

ROUTLEDGE REVIVALS

# **Liberalisms**

Essays in Political Philosophy

**John Gray**



## *Routledge Revivals*

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### **Liberalisms**

*Liberalisms*, a work first published in 1989, provides a coherent and comprehensive analytical guide to liberal thinking over the past century and considers the dominance of liberal thought in Anglo-American political philosophy over the past 20 years. John Gray assesses the work of all the major liberal political philosophers including J. S. Mill, Herbert Spencer, Karl Popper, F. A. Hayek, John Rawls and Robert Nozick, and explores their mutual connections and differences.

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# Liberalisms

The aim of this collection is to give a coherent and comprehensive analytical guide to liberal thinking over the past century and, more particularly, to consider the dominance of liberal thought in Anglo-American political philosophy over the past twenty years. It focuses on two fundamental questions about liberalism – what it is, and how it might be given a rational foundation. All of the essays seek to distinguish and assess the varieties of liberalisms which have prevailed in Anglophone political philosophy over the past century and to investigate how each of these might be justified. Accordingly, virtually all the major liberal political philosophers are examined – including J.S. Mill, Herbert Spencer, Karl Popper, F.A. Hayek, John Rawls and Robert Nozick – and their mutual connections and differences explored.

Given the liberal dominance of recent political philosophy, and the author's own contributions to its revival, his conclusion, that the liberal perspective has no privileged claim on reason, should interest all students of political thought.

**John Gray** is a Fellow of Jesus College, Oxford. This collection was prepared for publication by the author during a period of residence as Distinguished Research Fellow at the Social Philosophy and Policy Center, Bowling Green State University, Ohio.

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## **Preface and acknowledgements**

This collection, which begins and ends with a paper on J.S. Mill, contains a dozen essays, written over as many years, together with a new postscript written specially for this volume. The essays collected here were neither written nor selected haphazardly. They embody a single project, pursued continuously over the period in which they were written — the project of defining liberalism and giving it a foundation. The enterprise ended in failure. The upshot of the arguments developed in these essays is that the political morality that is constitutive of liberalism cannot be given any statement that is determinate or coherent and it has no claim on reason. The various projects of grounding liberalism (conceived as a set of universal principles) in a comprehensive moral theory — rights-based, utilitarian, contractarian or whatever — are examined in turn and found wanting. Recurrently in these essays, I conclude that a particular path of justification of liberalism is a dead end and a liberal ideology an impossibility — only to take up later another, and apparently more promising, justificatory strategy. When in the twelfth and last essay I conclude that no set of arguments is available which might ground liberalism and privilege liberal society over its rivals, this only voices definitively a suspicion that was with me from the first.

The aim of the postscript is to give in summary form a statement of the reasons for the indefensibility of liberalism as an ideology or general doctrine and to sketch the outlines of a post-liberal perspective on

government and society. In the postscript, I seek to show that the failure of liberal ideology is not to be lamented, since liberal political philosophy expresses a conception of the task and limits of theorizing that is hubristic and defective. The ruin of liberal political philosophy is only the most spectacular instance of the debacle of the received tradition, modern as much as classical, of philosophy as a discipline. In retrospect, then, the programme of these essays is to clear away the rubble, piece by piece, of the grand liberal theories, so as to open up a perspective in the political tradition we have inherited (and of which liberalism itself was a drastic abridgement). Indeed, if the later essays collected here had any practical goal, it was to protect the historical inheritance of liberal civil society from the rages of a fevered ideology which, throughout western society, and especially in America, threatens to squander that inheritance. It would be a hopeful augury if the current decomposition of liberal conventional wisdom — which this collection aims to bring to a conclusion — were to return us to a detailed investigation of the character and postulates of the forms of civil association that are most distinctive of our cultural tradition.

Conversations with a large number of theorists over the years have helped to crystalize the thoughts expressed in these essays. Among those to whom I would like to make a particular acknowledgement for stimulating and informing my thought on these questions are Isaiah Berlin, James Buchanan, David Gauthier, F. A. Hayek, Robert Nozick, Michael Oakshott, Karl Popper and John Rawls. Conversations with Jeffrey Paul and Ernest van den Haag have entered into the thoughts developed in several of the later essays. The conception of the scope and limits of political thought intimated in the postscript owes much to conversations over several years with Charles King. I am indebted to Jeremy Shearmur for suggesting to me that a collection of my essays on liberalism might be worth publishing. It should go without saying (but I say it nevertheless) that none of the persons whose help I have mentioned shares responsibility with me for the thoughts and arguments developed in these essays.

With the exception of a light editing in the interests of conformity of style, I republish these essays in their original form. The essays appeared first in the following publications, to which I am indebted for granting me permission to reprint them: ‘John Stuart Mill and the future of liberalism’, *The Contemporary Review* 220 (1328) September, 1976; The liberalism of Karl Popper’, *Government and Opposition II* (3) Summer, 1976; ‘Social

contract, community, and ideology', in P. Burnbaum, J. Lively and G. Parry (eds), *Democracy, Consensus and Social Contract* (Larden and Beverly Hills: Sage Publications, 1978); 'On negative and positive liberty', *Political Studies XXVIII*, 1980; 'Freedom, slavery and contentment' in D. Robertson and M. Freeman (eds), *Frontiers of Political Theory* (Brighton: Harvester Press, 1980); 'Hayek on liberty, rights and justice', *Ethics* 92 (1) October 1981; 'Spencer on the ethics of liberty', *History of Political Thought III* (3) Winter 1982; 'Indirect utility and fundamental rights', *Journal of Social Philosophy and Policy I* (2) Spring 1984; 'Liberalism and the choice of liberties', in T. Attig, D. Callan and John Gray (eds) *Restraint of Liberty*, Bowling Green Studies in Applied Philosophy, 1986; 'Contractarian method, private property and the market economy', in J.W. Chapman and J.R. Pennock (eds), *Nomos 31, Markets and Justice* (New York: New York University Press, 1988); 'Mill's and other liberalisms', *Critical Review* (New York) 2 (2) Summer 1988; 'Oakeshott on law, liberty and civil association' was published in a shorter version in *The World and I* (Washington) September 1988.

