. This led to concentration on the difference between the different ways of affecting other people's behaviour which appeared incapable of bearing the strain of his argument. Nagel shifted the weight of the anti-consequentialist argument from patient to agent. This is clearly so in the case of personal projects and relationships. But it is also true of his understanding of deontological constraints. Like Nozick he notices that 'deontological reasons have their full force against *your doing* something—not just against its happening'.[2] But unlike Nozick he correctly perceives that deontological reasons cannot get their agent-relative character from the interest they respect alone. That would lead to an agent-neutral reason (which may be an action reason). Their agent-relativity derives according to him from their concern with the agent.

Williams, like Nagel, finds the explanation of the agent relativity in the integrity of the agent. This provides a new and more promising attempt to account for the moral significance of the separateness of persons. One way in which Williams' account appears superior is that it involves a radically modified understanding of one's moral obligations towards others. The separateness of persons is not merely a limitation on the extent to which compliance with such obligations can be imposed on one from the outside, it is not merely a reflection of the moral relevance of coercion. Another promise held by Williams is the rejection of the view of separability of persons as a device to lighten the moral burden, to allow one an escape from moral rigorism.

[1] In J. J. C. Smart and B. Williams, *Utilitarianism; For and Against*, Cambridge, 1973, pp. 116–17.

[2] Nagel, ibid..

At the very start of the long quotation above he denies that that is a proper understanding of the problem. Instead what is at stake is gaining a correct perspective of the relationship between one's own projects and the moral requirements which arise independently of them. That perspective will not necessarily set a limit to required self-sacrifice. Sometimes there may be no other morally acceptable options than sacrificing one's life, and that may happen in circumstances not due to one's own previous immorality. The point is that when that is the case it is so because of considerations which chime in with one's integrity. Consequentialism is wrong not because it is rigoristic, but because it misperceives the relationship between morality and integrity.

The conclusions of this part of the book will be in line with Williams' views expressed above. And yet it has to he admitted that the quoted paragraph is deeply puzzling. To be sure, there are ways of dissociating from our own attitudes and projects which involve alienation and loss of integrity. But not every disengagement from ourselves is like that. We all sometimes do look at ourselves from the outside, and find the experience salutory. We often urge ourselves and others to do so more often. Consequentialism does indeed require a certain measure of dissociation. It requires us to conceive of ourselves as one person among many, whose claims on resources may conflict with other claims, who owes obligations to others, including obligations which are not of one's own choosing. Why is that an attack on integrity?

One might agree with Williams that if consequentialism stops us from having any other projects than maximizing desirable consequences then it attacks our integrity, denies the separability of persons, and leads to alienation. But he does not claim that. On the contrary, he points out that utilitarianism presupposes that people have other projects, besides that of maximizing everyone's happiness. Otherwise it will be empty.[1] The consequentialist merely asks of us that in comparing our projects and commitments with those of others we should not think that ours have a superior claim simply because they are ours. Some people would claim that that is the essence of morality. The idea seems to be built

[1] Williams, Ibid., pp. 110–13.

into the ideal-observer, original-position, universalizability, and other methods of moral reasoning, which between them account for deeply felt intuitions about the nature of morality. We require an account of why, this long moral tradition notwithstanding, that measure of disengagement from the personal point of view is an attack on our integrity. Is proceeding with one's projects only after making sure that they should not yield to other people's call on our time and resources inconsistent with identifying with our projects as what our life is about? Is it to treat ourselves as a channel in some impersonal decision procedure? And if it is, what room is there left for morality, any morality? Is not Williams' argument one which leads to the rejection not of utilitarianism alone but of any morality not based on the accident of the agent's own projects?

We should accept Nagel's remark that 'there can be good judgment without total justification. The fact that one cannot say why a certain decision is the correct one, given a particular balance of conflicting reasons, does not mean that the claim to correctness is meaningless. . . What makes this possible is *judgment* . . . which reveals itself over time in individual decisions rather than in the enunciation of general principles. . . in many cases it can be relied upon to take up the slack that remains beyond explicit rational argument.'[1] Even so one needs some argument for such judgment to take the slack from. Williams offers no alternative to the consequentialist way of impartially balancing the relative importance of various projects to those who have them.[2]

[1] T. Nagel, *Mortal Questions*, Cambridge, 1979, pp. 134–5.

[2] For a very sensitive account of how a consequentialist will set about such a task see J. Griffin, op. cit..

where membership in a racist group is the social norm. Such cases do arise. They arise all too often. But they are neither conceptual nor natural necessities or strong tendencies.

Some may agree with all that was said so far and yet feel that the main problem was merely swept under the carpet in the concession that there are occasional conflicts between the agent's well-being and the well-being of others. That is indeed the main problem, and its consideration is not to be dismissed glibly by a few comments here. All that this argument is designed to estahlish is that the resolution of such conflicts is to be found in values which are both the foundation of the agent's own well-being and the reasons which compel respect for the well-being of others. He must remain faithful to these values, and be guided by them in such conflicts, or else his own well-being will be compromised, and not only that of others. These remarks deny that there is a logical difference between a conflict of reasons which affect only the well-being of the agent, and such a conflict where the well-being of the agent is in conflict with that of others. Both types of conflict are rooted in values on which the well-being of the agent is founded, and their resolution depends on the guidance which these same values provide. But there is nothing here to imply that there is always one correct resolution to conflicts of reasons. Where there is no resolution, or where more than one resolution is correct, different people may act differently while none acts against reason. But these matters cannot be explored here.

Who then is the moral person? What is the proper relationship between self-interest and moral concern? At a superficial level one is inclined to say that he is a person among whose pursuits there are many non-self-interested ones, and whose self-interested goals do not conflict, except occasionally, with the well-being of others. This, though true, takes the divide between one's self-interest and the other aspects of one's well-being too seriously. A better answer is that the morally good person is he whose prosperity is so intertwined with the pursuit of goals which advance intrinsic values and the well-being of others that it is impossible to separate his personal well-being from his moral concerns.

13
Incommensurability

The previous chapter argued for six main conclusions. *First*, to a large degree the well-being of a person is determined by his goals. Whether what he does or what happens to him is good for him or not depends to a considerable extent on what goals he has. *Second*, important goals form nested structures. They are comprehensive goals in which are embedded as constituent parts more limited goals. *Third*, goals are held for reasons, and those normally are not (at least not exclusively) the will of the agent but the value of his goals. *Fourth*, comprehensive goals are based on social forms. *Fifth*, other than one's biologically determined needs personal well-being depends primarily on action reasons. *Sixth*, morality and personal well-being are not two independent and mutually conflicting systems of values, and there is no essential tendency in their demands, or the reasons for action that they generate, to conflict. While the first and the fifth of these conclusions explain the allure of the fifth feature of consequentialism, the thesis of the transparency of values, the third and fourth conclusions establish the falsity of this thesis. The present chapter aims to refute the second feature of consequentialism, its belief in comparability. The conclusions of the previous chapter, it will be argued, entail that both values and valuables are to a large degree incommensurable.

The task divides into three. First, the notion of incommensurability has to be explained and shown to be a credible, useful concept. Second, the existence of a widespread belief in pervasive incommensurability between significant options has to be established. Third, that belief has to be explained in a way which brings out the value of incommensurabilities, the impact they have on people's well-being.

1. *The Concept*

One difficulty in arguing for incommensurability is in finding conceptual room for it. What could it mean? Given any two values, say liberty and equality, could it fail to be the case that either liberty is more important than equality, or it is less important, or that liberty and equality are equal in importance? Is there a fourth possibility? Of course, this way of describing the problem is very misleading. We are not looking for another judgment of the relative importance of two valuable options. Rather we are looking for failure of comparability (I will use 'incomparable' and 'incommensurate' interchangeably). This provides the clue for a simple definition of incommensurability.

> A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value.[1]

People might say: But what else can two options be? If neither is better than the other, surely their value must be the same. Sometimes comparative judgments of importance are implicitly understood to be between independent values. In such cases it may be far from clear what comparison is meant. Is it a question about the comparative value of complete freedom and absolute equality? If so it is possible that comparing liberty and equality is meaningless. It makes sense to talk of the relative weight of options one can at least in principle choose between. It makes no sense to talk of choosing between perfect liberty and absolute equality. As long as one is a person one has some liberty. Nor is it clear what could be meant by 'a situation of total inequality', in whatever respect one cares to think of. Similarly, one cannot be equal to another in all respects, without being that other, nor can one be free to do everything. Certain freedoms consist in part of a degree of unfreedom (being married *is*, in part, not having the freedom to seek other partners). All one can do, this argument runs, is to compare different combinations of liberty and equality, for we can have a choice between such packages. But to say that it makes no sense to

[1] Incommensurability is so defined that only what is valuable (or of negative value) can fail to be comparable in value with another valuable.

compare liberty and equality in themselves is not to admit incommensurability, for judgments of incommensurability deny the truth and not the meaningfulness of judgments of commensurability.

If, on the other hand, comparisons of the value of liberty and equality are meant to be comparisons of types of options then it is clear that they are incommensurable. That is, the class of all liberty-enhancing options may be incommensurate with the class of all food-providing options. This simply means that it is not the case that whatever one's circumstances any food-providing option is better than any liberty-enhancing one, nor is the opposite true. At the same time it is not the case that, whatever the circumstances, any option of the one kind is of equal value to any option of the other kind. One would expect type incommensurability to be true of all or at least most natural types. But the incommensurability we are interested in is that of individual options. Is there conceptual room for it?

Assume that we start with two options, A and B, of which the first is the better one. Gradually improve B and reduce the value of A. There must, it seems, come a point where they are equal in value. Clearly this argument is based on confusion. It presupposes, for example, that degrees of improvement are infinitely divisible. Only then is there any reason to expect that one option would be level with the other before it surpasses it. Of course, the disappearance of the point of equality does not yield incommensurability. It means that one jumped by too much and now B is better than A. So even if one assumes that what determines the value of different options is not indefinitely divisible, and that as a result precise equality cannot always be achieved, there is still no room for incommensurability. It means only that there might come a point when the smallest conceivable improvement in the value of the lesser option makes it more valuable than the other one. There is no equality, but nor is there incommensurability.

The conceivability of incommensurability has to be established in two steps. First, one must give it an interpretation which explains in what way incommensurability differs from equality of value. The definition leaves one with

the uncomfortable suspicion that they are merely different names for the same thing. Secondly, one must provide some account of how that conceptual possibility might be realized. Otherwise the suspicion that, though the definition is clear enough, there is a conceptual impediment to the existence of incommensurabilities is bound to linger.

To begin with, however, let us note that the definition allows for two distinct types of incommensurability. *First*, there is the case in which it is false that of A and B either one is better than the other or they are of equal value. *Second*, there is the case in which this statement is neither true nor false.

I shall refer to the second as *indeterminacy* of value. For the most part when talking of incommensurability I shall have the first case only in mind. So far as I can see indeterminacy of value is an undoubted result of the general indeterminacy of language, which is itself a consequence of the indeterminacy of action and intention. Its importance lies in its general relevance to the understanding of language and of action. I am not aware of any very significant implications it has for practical thought. Except for the occasional incidental reference I will therefore disregard it from now on.

Let me start with the explanation of the difference between equality of value and incommensurability. One way of bringing out the difference is by saying that if two options are incommensurate then reason has no judgment to make concerning their relative value. Saying that they are of equal value is passing a judgment about their relative value, whereas saying that they are incommensurate is not. I shall return to this contrast later; but first let us mention another way of stating the difference.

Incommensurability implies (subject to a reservation to be entered below) that an option may be better than one of two incommensurate options without being better than the other. In this respect incommensurability is unlike equality. What is better than one of two equal options is necessarily better than the other. We can illustrate the idea by looking at another concept with a similar structure, that of resemblance. John Mackie explains:

> [C]onsiderations may be imperfectly commensurable, so that neither of the opposing cases is stronger than the other, and yet they are not finely balanced. Consider the analogous question about three brothers: Is Peter more like James than he is like John? There may be an objectively right and determinable answer to this question, but again there may not. It may be that the only correct reply is that Peter is more like James in some ways, and more like John in others, and that there is no objective reason for putting more weight on the former points of resemblance than on the latter, or vice versa. While we might say that Peter's likeness to James is equal to his likeness to John . . . this does not mean that any slight additional resemblance to either would decide the issue; hence it does not mean that this equality expresses an improbably exact balance.[1]

The test of incommensurability is failure of transitivity. *Two valuable options are incommensurable if (1) neither is better than the other, and (2) there is (or could be) another option which is better than one but is not better than the other.*

This failure of transitivity is of great importance, for so many assume that if A is not worse than B and C is better than A it follows that C is better than B. This is a *non sequitur*. In the study of people's actual valuations of different options, reliance on transitivity of this kind often leads the researcher to find either irrationality, or hidden preferences which restore transitivity, where neither exists. Revealed preferences are a very incomplete and misleading clue to people's valuations. These can be accurately gauged only if one takes account of people's own reasons for different valuations (a delicate task which is in principle incapable of completion, as it is impossible completely and exhaustively to describe a person's set of values at any given time). Their reasons may reveal belief in incommensurability without betraying irrationality.