In addition to the above acknowledgements, I wish to acknowledge the support of the Social Philosophy and Policy Center at Bowling Green State University. Preparation of this volume was undertaken by me during a period of residence there as Distinguished Research Fellow. I am greatly indebted to the directors and staff of the Center for the assistance they have given me in preparing this volume for publication.

John Gray

August, 1988

## Chapter one

# **J.S. Mill and the future of liberalism**

If there is a consensus on the value of Mill's political writings, it is that we may turn to them for the sort of moral uplift that sustains the liberal hope, but we shall be disappointed if we expect to find in them much enlightenment about the urgent issues we face today. There are some, claiming access to new and greater truths, who do not hesitate to announce the obsolescence of that impassioned and reasonable liberalism which is the inspiration of all Mill's political writings. There are many others who will express their confidence that most of the causes for which Mill fought have now been safely won, and who accordingly deny to Mill's writing that contemporary relevance they undoubtedly possessed for their original readers. Most significantly, perhaps, there is a widespread impression in progressive circles that Mill's tentative and humane liberalism has little to say to the perplexed citizens of societies whose manifold crises demand bold and drastic measures. Whether the news is greeted with regret, complacency or acclamation, there are not many who doubt the accuracy of the report that Mill's liberalism is as dead as any tradition of political thought can be.<sup>1</sup>

Obituaries of this kind may be premature, however, and their currency should be a matter of concern for all liberals. Mill's liberalism has a relevance which transcends the conditions of the age in which he wrote, and it meets needs which are enduring and widely felt. Mill's writings contain

an argument for an open society which has not yet been decisively refuted, and of which every generation needs reminding: they are especially relevant to those sceptical of the claims of collectivist and totalitarian systems, who remain dissatisfied with any kind of purely defensive conservatism and seek a form of radicalism which is not afraid to contemplate the necessity of massive changes in current policies and institutions but which keeps a clear head about the dangers of all such large-scale social engineering. Those who are looking for an open-minded radicalism of this kind will find that Mill addresses himself to some of the most pressing problems that we face today. It is hard to believe that contemporary debate has not suffered through neglect of Mill's distinctive contribution to the liberal tradition.

### **Mill's argument in *On Liberty***

The vital centre of Mill's liberalism, as he expounds it in *On Liberty*, is not to be found in any of the consequential arguments he adduces there in support of liberal freedoms of thought, expression, and association, but rather in a conception of human nature and self-development. The central argument of *On Liberty* is the claim that a liberal society is the only kind of society in which men confident of their own manifold possibilities but critical of their own powers and of each other, men who aspire to the status of autonomous agents and who cherish their own individuality, will consent to live. His conception of man as a progressive being suggests to Mill the necessity of defining the sphere of legitimate social control in such a way as to promote the development of men as autonomous agents and he does this by proposing the famous *principle of liberty*. In fact this principle assumes various forms at different stages in Mill's argument, but its main force is contained in the injunction that the liberty of the individual should be restricted by society or by the state only if his actions are (or may be) injurious to the interests of others.

It is important that present-day readers of *On Liberty* take note of two points about Mill's principle of liberty. First, though Mill carefully stresses that it states a necessary and not a sufficient condition of justified limitation of liberty (since costs of enforcement may make it wrong to limit liberty even where the interests of others are clearly damaged by a given kind of action), Mill also insists that the principle of liberty is violated in modern societies whenever individuals enjoy a traditional freedom to act in ways

injurious to others. The example of a traditional right unjustifiable by the principle of liberty which Mill cites most frequently is that of unrestricted procreation, which is injurious both to the interests of the offspring of irresponsible parents and to the interests of all who compete with them for scarce jobs and resources. Mill would have had no objection in liberal principle to proposals for the institution of 'child licences' (though he might well have had doubts about their practicability), and he would certainly have been sympathetic to those who advocate population control — including even coercive measures — as part of a freedom-preserving policy for an already overcrowded world.<sup>2</sup>

Second, it is a clear implication of Mill's principle that, in laying down a necessary condition of legitimate limitation of liberty, it disallows an indefinitely large range of interferences with personal freedom, and Mill is at pains to draw his readers' attention to two classes of intervention which his principle prohibits. These are: restrictions of liberty designed to prevent individuals from causing harm to themselves; and restrictions designed to bring an individual into conformity with the received moral ideas of his community.