We have here a simple way of determining whether two options are incommensurate given that it is known that neither is better than the other. If it is possible for one of them to be improved without thereby becoming better than the other, or if there can be another option which is better than the one but not better than the other, then the two original

[1] J. L. Mackie, 'The Third Theory of Law', *Philolophy & Public Affairs*, 7 (1977–8), 9.

options are incommensurate. I shall call this feature the *mark of incommensurability*. But remember that it is not its definition. While being, for most purposes, perfectly sufficient as a test of incomparability, it is not in fact a necessary condition of incomparability. It would have been a necessary condition had value been indefinitely divisible, i.e. had it been the case that between any two options which are not equal in value there is another (possible) option better than the one and worse than the other. But most values may well be discrete. If for one option to be better than the other it is necessarily the case that it is possible to perceive (in some appropriate sense of this word) the difference in their value then most values seem to be discrete. Be that as it may, if value is discrete then two options may be incommensurate even when they do not display the mark of incommensurability. That is it may be the case that neither of them is better than the other nor are they of equal value, and yet any conceivable option which is better than the one is better than the other. The same could be the case for any option worse than one of them. This shows that the mark of incommensurability should not be confused with its meaning. But it does not diminish its utility as a mark, a test of incommensurability which is likely to be adequate for all our purposes.

Given this account of the difference between incomparability and equality, let us proceed to the second stage and ask whether we have any reason to think that incommensurability is at all possible. The most important source of incomparability is 'incomplete' definition of the contribution of criteria to a value. This is most obvious where a value is a function of several criteria, so that a good novelist, for example, might be judged by his humour, his insight, his imaginativeness and his ability to plot. It is possible that our weighting of the different criteria does not establish a complete ranking of all possible combinations. In this example the different criteria are themselves evaluative ones. It is valuable to have insight, as well as to be able to invent plots, to be imaginative, etc. Incomparability can also exist if the value depends on a multiplicity of purely descriptive criteria.

There are at least two other sources of incomparability. First, indeterminacy results from vagueness and the absence of sharp boundaries which infect language generally and therefore apply to value measured by a single criterion as well. These apply even in cases in which a single descriptive criterion determines the value of options. Suppose one is judging how good a sign post is by its visibility. Its visibility depends, let us simplify, on its size only. The bigger it is the more visible it is, until it reaches a certain point beyond which its visibility declines (since it fills the horizon and is no longer easily seen as a single object). There is likely to be a range of sizes regarding which it will be neither true nor false both that different signs are of equal visibility and that one is more visible than the other.

Second, value is often determined by the probability that the option will produce certain effects. Judgments of probability are infected by considerable incommensurabilities of their own. These are contagious and are transmitted to the value of the relevant options. They do not depend on multi-criteria evaluations.

There is a strong temptation to think of incommensurability as an imperfection, an incompleteness. Why don't we develop the function from the different features to the overall valuation until it is complete and eliminate thereby all incommensurability? The mistake in this thought is that it assumes that there is a true value behind the ranking of options, and that the ranking is a kind of technique for measuring this value. It is true of course that when we express a judgment about the value of options we strive to identify what is true independently of our valuation. But the ranking which determines the relative value of options is not a way of getting at some deeper truth, it constitutes the value of the options. Values may change, but such a change is not a discovery of a deeper truth. It is simply a change of value. Therefore, where there is incommensurability it is the ultimate truth. There is nothing further behind it, nor is it a sign of an imperfection.

Mackie emphasized marginal, small-scale incommensurabilities. It may readily be agreed that small pockets of incommensurability abound. That is, it may be

agreed that people's judgments of value are not very fine, so that most options are surrounded by margins of incommensurability. I value a walk in the park this afternoon more than reading a book at home. But one can successively change the odds, making the park a little windier, the book accompanied by a glass of port, until one would say that neither is better than the other. At this point it is almost always possible to imagine a small but definite improvement in one option which will not be sufficient to make the improved option better than the other. Imagine that I am indifferent as between a walk in the park and a book with a glass of Scotch at home. It is possible that though I will definitely prefer (*a*) the book with a glass of port to (*b*) the book with Scotch, I am indifferent as between either and (*c*) a walk in the park. This establishes that I regard (*a*) and (*c*) as incommensurate. It seems plausible that normally people's valuation of options allows for marginal incommensurability of this sort. Furthermore, it seems plausible that they are not always wrong when their evaluations are incommensurable, i.e. that marginal incommensurability is a feature of sound practical reasoning generally.

Marginal incommensurability creates bounded areas of incommensurability, pockets of breakdown of comparability which may be regarded as no threat to the consequentialist position. Once you make one option not merely definitely and perceptibly, but also significantly better than the other it becomes better. These cases pose a theoretical puzzle for the consequentialist who has to adjust his assumptions to cope with them, but they need not undermine his substantive beliefs about the way people should behave, since they are marginal cases, bounded by the test of significance. The real question is whether there are cases of significant incommensurabilities.

2. *Incommensurability and Rough Equality*

There are plenty of insignificant incommensurabilities. Here are two cups, one of coffee and one of tea. As it happens (*a*) neither is of greater value to me than the other; (*b*) warming the cup of tea a little will improve its value; and (*c*) the

improved cup of tea will be neither better nor worse than the cup of coffee. Hence the two cups are incommensurate in value. What could be more trivial than that?

The very possibility of significant incommensurabilities appears to be mysterious. Some people say that the only significant failure of comparisons is of a different kind altogether, i.e. it is a case in which two options cannot be compared in any way. This *radical incomparability* excludes even the possibility of judging that of two options neither is better nor are they of equal value. That judgment is itself, I take the claim to be, a comparison of their value ending with a negative conclusion. Radical incomparability does not leave any room for any comparisons whatsoever, not even negative ones.

This seems to be a confusion. It mistakes the meaning of incomparability as we have been using the expression. Statements of incommensurability, i.e., statements that of two options neither is better nor are they of equal value, do not compare the value of options. They are denials that their values are comparable. Incommensurability is not yet another valuation of the relative merits of two options alongside such valuations as having greater value or having equal value. It is a rejection of the applicability of such judgments to the options in question.

That having been said, it is true that we can distinguish the narrow meaning of incommensurability, i.e. that it is false that one of the options is better and false that they are of equal value, from the broader meaning of the term which does leave room for another kind of failure of comparability, the one we called *indeterminacy*. The radical incomparability I vaguely described above seems to be nothing other than indeterminacy. But far from being the only true and radical case of breakdown of comparability, completely different from our insignificant incommensurabilities, indeterminacy seems to be a less dramatic case of wide incommensurability. I adverted to vagueness and indeterminacy of language as sources of indeterminacy of value-judgment. It was not my intention to suggest that such indeterminacy is trivial or unimportant in people's lives. It may profoundly affect lives which are caught in its web. But it seems to me that the

issues of its significance are the same, and trail the general issues of the significance of narrow incommensurability. From the point of view of the explanation of practical thought it does not represent any special important issues.

Just as it is misleading to aspire to some deeper true incommensurability, more profound than the notion we have in mind, so it is misleading to dismiss the significance of incommensurability of our kind on the ground that it simply means *rough equality*. If A and B are roughly equal then the difference in their value is not great. A may be better than B and yet be also roughly equal to it. This is not a trivial point. To establish rough equality one needs, it would seem, some way of measuring the difference in value and establishing that it is not great. This is easiest when distances between options are susceptible to cardinal measurement. Clearly not all options are susceptible to this, and none of those which are incommensurate are. Can rough equality consist merely in certain ranking relations? It is arguable, for example, that if every possible option that is better than A is also better than B and every possible option that is worse than A is worse than B and vice versa, then A and B are roughly of equal value. This condition can be met even if A and B are not of the same value provided there is some conceptual or principled impossibility of indefinite divisibility. It could then be the case that A is better than B, or vice versa. But it could also be that they are incommensurable, and still roughly of equal value.

Considerations to be advanced in a moment suggest that this condition is insufficient to establish rough equality of value. In any case the condition is clearly inadequate for its task. It fails, for example, to identify as insignificant the difference in the value of the cups of tea and coffee we started with. In fact it fails to discover rough equality among any options which meet the test of the mark of incommensurability. It is the mark of incommensurability that it fails, that there are possible options better than A and yet not better than B, or vice versa. Only incommensurabilities which cannot be identified by this test turn out to be between roughly equal options.

But can the two cups of our example really be of roughly

equal value? I said that it seems as if rough equality presupposes an ability to establish that the gap between the value of the two options is not great. It presupposes, in other words, or seems to, a comparative judgment of the value of the two options. But did we not say that incommensurability is defined as the denial that such comparisons are true of the options concerned? If so then by definition incommensurability is incompatible with rough equality. But then the two cups are not of roughly the same value.

Something has gone seriously wrong. It seems that we have been looking at the wrong kind of criterion for rough equality. It seems that there are criteria which have nothing or little to do with the ranking of the options concerned. Let us make a fresh start and accept that two options are of roughly equal value if one is right to be indifferent between them, i.e. if little depends on which is chosen, if it does not matter which one chooses. Perhaps this condition obtains sometimes even among incommensurabilities.

Indeed the new test seems to reverse the situation. It now seems that all incommensurables are necessarily roughly equal in value. The argument is simple:

(1) Two options are roughly equal if and only if it does not matter which one is chosen, if it is right to be indifferent between them.
(2) What rightly makes one care about which option to choose is that one is better supported by reason than the other.
(3) There is no reason to prefer either of two incommensurable options.
Therefore, all incommensurables are of roughly equal value.

Since I approve of the new test, subject to a clarification to be made in a minute, the only way to avoid the conclusion is to challenge the second premiss. It appears solid. Is not the existence of a reason to prefer one option to the other what makes the choice significant? Do we not say that if the options are of equal value then it does not matter which one is chosen? But on reflection it turns out that (2) is false, and owes its intuitive appeal to a confusion between it and:

(2[1]) What rightly makes one care about which option to choose is that each is supported by weighty, and very different reasons.

Let us take as our example the case of a person who has to choose between two options. The one will irrevocably commit him to a career in law, the other will irrevocably commit him to a career as a clarinettist. He is equally suited for both, and he stands an equal chance of success in both. It seems to me that this is the sort of decision that anyone facing it quite rightly cares a lot about. It is a choice that one ought not be indifferent to, or unconcerned about. To be indifferent to this kind of choice is not to have a proper respect for oneself.[1]

Furthermore, I can be certain of all I have just written while not knowing whether or not either the legal or the musical option is better than the other. Assume, for example, that neither is better than the other. It hardly needs arguing that in that case they are incommensurable. The suggestion that they are of exactly the same value cannot be entertained seriously. One would still be greatly and rightly concerned about the choice. It is one of major significance for one's life. The example shows that we can judge the importance of the reasons for two options without judging their relative importance. This is hardly surprising. As was pointed out in the last chapter, the more comprehensive an option is, i.e. the more aspects of one's life it affects, the more important it is, other things being equal. It follows that incommensurable options can be of roughly equal value. But that they need not be. The choice between them can be the most momentous choice one will ever face.[2]

Three clarifications may help to bolster the argument.

[1] It will be noticed that I declined to follow the oft repeated advice to separate issues of the logic or structure of value from substantive questions of what is valuable. I doubt whether there is any sharp or significant divide between questions of rationality, of the structure of comprehensible practical thought, and substantive evaluative issues, such as the nature of individual well-being, what makes a person better off.

[2] The ability to classify two options into one class of value, e.g. determining that each is quite valuable but not very valuable, does not establish rough equality of value. It all depends on how significant the differences are between options in one class. They may be very great indeed, as are the differences between all options which have a positive value.

First, notice that not only the importance of the reasons for the options, but also the degree to which they differ, determine the significance of the choice. Suppose one's choice is between a post with Slaughter & May and one with Freshfields. Each is as comprehensive a choice as the one in our previous example. But, different as those much respected firms of solicitors are, the differences between the reasons for the options pale into insignificance compared with the ones in the other example. Consequently the choice itself is much less momentous, even though, precisely because the reasons are more of a kind, one of the options is much more likely to be a better one than in our other case.

Second, the significance of a choice turns out to have little or nothing to do with the fact that one option is better than the other. Brown bread is definitely better than white. But the choice can hardly be deemed to be a very significant one. One does not care much which one chooses. Premiss (2) above is altogether wrong. It follows that if there are no significant choices between options of exactly equal value that is because there are no options of equal value among those supported by weighty and very different reasons. This seems to me correct. But that is another story.

Third, we have discovered that there are two different notions of rough equality of value. The one presupposes a measure of value to establish that the options are close in value. The other depends on the significance of the choice between the options. The first does not apply to incommensurable options since by definition one cannot measure the gap in value between them. The second does apply. It reveals that some of these options are of roughly the same value while others are not. The difference between the significant and the trivial breakdown of comparability is not a difference in meanings of incommensurability, but in the significance of the choice between different incommensurable options.

The puzzle we began with was: how can incommensurability be anything other than trivial? It attests to the indeterminacy of reason. Where the considerations for and against two alternatives are incommensurate, reason is indeterminate. It provides no better case for one alternative

than for the other. Since it follows that there is no reason to shun one of the alternatives in favour of the other, we are in a sense free to choose which course to follow. That sense of freedom is special, and may be misleading. It is unlike the situation where one course of action is as good as the other. It is indifferent which action we take. They are equally good and equally bad. Incomparability does not ensure equality of merit and demerit. It does not mean indifference. It marks the inability of reason to guide our action, not the insignificance of our choice.[1]

How can that be? We are not concerned with the inability of reason to guarantee that we are guided by it. Our perennial ability to act irrationally is not in question here. Nor are we questioning the fact that many aspects of every action are not in fact guided by reason. Those aspects of an action which constitute a person's style are an obvious example. Normally one does not reason about one's body posture, manner of movement or speech, and the like. But all these can become subject to reasoning. One may, as an actor might, plan carefully every aspect of one's gait and demeanour. Incommensurability speaks not of what does escape reason but of what must elude it. This too is unremarkable if what eludes it is insignificant. We are unperturbed by the pervasiveness of insignificant incommensurabilities of the kind instanced in Section 1 because they apply to insignificant choices. It does not matter whether I stay at home to read a book or go for a walk in the park if there is no reason to prefer one course of action to the other.