Importantly, Mill goes much further than most contemporary liberals in ruling out such paternalist restrictions on liberty as are involved in legal prohibitions of the sale of 'hard' drugs. Equally, there can be little doubt that Mill would adopt an uncompromising libertarian stand on questions of censorship and pornography, and would reject all legislation on sexual behaviour which has a moralistic rather than a straightforwardly harm-preventing rationale. Nor can it be doubted, finally, that Mill would have extended his support to the campaigns of those, like Dr Thomas Szasz, who wish to see the practice of the confinement and involuntary treatment of those judged mentally disordered discontinued or at least subject to far more stringent legal controls.<sup>3</sup> Whether or not contemporary liberals follow Mill in his intransigent opposition to State paternalism and legal moralism, they would be well-advised if they were to consider carefully his objections to such policies.<sup>4</sup>

## **Mill's radicalism**

Though fashionable progressive opinion will find Mill's stand on the question of drug use and censorship congenial, it is worth noting that his no

less sensible views on the proper organization of national education find little favour in such circles. Mill's view that 'an education established and controlled by the State should only exist, if it exist at all, as one among competing experiments, carried on for the purpose of example and stimulus, to keep the others up to a certain standard of excellence',<sup>5</sup> despite the fact that it flows directly from his concern with the promotion of diversity and variety in all spheres of life, finds few echoes in contemporary political life outside the right wing of the Conservative Party and the far-left disciples of Ivan Illich, though for many years liberals have continued unnoticed to advocate voucher schemes as an alternative or a supplement to State education.<sup>6</sup> It is paradoxical that radicals who bemoan the fate of such schools as Raisinghill have not grasped the simple truth that bold experiments are unlikely to flourish in a monopolistic State education system dominated by conservative bureaucracies and politically vulnerable local authorities. Mill's views on education reveal an important difference between his anti-collectivist radicalism, which sought always to assist the disadvantaged by widening their opportunity for free choice and self-reliance, and the Fabian paternalism by which it was supplanted, whose goal apparently is to make the poor dependent on an expansionist apparatus of social workers and benevolent planners.

This overall contrast between Mill's radicalism and that of twentieth-century political parties (to which I shall return shortly in another context) is worth remarking on in that it discloses one of the most important tendencies of Mill's political thought, which is expressed in his constant search for methods which alleviate distress and strike at the roots of social injustice while restricting personal liberty to the minimum practicable extent. The relevance of Mill's anti-collectivist approach has increased rather than diminished in the century and more since his death, for we know now that vast nationalized social services not only involve considerable loss of liberty, but often facilitate a net redistribution of income and resources from the poorer to the better-off sections of the community. Indeed, those who give up the most freedom under such schemes are the poor who get least in return.

Mill's whole approach to the social injustices of industrial society involves a critique of orthodox socialism which can be deeply instructive to radical reformers well over a century later. Presciently identifying the fate of revolutionary socialism, Mill warned that catastrophist strategies to



socialism, since they presuppose the collapse into chaos of the existing social order, are bound to generate (not the benign classless anarchy of which their proponents dream) but rather a dictatorship, in all probability far more oppressive than the old regime, in which there will be little or no room left for individuality of any kind. He was no less perceptive about the dangers of reformist socialism of the Statist or Fabian variety. If it is plainly mistaken to count Mill among the precursors of Fabianism, it is probably equally inaccurate, however, to suggest that he would be at home in the Selsdon Group;<sup>7</sup> for Mill developed a series of proposals for the alleviation of the central injustices of the industrial society that was emerging around him which have the most radical implications today.

It should be a commonplace by now that Mill was no inflexible adherent of *laissez-faire* — for that matter, none of the classical economists subscribed to *laissez-faire* principles without making important exceptions and qualifications to them — and he acknowledged the propriety of a wide range of governmental activities, many of the kind which have become taken for granted in the liberal democracies of the twentieth-century western European and English-speaking world. It is important to recognize, however, that Mill's proposals for tackling the social problems of an industrial civilization go far beyond anything that merely suggests the kind of activities undertaken by the post-war Welfare State.

The major targets of Mill's criticism of the arrangements of the emergent industrial society of his day were the maldistribution of property and the oppressive system of industrial organization. In the posthumous 'Chapters on Socialism', published in the *Fortnightly Review* in 1879, Mill declared that, in existing society, 'reward, instead of being proportional to the labour and abstinence of the individuals, is almost in an inverse ratio to it'. One of the primary causes of this inequitable distribution of rewards, according to Mill, was the concentration of fortunes facilitated through their uninterrupted accumulation across the generations, and his remedy for this, though much discussed in subsequent economic writings, seems as Utopian today as it did when he proposed it in the first edition (in 1848) of his *Principles of Political Economy*. Mill advocated the institution, not of an estates duty, but of what we would nowadays call an accessions duty or an inheritance tax, to be levied on the recipient and not on the donor of the capital.

The merit of such a tax is that, unlike other arrangements, it need not transfer wealth from private individuals to the State, since it is eminently avoidable through the desirable expedient of dispersing one's wealth widely. Mill's support for a reform of inheritance taxation which would promote the diffusion of wealth, when taken in conjunction with his opposition to the progressive taxation of income, distinguishes his radical sense of social injustice sharply from that which animates most socialists. Though it prompted him to favour a redistribution of property and so of incomes in the context of the industrial society of his day, Mill's radical conception of social justice has no specifically egalitarian orientation, condemning the inheritance of large fortunes rather on the grounds of its undeservedness and because huge concentrations of wealth may ultimately become inimical to liberty — whether they are held in governmental or in private hands. Equally, however, Mill's conception of social justice separates him from all those conservatives who are, at bottom, concerned with nothing more than the preservation of entrenched privilege. In the first edition of *Principles of Political Economy*, Mill's advocacy of what amounts to a guaranteed annual income or social dividend for all, confirms this contrast with conservative thought, and shows how close is his position to that of contemporary radicals in the same tradition.<sup>8</sup>