We sought the explanation in the consequences of the choice. The consequences may transform the nature of a person's project, or change the relations between him and the people closest to him. When a choice between two incommensurate alternatives has such far-reaching consequences it is a significant choice, even though reason fails to provide complete guidance. It is a mistake to think that if the consequences are momentous they will translate into

[1] To be precise there are reasons for (and against) each of the incommensurate options, and these may be enough to determine their ranking as against other options. But in the choice between the incommensurate options reason is unable to provide any guidance.

reasons for one action or the other which will make the choice determined. For one thing, the consequences may be of a kind that should not guide one's action (as when one should act out of friendship and fellow feeling and not on the ground that one's help and support will be appreciated and reciprocated). For another, even where they guide one's choice they may fail to determine its outcome. The choice between looking after an aged parent and getting married in order to have a family of one's own is momentous in its consequences. It should be informed by knowledge of these consequences. And yet they may well fail to yield a determined outcome, a definite right or wrong, wise or foolish decision.

3. Denying Comparability

The argument so far was meant to cut through the conceptual fog and to establish the possibility of significant incommensurablity. It did little to demonstrate its existence or to explain why it arises, and what if any positive role it plays in our practical thought. Before we tackle these tasks (in the next section) it would be helpful to reflect on another aspect of the methods employed to establish what is the comparative value of options in the eyes of people. These reflections yield a brief, abstract argument for the existence of significant incommensurabilities.

In a lifetime an individual passes judgment on the relative value of a large number of alternative options, but they are inevitably a small proportion of all possible comparative judgments. Theories which provide general recipes for comparing values, when they are not victims of the illusion that revealed preferences provide the clue to their problem, begin by establishing people's actual judgments on the relative value of options, and extrapolate principles which can be applied generally and without restriction to any pair of alternatives. Unrestricted generality is built into the theory-forming process as a theoretical desideratum. The question of incommensurability is begged without argument. Suppose we give it a fair hearing. What can be said in favour of significant incommensurability?

To start with, having abandoned the methodological preference for unrestricted generality, we are free to take seriously the fact that people not only form judgments of the comparative merit of some options but also deny the comparability of others. Not surprisingly in a given culture these reactions tend to be widely shared. It is common to deny, for example, that the comprehensive goals discussed in the previous chapter are comparable in value. People are likely to refuse to pronounce on the comparative value of a career in teaching and in dentistry. They deny the comparability of playing a musical instrument and cycling to visit old churches as pastimes, etc. Such judgments of incomparability may be expressed in a variety of ways. We should not be surprised if as often as saying that such options are incomparable people will simply refuse to compare them, or will say that there is nothing to choose between them, or will express ignorance as to their comparative value, etc. Their true meaning can be established in the ways described in the previous sections. If people's evaluations can form a foundation for a general theory of comparative value judgments, perhaps people's refusal to evaluate could provide a pointer to the existence of one class of significant incommensurability. Simple non-valuations may be significant as well. But they may also be accidental. Refusals to evaluate must be significant.

Their significance is, however, problematic. One may point out, first, that while people reject the thought of comparing the value of various options when the question is raised in the abstract, they do make decisions about tradeoffs when the issue is forced on them by the circumstances of their lives. Second, even while refusing to make comparisons, people are engaged in choices that imply such comparisons. For example, one may refuse to admit the comparability of married life in modest circumstances with life as a rich single person while preferring cohabitation to marriage for tax or similar reasons, and agreeing to part with one's partner in order to go abroad and make money for several months. Could not one combine these valuations of the symbolic significance of the marriage bond with the valuation of the worth of actual companionship and, with

the addition of other similar indicators, conclude what value that person, his protestations to the contrary notwithstanding, really does assign to his marriage?

The problem with pursuing this suggestion and trying to work out the comparative value people assign to options that they refuse to compare is that it leaves out of account the refusal to compare values itself. It bypasses and ignores it. To do so is to falsify people's judgments of comparative value. One retort is that the refusal is not ignored. While it is denied relevance to the valuation of the options one is refusing to compare, it is given its proper and separate place as being a negative valuation of the activity of comparing values. If Judy refuses to judge whether she values her friendship with John more or less than she values $1,000,000, she nevertheless does regard it as worth either more or less or precisely the same as $1,000,000, but she also values not thinking about this question. Hence her refusal to compare.

Judy's reply is that she does not mind taking time off and answering the question about the comparative value of her friendship and the money. All she meant is that they are incommensurate, and that is the answer. There is no thought she refuses to entertain. Only an a priori commitment to commensurability can lead one to misrepresent her belief in the incommensurability of two options as a negative valuation of a third option. Later on we will see that an emotional response to attempts to press on one comparisons of incommensurable options is a natural and justifiable concomitant of some judgments of incommensurability, as is the reply that one of the incommensurable options 'is not an option one would even consider' as an alternative to the other. But neither fact can be equated with putting a negative value to the activity of thinking about the question. Those thoughts are pointless and annoying. But the annoyance and feelings of pointlessness are not to be equated with judgments of incommensurability. They are sometimes absent, as in most cool philosophical discussions, while the judgments which normally trigger them remain.

The defender of commensurability may remain unimpressed by his inability to explain refusals to compare

value. He will say that whatever the explanation it is not that the person who denies that two options are comparable really finds them incommensurate. He will rely again on the two reasons mentioned above. First, when a choice is forced on the person he will prefer one option to the other, and his choice is not arbitrary. It may well, for example, be predictable. Second, one is able to extrapolate his relative evaluation of the options he refuses to compare on the basis of other comparative judgments he is happy to make. The very person who denies that one can measure the value of friendship in money or in other commodities is often willing to sacrifice a friendship for a job which takes him to a different part of the country. The same person may well decline the offer of the job for the sake of which he will sacrifice a friendship if an opportunity for an equally well-paid job arises in his own town. So he is in effect trading a friendship for money, and by extrapolation its rough monetary value can be established.