An inequitable distribution of property is, of course, closely related to that mode of capitalist industrial organization in which enterprises are owned and managed by owners of capital who stand in an authoritarian relationship with wage-earners. Throughout his life Mill was opposed to such a system of industrial organization. He opposed it because, in the first place, it institutionalized a permanent conflict of interests between owners of capital and wage-earners, and no system of productive association which rested on such a contradictory basis could be expected to be either stable or efficient. In the second place, the separation between wage-earners on the one hand and owners and manager on the other, deprived workers of any real opportunity for personal initiative. In so doing, it stultified their growth and prevented them becoming anything like the responsible, autonomous individuals that Mill had theorized about in *On Liberty*. Mill's fundamental objection to the capitalist system of his day led him to take a life-long interest in schemes for profit-sharing, industrial partnership, and producers' co-operation; but his boldest vision goes far beyond such proposals, and can

best be described as a form of non-revolutionary, competitive syndicalism. As Mill put it:

The form of association ... which, if mankind continues to improve, must be expected in the end to predominate, is not that which can exist between a capitalist as chief, and work-people without a voice in the management, but the association of the labourers themselves on terms of equality, collectively owning the capital with which they carry on their operations, and working under managers elected and removable by themselves.<sup>2</sup>

### **Mill's post-capitalist society**

A number of points need making at once about the syndicalist or non-State socialist vision which is expressed in this passage. Crucially, Mill's vision of a post-capitalist society, unlike that of virtually all socialists, does not include the elimination of competition. Indeed, as far as Mill was concerned, no changes in the existing system of industrial organization would bring about a tolerable society which sought to suppress competition between enterprises and individuals, or which resulted in competition becoming less effective. If Mill is in any sense a socialist — and he certainly envisaged a social order which was no longer recognizably that of nineteenth-century England, and which differs at least as much from our own capitalist society — then his was decidedly a 'market socialism'. Unlike market socialism of the Yugoslav variety, however, Mill's vision of a post-capitalist society is not one in which the institution of private property in the means of production has been abrogated: there is no suggestion that the workers' shares in their enterprises will not be marketable, and there is every reason to think that Mill wanted to see an improvement in the capital market, with an entrepreneurial class of industrial pioneers having an acknowledged place even in the fully realized syndicalist society. Again, it should be noted that, despite his unorthodox sympathies with trade unionism, Mill envisaged no real place for trade unions in the society of the future; he looked forward to a time when the harmony of interests between all partners in production, facilitated by workers' ownership and self-management, would allow 'the true euthanasia of trade unionism'. In other words, Mill's proposals for workers' participation in management were at the furthest removed from those contemplated by western socialist theorists,

which apparently envisage no more than the inclusion in management of faithful representatives of our reactionary trade union bureaucracies.

Perhaps the cardinal example of how Mill's thought catches up with our preoccupations in the last quarter of the twentieth century is to be found in his advocacy of the stationary-state economy. Like other classical economists, Mill accepted that economic growth could only be temporary in a world of scarce natural resources, in which population constantly pressed on land and food reserves. In contrast with all other economists in the classical tradition, however, Mill did not fear the arrival of a stationary economy, but rather welcomed it as an opportunity for a large-scale transformation in social values. It is true, of course, that a large part of Mill's concern that society be re-ordered so as to allow a peaceful transition to a no-growth economy derives from his neo-Malthusian insistence on the finitude of the world's resources and the constant danger of overpopulation — an insistence which seems far less unreasonable now than it did 20 years ago. Yet the larger part of Mill's advocacy of a stationary-state economy is not concerned with considerations of resource depletion but with the damaging effects on human character of the unremitting pursuit of possessions and with the destructive consequences for our natural environment of open-ended economic growth.

I suggest that it is a feature of Mill's radicalism — one which makes it especially relevant to contemporary radical reformers — that, unlike almost all forms of socialism, it is not based on the illusory prospect of a cornucopian abundance created by the magical fecundity of technology. At a time when such a viewpoint was almost unknown, Mill told his readers that:

It is only in the backward countries of the world that increased production is still an important object: in those most advanced, what is economically needed is a better distribution, of which one indispensable means is a stricter restraint on population.<sup>[10](#)</sup>

Again, he concludes the prophetic chapter of *Principles of Political Economy* on 'The stationary state' with the remark that 'a stationary condition of capital and population implies no stationary state of human improvement'.<sup>[11](#)</sup> Mill's summons to us to welcome a stationary-state economy has increased in relevance during a century in which the self-defeating and destructive aspects of indefinite economic growth have become one of our most central concerns. It is more than ever urgent that

we heed it at a time when an unplanned curtailment of economic growth precipitated by a rise in the cost of energy has panicked many public figures into supporting a desperate search for new methods of sustaining the growth economy.