Both reasons are, however, illegitimate. The second, extrapolation, relies on transitivity and commensurability. It therefore begs the question. Our analysis of incommensurability does, at the same time, block the consequentialist first move. The ability and willingness to choose does not depend on valuing the chosen option more than the rejected one. One is able to choose when the two are of exactly the same value, as well as when they are incommensurate. The fact of the choice does not reveal why it was made. The chooser may even have chosen the less valued option, as in cases of weakness of the will. Nor is the fact that the choice is not arbitrary sufficient to establish that it was done because the chooser values the chosen option over its alternative. The choice is not arbitrary in one or both of two respects. First it may be based on a reason. Though the reason is incommensurate with the reason for the alternative it shows the value of that option and when that option is chosen it is chosen because of its value. Second, the choice may be in character. The chooser is the kind of person who would choose thus in the prevailing circumstances. But far from his non-arbitrary choice necessarily reflecting his valuation, it may even run contrary to it, as it does if he is prone to weakness of the will in certain circumstances.[1]

There is a further difficulty which the supporter of commensurability must face, and it brings us to the heart of the matter. His tests for assigning judgments of comparative value to people must satisfy the condition that their application does not change those people's judgment of comparative value. It will be conceded that often when people are forced to choose between what they hold to be incommensurable options they will at the time of choosing or subsequently come to hold views concerning the comparative value of these options. But do these views reflect their previous beliefs, or are they new beliefs acquired under the impact of the forced choice? If one takes seriously the early sincere refusal to compare the value of the different options then one must conclude that the test changed these people's valuations rather than revealed them. The normal assumption to the contrary is based on the a priori methodological commitment to commensurability.

Saying that two options are incommensurate does not preclude choice. Rational action is action for (what the agent takes to be) an undefeated reason. It is not necessarily action for a reason which defeats all others. We are, it is essential to remember, inquiring into the structure of practical reasoning, i.e. of the ways people conceive of themselves and their options and judge them. Psychological or other theories may explain, even predict, people's choices on some of the occasions in which they find their options to be incommensurate. This is compatible with widespread incommensurability. While the agent's reasoning figures in many explanations of behaviour there are other factors which also play a part.

Often a mounting pressure to choose leads to the formation of a judgment of comparative value. The agent will come to think that one option is better than another. But this, far from revealing the agent's antecedent view of the comparative value of the options, indicates a change in his judgment. Sometimes those changes are dramatic and far-

[1] To claim that actions which are in character reveal unconscious valuation is to misunderstand the role of valuation in a person's life. Cf. above p. 291.

reaching. Having made certain agonizing choices we feel that we will never be the same again. We often refer to loss of innocence on such occasions. To a certain extent this is part of everyone's growing up. We learn to confront choices which are 'part of life'. The occurrence of such changes of valuations in growing up shows that they need not be, and mostly are not, very dramatic. They are part of a continuous process of revaluation which we undergo throughout life. But not all incommensurabilities are eliminated in this way. Many remain, and some of them play a special positive role in our lives.

4. *The Incomparability of Comprehensive Goals*

People have certain biologically determined needs. Most of them do not essentially involve meaningful relations with another person, though many become, in most cultures, the foundations of such relations. Though the satisfaction of these needs to a certain level of adequacy is necessary for people's well-being it is not sufficient. All except those who live in circumstances of the most severe deprivation, have aspirations, projects and preoccupations which far transcend the satisfaction of the bare biologically determined needs. Certain aspirations are of such value that those who do not share them are impoverished by that alone, however successful they are in the pursuits in which they actually engage. I will be concerned exclusively with these aspects of personal well-being.

In the previous chapter it was argued that people endorse their pursuits, relationships, and all they care about for reasons. That is, that they have them because of their belief in their value. Now I wish to suggest that in many cases those reasons are indeterminate in the following sense: but for the fact that the project, pursuit or relationship is one the person concerned is already engaged in, if he is, the reasons for him to be engaged in it are incommensurate with reasons for him to engage in some other projects, pursuits, or relationships, which are incompatible with those he has.

There are two aspects to the proposition. First, the value of many pursuits to people other than the agent, their value

to society, cannot be compared with the value of many alternative pursuits. Second, their value to the agent, their contribution to his well-being, cannot be compared with that of many others. Some pursuits are of value to society, either instrumentally or intrinsically, more than others. Which is more valuable varies with the circumstances of a particular society. There are times when a career as a medical practitioner does more good than a career in medical research. There are times when the reverse is the case. But in many circumstances such judgments regarding certain options are out of place. Both pursuits are valuable, but it makes no sense to say that one is more valuable than the other nor that they are of equal value. Most of the time this will be true of medical research and medical practice, as well as of a career as a book illustrator or a pig farmer, or an electrical engineer, or a product designer for a manufacturer of household goods, etc.

It is customary to concede that often we do not know which pursuit is more valuable to society, but it is always one or the other or they are of equal value. Our ignorance is due to incomplete information. This response is all the more plausible since often it is indeed the case that ignorance alone stops us from discovering which pursuit is the more valuable to others in the circumstances. But if the contribution of various events to the agent's well-being is incommensurate it is hard to avoid the conclusion that so is their contribution to the well-being of others.

Suppose one compares the option of a career in law with a career in teaching. Suppose, to simplify, that if one were a teacher one would encourage some pupils to become (successful) solicitors who would otherwise have become (successful) general practitioners, and that that is all the significant difference one's becoming a teacher would make to others. If one became a solicitor, we will again assume for the sake of simplicity, one would prevent the dismissal of several employees of the Central Electricity Generating Board, who, had they been dismissed, would have started a small business as contractors for electrical jobs. If the well-being of the pupils under the one scenario is incommensurate with their well-being under the alternative

tributes to avoidable aspects of life.[1] My argument concerns only dilemmas between what is avoidable in principle but cannot be avoided in particular conditions.

Given that the value of an action is in general independent of the ability to choose it in particular circumstances, to complain that it does not have a negative value because one cannot avoid it or a positive one because one cannot choose it is to commit the unforgivable sin of irrational optimism, i.e. of believing that not only can one always do what is best in the circumstances (which is in itself doubtful) but that whatever the circumstances, the possibilities they offer the agent determine what is valuable and what is not. Nobody I know is guilty of this sin. But many are willing to believe that while it is possible that one's circumstances will present one only with poor choices they cannot be so bad as to leave one with no option but to do wrong. The explanation offered for that belief is that judging that in every situation there is at least one option which is not wrong is not judging the value of the option, but rather offering advice about its eligibility compared with the others. There is no denying that many judgments do precisely that. The point is that where an agent is faced with only two options and they are incommensurable that kind of judgment is out of the question. One cannot compare the value of the options, one can only judge their value each one on its own. If each involves wrongdoing then there is no escaping the conclusion that whatever the agent does he will do wrong.

To summarize the argument so far: the moral character of an action as wrong or evil serves as a guide to the agent, as a reason for his action, because reasons for action follow the value of what they are reasons for. That value is there independently of one's ability to choose or to avoid it on this particular occasion. When an evil action is unavoidable it is still evil. It is evil, ultimately, because of what it does to the well-being of the agent and of others. It does the same even when the only way to avoid it is to perform another evil action.