### **The relevance of Mill's radical liberalism**

My discussion of the relevance of Mill's thought to contemporary liberals should have illuminated some of the reasons why it is a mistake to regard him as a patron saint of a defunct creed. In at least three respects, I suggest that Mill's radical liberalism still has much to offer those in search of a reasonable radicalism. Mill's is a decentralist, anti-statist radicalism, which, unlike orthodox socialism, addresses itself to the problems involved in meeting the widely acknowledged need for political devolution and the diffusion of power and initiative within the great entrenched institutions of our society. It is a radicalism which, while calling for a massive redistribution of property and therefore of incomes, offers an alternative conception of social justice to that of a levelling-down egalitarianism — which, in practice, seems inexorably to result in either a stagnant and uniform society, or in a society where differentials in power and authority replace far more innocuous differentials in monetary reward. Moreover, it is a radicalism which is well prepared to meet the challenges posed by an end to economic growth in the world's developed (or overdeveloped) societies. Mill's political thought should be a central inspiration of those who seek to modify the institutions and policies of liberal societies while remaining faithful to the central ideals of the liberal tradition.

It would do no good to pretend that we can find in Mill's writings answers to all the major problems that confront us now — and, in any case, Mill would have deprecated any such attempt. Mill cannot tell us how we are to combat explosive inflation and ever-increasing unemployment while preserving traditional liberal freedoms: we will look in vain in his works for illumination regarding the multiple crises of contemporary economic systems (both 'capitalist' and 'socialist'). In forging institutions to cope with unprecedented economic conditions, we need (as Keynes emphasized) new wisdom for a new age. It would be disloyal to the spirit of enquiry which Mill stood for, if we were to exempt from criticism any of the political or economic institutions which we have inherited from the great age of English liberalism. As Mill himself argued, radical reforms in our

political institutions will be necessary if we are to realize the promise of democracy, while avoiding the danger of a democratic tyranny of the majority.<sup>12</sup> Though we must not expect from Mill's writings a blueprint for the achievement of a liberal society in a world in many ways very different from Mill's, it has been the argument of this chapter that radicals will be unreasonable if they neglect Mill's thought on some of the principal dilemmas that perplex us today. Mill always regarded his age as an age of transition: and our age is no less an age of transition. It would be a hopeful augury if the current decomposition of conventional political wisdom were to encourage liberals to re-examine Mill's views on how this great transition should be conducted.

## Notes

- <sup>1</sup> Some dissenters from this consensus are: Alan Ryan, 'John Stuart Mill's art of living', *The Listener*, October 21, 1965, 'John Stuart Mill and the open society', *The Listener*, May 17, 1973; Antony Flew, 'J.S. Mill — socialist or libertarian?', in Michael Ivens (ed.) *Prophets of Freedom and Enterprise!*, (London: Kogan Page for Aims of Industry, 1975) pp. 21–7; Ian Bradley, 'John Stuart Mill — a Victorian's message for modern liberals', *The Times*, May 8, 1973.
- <sup>2</sup> For example: Jack Parsons, *Population versus Liberty*, (London: Pemberton Books, 1971) with forewords by Douglas Houghton, Sir David Renton, and Lord Beaumont.
- <sup>3</sup> See Thomas Szasz, *Law, Liberty and Psychiatry*, (London: Routledge & Kegan Paul, 1974) and other writings.
- <sup>4</sup> See especially [Chapter Three](#) of *On Liberty*.
- <sup>5</sup> *On Liberty*, (Dent edition, 1972) p. 161.
- <sup>6</sup> For example, Milton Friedman, *Capitalism and Freedom*, (Chicago: University of Chicago, 1974); A.T. Peacock and C.K. Rowley, *Welfare Economics — A Liberal Restatement*, (London: Martin Robertson, 1975).
- <sup>7</sup> The suggestion is made by Flew (see note 1, above) in Ivens, *Prophets of Freedom and Enterprise*.
- <sup>8</sup> See, for example: Professor J.E. Meade's *Intelligent Radical's Guide to Economic Policy*, (London: George Allen & Unwin, 1975) for a reform programme very much in the Millian tradition.
- <sup>9</sup> *Principles of Political Economy*, (Penguin edition, 1970) p. 133.
- <sup>10</sup> *ibid.*, pp. 114–15.
- <sup>11</sup> *ibid.*, p. 116.
- <sup>12</sup> See Mill's proposals for a proportional or personal representation in *Considerations on Representative Government*, [Chapter X](#).

## Chapter two

# The liberalism of Karl Popper

The beliefs which we have most warrant for have no safeguard to rest on, but a standing invitation to the whole world to prove them unfounded. If the challenge is not accepted, or is accepted and the attempt fails, we are far from certainty still; but we have done the best that the existing state of human reason admits of; we have neglected nothing that could give the truth a chance of reaching us; if the lists are kept open, we may hope that if there be a better truth, it will be found when the human mind is capable of receiving it; and in the meantime we may rely on having attained such approach to truth as is possible in our own day. This is the amount of certainty attainable by a rational being, and this is the sole way of attaining it.<sup>1</sup>

Despite its wide influence, the political thought of Karl Popper has received, until recently, remarkably little systematic attention from academic political theorists. Hailed by Isaiah Berlin as the most formidable of Marxism's living critics<sup>2</sup> and reviled by Marxists as a prominent luminary of that White Emigration whose pernicious influence is mainly responsible for the ideological rejuvenation of a moribund reactionary culture,<sup>3</sup> canonized as a prophet of freedom and enterprise<sup>4</sup> and lumped together with such despised conservatives as Oakeshott, Namier and Butterfield as one of those who want only 'to keep that dear old T-model on the road by dint of a little piecemeal engineering',<sup>5</sup> Popper incontestably has been a storm centre of several major ideological controversies. Equally,



Popper's dissident reinterpretations of the thought of Plato and Hegel, like his defence of value-freedom and methodological individualism in the social sciences, have generated massive and subtly ramified literatures, while the form of critical rationalism which has been developed by some of his disciples has been seen, both by its proponents and by its enemies, as the foremost contribution to the contemporary struggle against irrationalism.<sup>6</sup> Yet, though its central importance is attested by the long-standing controversies it has engendered and by its impact on a broad range of disciplines, Popper's work in social and political philosophy has not received anything like the sustained critical examination it warrants. It may be that Popper's contributions to social and political theory, like those of Russell, have been over-shadowed by his achievements in epistemology and logic. Certainly, it is true that the polemical form of Popper's political writings has obscured his many positive contributions to political theory. Arguably also, the fact that many of Popper's most important arguments are directed against revolutionary ideologies has fostered the misconception that his political philosophy is a species of conservatism which (in an era in which conservative political thought is rarely thought worthy of serious study) has only served to reinforce its neglect.<sup>7</sup>

The object of any significant exploration of Popper's work in political theory is to identify its most distinctive features, to comment on its relationship with his philosophy of science, and to evaluate its contribution to some of the central problem-areas of contemporary political thought. In working out this research programme, I hope to support a substantive thesis regarding the character of Popper's achievement as a political philosopher: it is that his works contain a defence of liberalism (one of the most formidable to be found anywhere in twentieth-century thought) which gains much of its power from the fact that, like Kant's, Popper's liberalism is embedded in a comprehensive philosophical perspective on the nature of human knowledge, rationality, and freedom of thought and action. In Popperian fashion, I shall support this thesis by way of a critical examination of a recent rejoinder to Popper's assault on the basic assumptions of revolutionary thought. Next, in the context of a comparison of Popper's liberalism with that of J.S. Mill, I shall attempt to evaluate the extent to which Popper's political thought is securely based in his general philosophy. I conclude by suggesting some lines of research by means of which Popper's political philosophy may be further developed.



## **The general character of Popper's philosophy**

The central core of Popper's epistemology is the proposal<sup>8</sup> that falsifiability be treated as a criterion of demarcation between empirical and non-empirical statements, propositions and theories. Popper suggests that we use the falsifiability of its theories to distinguish science from myth and metaphysics, for example, and he points out that the adoption of the proposal will enable us to characterize as pseudo-scientific such enterprises as psychoanalysis, astrology, and Marxism. Contrary to innumerable accounts of his philosophy,<sup>9</sup> Popper's demarcation criterion was never intended as a criterion of the meaningfulness of sentences. As well as supplying a demarcation criterion between science on the one hand and metaphysics, myth and pseudo-science on the other, Popper's falsificationism enabled him to propose a solution to Hume's problem of induction. For, accepting the validity of Hume's arguments against the propriety of reasoning from instances of which we have had experience, to the truth of the corresponding laws of nature, and trading on the (purely logical) asymmetry between verification and refutation, Popper's falsificationism allowed him to characterize science as a strictly deductive enterprise in which conjectures are boldly propagated and then severely tested by attempted refutations. When science is so understood, the growth of scientific knowledge is seen to occur, not through the use of any form of 'inductive inference' by means of which theories might be verified, confirmed or probabilified, but by an error-elimination procedure in which hypotheses of ever increasing empirical content (or verisimilitude) are corroborated by withstanding ever more stringent tests. Unlike Hume, Popper draws no irrationalist conclusions from the collapse of induction: rather, appealing to a principle of transference from validity in logic to efficacy in psychology, he rehabilitates rationality in thought and action with the conjecture that learning occurs in human beings and all other problem-solving organisms by an error-elimination process loosely analogous to evolution by natural selection, and not through any (mythical and logically invalid) piling up of inductive confirmations in support of general hypotheses.

With his account of scientific progress as a process in which theories of increasing verisimilitude are developed in response to ever deeper problems, Popper links the growth of knowledge with the evolutionary passage from lower to higher forms of life, preserving a qualitative

distinction between problem-solving in the lower organisms and in science by emphasizing the self-critical character of error-elimination procedures in the latter. Popper's evolutionism is further linked with his pluralist theory of a three-tiered world, comprising not only material things and states of mind (which he calls 'World 1' and 'World 2' respectively), but also a domain of intelligibles, virtual objects or objective structures (which he calls 'World 3').<sup>10</sup> It is in this third world, man-made but autonomous in that objective problems and theories await discovery within it, that man's cultural evolution mainly occurs, and it is the central thesis of Popper's philosophy that growth in human knowledge and understanding presupposes the adoption of a method of criticism. A critical approach to empirical science is shown in the adoption of the method of conjectures and refutations, but Popper has himself applied the critical method to the study of irrefutable theories in philosophy,<sup>11</sup> and it has implications for the whole span of human thought. In fact, Popper's 'critical approach' embodies a theory of rationality as consisting of openness to criticism.<sup>12</sup> It is in its critical theory of rationality, together with its combination of fallibilism or dynamic scepticism<sup>13</sup> in epistemology, and realism or objectivism in ontology — a combination which he characterizes as involving rejection of the common-sense theory of knowledge with retention of the common-sense theory of the world — that the chief interest of Popper's general philosophy lies.