[1] These remarks are in line with Ruth Marcus 'Moral Dilemmas and Consistency', *Journal of Philosophy*, 77 (1980), 121, and R. Chisholm, e.g. in 'Practical Reason and the Logic of Requirement', J. Raz (ed.) *Practical Reasoning*, Oxford 1978.

This argument takes us beyond dilemmas which involve incommensurabilities and opens the way to an explanation of the first kind of dilemmas. They are those which involve a choice between a lesser and a greater evil, where it is right to do the lesser evil and wrong to do anything else, and where one may yet claim that one did a wrong even while doing the right thing. In other words, they are cases where the fact that one's best option involves wrong doing does not erase the wrongful character of the action. They are moral dilemmas because they are cases in which the act which is morally required of one is wrongful. Those who think of the moral character of actions purely in term of the guidance they give agents will find this description incomprehensible. Those who remember that guidance depends on the value of the action will see the possibility that in certain regrettable circumstances one may be morally guided towards an action which is wrongful, and its wrongfulness is not negated by its being the best of what is available. It is yet again a situation where the act will damage the agent's well-being, and often that of others as well. In that it is a wrongful act even as the agent has no morally acceptable way of escaping it.

To avoid any possible misunderstanding let it be repeated that the claim here made is not that the action is wrongful because it adversely affects the agent's well-being. Rather it adversely affects his well-being because it is wrongful. The relevance of pointing out its consequences to his well-being is to counter the objection that saying of an action one cannot escape that it is wrongful is idle and confusing talk. It is a bad action but being the best in the circumstances there can be nothing one may convey except confusion by saying that it is wrongful. To this charge the answer was that there is a difference between performing a bad action where the circumstances not only make its performance unavoidable but erase its character as wrongful, and those cases when they do not. In the second kind of case only do the dire consequences to the agent's well-being follow the action. (People who are not in this situation may mistakenly think that they are. They may for no good reason regard their actions as having sealed their fate, and condemned them to abjure any close relations, any possibility of meaningful life.)

Several important questions remain to be considered. In particular, why does an action which is inevitable affect the agent's well-being when this is understood as the success of his life? If it does why does it have moral colouring? Failure in a piano competition may undermine a pianist's well-being. But it has no moral connotations. Can the inevitable be morally significant? All these questions ultimately come to this: what sort of consequences to the agent's well-being can flow from his immorality? Does not morality affect the fate of others, while prudence alone matters to the agent's own well-being?

The answers are implicit in the analysis of personal well-being and of its relation to morality offered in Chapter Twelve. Disregarding yet again the important class of biologically determined needs, the success of a person's life depends on the success of his pursuits and relationships. This depends in part on his success in achieving his goals, and in part on the value of these goals. If he fails to achieve his goals his life is, at least to a certain extent, a failure. The shape of his goals is not entirely up to him. They are so many variations on the social forms available to him. Therein lies the possibility of tragic choices, i.e. choices under circumstances in which whatever a person does he would irreparably damage one of the projects or relationships which he pursued and which shape his life. It may even be a choice which will make it impossible for him to have a life worth living. Such dilemmas are moral dilemmas when the goals they involve are among those where the demands of morality and the conditions of the person's own well-being coincide.

V

FREEDOM AND POLITICS

The traditional autonomy-oriented conception of individual freedom, of which the views defended in this book are a variant, leads to a 'moralistic' doctrine of political freedom, i.e. one based on the moral value of individual liberty. Part Four, partial and incomplete though its argument was, laid the required moral foundations for this conception. It outlined the features of a theory of value necessary for an adequate defence of political liberty. They provide the foundation for the examination in Chapter Fourteen of personal autonomy and of value-pluralism. Between them these two doctrines define the view of personal freedom which is defended in this book, and provide it with a basis in the moral outlook explained above. Finally, Chapter Fifteen outlines the implications for political action of this conception of pluralism. In many ways the argument seeks merely to reestablish some of the basic tenets of Millean liberalism. Chapter Fifteen proposes a reinterpretation of Mill's harm principle, and points to the ways in which it has to be transcended. Personal freedom, when understood as presupposing value-pluralism and as expressing itself in personal autonomy, can and should be promoted by political action. The interpretation of the political protection of freedom as purely a doctrine of limited government finds no support here. But with all that, respect for liberty imposes on governments the sort of constraints advocated by the reinterpreted harm principle. It should form part of the doctrine of liberty.

dominant liberal one then clearly one should take whatever action is necessary to protect it. The difficulty arises for those who believe the illiberal culture to be inferior to theirs. Should they tolerate it?

The perfectionist principles espoused in this book suggest that people are justified in taking action to assimilate the minority group, at the cost of letting its culture die or at least be considerably changed by absorption. But that is easier said than done. Time and again I have emphasized that people can successfully enjoy an autonomous life only if they live in an environment which supports suitable social forms. By hypothesis members of the autonomy-rejecting group lack this support in their communities. Wrenching them out of their communities may well make it impossible for them to have any kind of normal rewarding life whatsoever because they have not built up any capacity for autonomy. Toleration is therefore the conclusion one must often reach. Gradual transformation of these minority communities is one thing, their precipitate disintegration is another. So long as they are viable communities offering acceptable prospects to their members, including their young, they should be allowed to continue in their ways. But many of them are not self-sustaining. Often it is clear that they cannot be expected to survive for long as an isolated group in a modern society. Sometimes they survive as a dwindling community through the forceful stand of some of their members who sometimes combine with misguided liberals and conservatives to condemn many of the young in such communities to an impoverished, unrewarding life by denying them the education and the opportunities to thrive outside the community. In such cases assimilationist policies may well be the only humane course, even if implemented by force of law.

These remarks are of course abstract and speculative. They are meant to indicate the direction in which the conclusions of this book lead, rather than to deal with the issue in depth.

5. *The Shape of Freedom*

The moral outlook the implications of which we have explored is one which holds personal autonomy to be an essential element of the good life. We saw that such a morality presupposes competitive pluralism. That is, it presupposes that people should have available to them many forms and styles of life incorporating incompatible virtues, which not only cannot all be realized in one life but tend to generate mutual intolerance. Such an autonomy-valuing pluralistic morality generates a doctrine of freedom. It protects people pursuing different styles of life from the intolerance which competitive pluralism has the inherent tendency to encourage, and it calls for the provision of the conditions of autonomy without which autonomous life is impossible.

Three main features characterize the autonomy-based doctrine of freedom. *First*, its primary concern is the promotion and protection of positive freedom which is understood as the capacity for autonomy, consisting of the availability of an adequate range of options, and of the mental abilities necessary for an autonomous life. *Second*, the state has the duty not merely to prevent denial of freedom, but also to promote it by creating the conditions of autonomy. *Third*, one may not pursue any goal by means which infringe people's autonomy unless such action is justified by the need to protect or promote the autonomy of those people or of others.