The nature of the relation between Popper's philosophy of science and his political philosophy has always been one of the most disputed aspects of his thought. Since it is one of the central theses of Popper's critics that his political philosophy consorts badly with his account of scientific method — in that Popper appears to commend permanent revolution in science while favouring incremental reformism in political life — it is vitally important that we settle the prior question of whether the two parts of his philosophy are indeed logically related. It is plain that both the claim that Popper's political philosophy is inconsistent with the philosophy of science, and the claim that the former is entailed by the latter, presuppose that a strong logical connection holds between the two. Some of Popper's most authoritative interpreters have seen his contributions to political thought as issuing directly from his account of scientific method. Brian Magee, for example, has asserted that 'it [Popper's political philosophy] is seamlessly interwoven with Popper's philosophy of science',<sup>14</sup> and in response to Magee's suggestion that his thought 'in these two apparently different fields

is all of a piece', Popper has himself acknowledged that 'there are a number of common ideas'.<sup>15</sup> Elsewhere, however, he has asserted that his social theory 'strongly contrasts with' his philosophy of science.<sup>16</sup> Rather than attempt to settle by appeal to testimony or secondary source the question whether the epistemological and the political aspects of Popper's thought are as inextricably linked as is presupposed, both by accusations of inconsistency and by claims to detect an entailment relation between them, it may be more worthwhile to state directly (and then to proceed to defend) my main thesis with regard to Popper's political thought. That is, that those of his critics who have postulated a relation of dependency between his political philosophy and his epistemology are not mistaken, but that the claim that there is any inconsistency between these two parts of Popper's thought rests upon a demonstrably defective understanding of both of them, and so fails to conceive correctly the nature of the relation between them.

### **The philosophy of science and a science of politics: some reflections on Dr Freeman's critique of Popper's political thought**

Both liberals and Marxists have seen the most significant part of Popper's political thought in his attack on what he judges to be the basic assumption of revolutionary ideology. In conformity with his avowed method of strengthening the opponents' position before subjecting it to criticism, Popper develops his critique of revolutionism by expounding (and on occasion constructing) arguments in support of the principal doctrines which he thinks are presupposed by revolutionary thought. First of the doctrines he selects for exposition is historicism, which he defines as: an approach to the social sciences which assumes that *historical prediction* is their principal aim, and which assumes that aim is attainable by discovering the 'rhythms' or the 'patterns', the 'laws' or the 'trends' that underlie the evolution of history.<sup>17</sup>

Closely associated with historicism as one of the supporting doctrines of revolutionary ideology is holism, which Popper defines as the doctrine that human events must be understood in the context of the 'social whole' of which they are a part. An holistic approach to the methods of the social sciences further suggests the necessity of an *holistic* or *Utopian* approach to social engineering, an approach with a definite plan or blueprint.<sup>18</sup> Popper's contention is that the Utopian approach to social engineering which is

commended by revolutionary ideology is based on pre-scientific and irrational modes of thought,<sup>19</sup> such as those embodied in historicism and holism, and that the advocacy of Utopian social engineering is as irresponsible as its attempted practice is disastrous.

In a recent attack on Popper's social and political thought, Dr Michael Freeman has fastened upon Popper's claim that there is a 'Utopian' approach to social engineering that is demonstrably unscientific and irrational as clear evidence of that gulf which he claims exists between Popper's fallibilist epistemology and his 'dogmatic' and 'aprioristic' social philosophy. Expounding his claim that Popper's political thought embodies a form of 'epistemological conservatism' which is manifestly inconsistent with the falsificationist ethic of his philosophy of science, Freeman asks rhetorically:

Why shouldn't Utopians defy laws that are only tentative? If any law may be refuted by experience, can there be a case against Utopian experiments? If all scientific knowledge is tentative, and if social theories are identified as Utopian on the basis of scientific knowledge, then all identification of social theory as Utopian must likewise be tentative.

Freeman continues:

I wish to suggest the name 'epistemological conservatism' for this aspect of Popper's philosophy. Epistemological conservatism is the position that certain proposed social reforms must be ruled out on the grounds that they violate scientific laws.

He concludes:

At the epistemological level, his [Popper's] objection to utopianism is that it violates the laws of science. But, according to Popper's own account, scientific laws are never more than tentative. This weakens the critique of utopianism in two ways. First, it means that the identification of any social theory as 'Utopian' must always be tentative. Secondly, since Popper declares again and again that the true scientific spirit is earnestly and vigorously to seek out falsification of our tentative laws, it would seem that Popper's theory of the growth of knowledge encourages rather than discourages Utopian experiment.<sup>20</sup>

Freeman's accusation of inconsistency against Popper has also been made, in a very similar form, by Ernest Gellner:

There is ... both a unity and parallelism, and also an asymmetry and strain between Popper's philosophy of science and his social theory. His social

ethic consists of the commendation of the virtue of openness, which is the social equivalent of falsifiability — the holding of social principles without rigidity, in a spirit which is willing to learn, innovate, experiment and change ... But a conspicuous asymmetry also appears. In science, openness implies the taking of maximum risks. In social affairs, the contrary is commended.<sup>21</sup>