We explored the limits of the doctrine, which are two. First, it does not protect nor does it require any individual option. It merely requires the availability of an adequate range of options. We saw that this lends the principle a somewhat conservative aspect. No specific new options have a claim to be admitted. The adequacy of the range is all that matters, and any change should be gradual in order to protect 'vested interests'. Secondly, the principle does not protect morally repugnant activities or forms of life. In other respects the principle is a strong one. It requires positively encouraging the flourishing of a plurality of incompatible and competing pursuits, projects and relationships.

It turns out that this autonomy-based doctrine of freedom implies the harm principle. Like it it yields the conclusion that one may not use coercion except to prevent harm. It does so only by embedding the harm principle in a moral

outlook which, by relating it to a particular conception of individual well-being, gives the notion of harm concrete content. Not all the traditional supporters of the harm principle will welcome its vindication in this form. It is embraced not as a complete doctrine of political liberty but as one element of a wider doctrine. It is a consequence of the third proposition in the enumeration above. It is itself part of a perfectionist doctrine which holds the state to be duty-bound to promote the good life. It stops at coercion and manipulation only where their use would not promote the ability of people to have a good life but frustrate or diminish it.

This view differs both from some common liberal and from some common collectivist beliefs. On the one hand some will protest that the perfectionist approach advocated here overlooks the need to shun paternalistic measures for they offend human dignity. Respect for people as responsible moral agents, it is said, is inconsistent with paternalism. It requires leaving people to make their own decisions. I have argued against the simplistic presuppositions of this view. It disregards the dependence of people's tastes and values on social forms, on conventions and practices which are the result of human action (though usually not of action designed to achieve these results).

Respect for persons requires concern for their well-being. It calls for a proper perception of the importance of agency reason. This means a conception of well-being assigning a central role to the agent's own activities in shaping his well-being. An autonomy-based morality is not only consistent with these precepts, it goes further in demanding that people should be allowed freely to create their own lives. This is not only consistent with perfectionism. It requires it. It calls for the creation of conditions of valuable autonomy through the pursuit of perfectionist policies.

Its perfectionist character, the rejection of moral individualism, and the emphasis placed on the importance of collective goods bring the views here advocated close to various collectivist, or communitarian doctrines. They differ from many collectivist doctrines in that they do not lead to strong centralist government, nor to a radical programme of

change through political action. The espousal of a pluralistic culture, to the extent of supporting competitive pluralism, and the autonomy-oriented conception of personal well-being militate against support for a strong government. The role of government is extensive and important, but confined to maintaining framework conditions conducive to pluralism and autonomy.

Since values are grounded in concrete social forms there is no room for radical political action to secure a fundamental change of social conditions. Politics is the art of gradual amelioration. I mention these points briefly here because of their obvious bearing on the scope of legitimate government and therefore on individual freedom. They were not explored in this book, which was not concerned with the appropriate institutional framework suitable in the light of the moral outlook advocated above.

This brings us to the relation between the autonomy-based doctrine of freedom and the doctrine of legitimate authority espoused in the first part of the book. One way of explaining their relation views the autonomy-based doctrine of freedom as stating the ideal. The service conception of authority dampens expectations by bringing to mind the limited power governments have to do good, and the dangers that placing power in their hands will misfire and do more harm than good. The doctrine of autonomy-based freedom is not inimical to political authority. On the contrary, it looks to governments to take positive action to enhance the freedom of their subjects. This cannot disguise the dangers inherent in the concentration of power in few hands, the dangers of corruption, of bureaucratic distortions and insensitivities, of fallibility of judgment, and uncertainty of purpose, and, the limitation which perhaps goes deeper into the inherent weakness of all concentration of power, the insufficiency and the distortion of the information reaching the central organs of government.

These afflictions affect different countries and different constitutional structures in different ways. Each has its own weaknesses and its own strengths. Some governments can be entrusted with the running of schools which it would be wrong to entrust to another, and yet the second can be relied

upon to encourage technological innovation in discriminating and imaginative ways, whereas the first cannot—to give one contextless example. My point is that such differences are not merely the result of personalities. They are conditioned by the political culture of a country, by its constitutional history, by its methods of recruiting its political élite, and its relations to social and economic élites, and similar factors.

The study of these issues belongs to the theory of political institutions which must supplement any inquiry into political morality to give it concrete content applicable to the circumstances of a particular country. I mention their relevance because their presence affects in a radical way the degree to which one is willing to entrust any government with the tasks whose existence is indicated by the doctrine of freedom advocated in this book. I said that the limitations of governments force one to compromise the purity of the ideal doctrine of freedom. At the same time these limitations can be and are presented as one of the foundations of political freedom. Since power is corruptible, fallible and inefficient it should not be trusted. It should be hedged and fenced. The impotence of politics to do good, the unreliability of governments, is the basis of the freedom of the individual. This picture is both true and false.

It is true that it justifies restricting the right of governments to govern. It is also true that that limitation is based on concern for individual freedom and autonomy. To that extent a balanced view of the shortcomings of governments will lead to much more extensive freedom from governmental action than is entailed by the doctrine of autonomy-based freedom explained here. But this extension of freedom from governmental action is, in most cases, a result of a failure to achieve the full measure of freedom as a capacity for autonomy. The extended freedom from governmental action is based on the practical inability of governments to discharge their duty to serve the freedom of their subjects. And in most cases the result is that that freedom remains lacking. In most cases there is no other body nor any other social process which can achieve what government action

fails to, that is the existence of a full capacity for autonomy to all members of a community.

The shortcomings of governments are but one of the regrettable sources of political freedom. Another is the danger of civil strife. The pursuit of full-blooded perfectionist policies, even of those which are entirely sound and justified, is likely, in many countries if not in all, to backfire by arousing popular resistence leading to civil strife. In such circumstances compromise is the order of the day. There is no abstract doctrine which can delineate what the terms of the compromise should be. All one can say is that it will confine perfectionist measures to matters which command a large measure of social consensus, and it will further restrict the use of coercive and of greatly confining measure and will favour gentler measures favouring one trend or another. The main lesson is again the same. Such compromises promote freedom from government, and they do so because the adverse circumstances show that an attempt by the government to achieve more freedom will achieve less.

Freedom based on fear of civil strife, like freedom based on the unreliability of governments, depends on some doctrine of 'ideal' freedom. It presupposes an ideal doctrine of freedom, for it tells us when and how to compromise, just as the unreliability of government is measured by its inability to achieve the targets set by the doctrine of the 'ideal'. Furthermore these doctrines of freedom by necessity and compromise bring us the freedom of imperfection, the liberty from governmental action which all too often is an admission that perfect freedom is unobtainable.