Having claimed that Popper's rejection of Utopian social engineering betrays a dogmatism inconsistent with the critical spirit which the falsificationist epistemology indicates, Dr Freeman proceeds to accuse Popper of having an uncritical and aprioristic approach to the sociology of revolution. Popper's dogmatic approach to the sociology of revolution is disclosed in the fact that he never supports with evidence (or considers evidence against) the claim — made on several occasions in his writings — that adherence to historicist and holist theories was a significant cause of twentieth-century totalitarian terror. Again, Popper's advocacy of piecemeal social engineering is uncritical in that he refuses dogmatically to consider the hypothesis that in many important historical situations piecemeal social engineering is not a viable solution to the problems faced by people in a given society'.<sup>22</sup> According to Freeman, Popper's social philosophy is not only (inconsistently) aprioristic and uncritical; it is also deeply conservative and expressive of a sectional interest. Its conservatism is revealed in the fact that, while Popper repeatedly emphasizes the terrible costs of revolution, 'he never pauses to count the possible costs of piecemeal social engineering'.<sup>23</sup> The ideological character of Popper's political thought is attested by the fact that it ignores the possibility that there might be historical circumstances in which rational men would place other values above that of intellectual freedom', a neglect which is explained by the thesis that Popper's philosophy is a class ideology — the ideology of the scientific class'.<sup>24</sup>

In my view, Dr Freeman's attack on Popper's social thought incapsulates several widespread misconceptions regarding his account of the growth of scientific knowledge and the grounds of his rejection of Utopian social engineering. In the first place, it is worth pointing out that nowhere in his political writings has Popper definitely identified any proposed social reform as 'Utopian' on the ground that it is excluded by scientific laws. Such an identification would indeed be contrary to Popper's fallibilism; it would also contradict Popper's affirmation that:

it is necessary to recognise as one of the principles of any unprejudiced view of politics that everything is possible in human affairs; and more particularly that no conceivable development can be excluded on the grounds that it may violate the so-called tendency of human progress, or any of the other alleged laws of human nature.<sup>25</sup>

So careful is Popper to guard himself against any accusation of dogmatism that, immediately after giving a list of candidate sociological laws or hypotheses, he goes on to remark: 'Nothing is here assumed about the strength of the available evidence in favour of these hypotheses, whose formulations certainly leave much room for improvement.'<sup>26</sup> Dr Freeman has rightly emphasized that it is an inexorable consequence of Popper's conjectural account of scientific knowledge that every identification of a natural law is tentative and permanently liable to overthrow. Further, it is a cardinal feature of Popper's account of the unity of method in natural and social sciences that explanation and prediction are the same in both: as Popper has put it, 'a really fundamental similarity between the natural and social sciences' lies in 'the existence of sociological laws or hypotheses which are analogous to the laws or hypotheses of the natural sciences'. In both cases, these laws can be stated in a technological form by asserting that such and such a thing cannot happen: but there is no evidence to suggest that Popper is unaware that any such claim may be unfounded. In general, it is bizarre to characterize as 'epistemological conservatism' an account of scientific knowledge whose central thesis is that even the best corroborated theory should be accepted only as long as testing by attempted refutation has not revealed its weaknesses and suggested another, better theory, and whose implications for politics Popper has himself emphatically stated.

If Popper's argument against Utopian social engineering is not an argument based on the claim that some proposed social reforms are excluded by scientific laws, what is it? It is, at least in large part, an argument which appeals to the empirically necessary conditions of any kind of effective social engineering. Admittedly, it is also an argument which appeals to the logical impossibility of achieving the Utopian aspiration to control and reconstruct society 'as a whole'. As Popper has said: it is for many reasons quite impossible to control all, or nearly all these [social] relationships; if only because with every new control of social



relations we create a host of new social relations to be controlled. In short, the impossibility is a logical impossibility.<sup>27</sup>

Popper's argument against the logical possibility of a Utopian approach to social engineering is closely connected with his argument against a holistic method in social science, which (he demonstrates) ignores the inevitable selectivity of all observation and description, and attempts the logically impossible task of studying 'social wholes'. Consistently with these arguments, Popper affirms that 'of the two methods [piecemeal and Utopian social engineering], I hold that one is possible, while the other simply does not exist: it is impossible'.<sup>28</sup> Popper's arguments against the logical possibility of Utopian social engineering are, of course, logical arguments, precisely; what else could they be? They are a priori arguments because no other kind of argument is appropriate at this stage of the critique of Utopianism.

In view of Popper's repeated denials of the existence and logical possibility of Utopian social engineering (denials which Dr Freeman cites without comment), it is paradoxical to find Freeman proposing 'a sociological hypothesis which Popper rejects a priori, and the rejection of which vitiates much of his polemic against Utopian social engineering' — the hypothesis that 'in many important historical situations piecemeal social engineering is not a viable solution to the problems faced by people in a given society'.<sup>29</sup> As Dr Freeman has noted,<sup>30</sup> Popper's thesis is that, in practice, the Utopian is always forced to resort to a 'somewhat haphazard and clumsy although ambitious and ruthless application of what is essentially a piecemeal method without its cautious and self-critical character'.<sup>31</sup> If the hypothesis that Dr Freeman asks us to consider implies that there are situations in which Utopian social engineering is a viable approach to social problems, it would seem that it is a hypothesis which Popper is entitled (and, indeed, obliged) to reject a priori if the arguments against its logical possibility have any viability. Alternatively, of course, Dr Freeman's hypothesis may have no such implication: in that case, however, no one (least of all Popper) will be inclined to reject it. Indeed, as Popper has reminded us, 'there are infinitely many possibilities of local, partial or total disaster',<sup>32</sup> so there may well be 'important historical situations' in which there is *no* 'viable solution to the problems faced by people in a given society'.

In fact, however, it is not clear in what sense Dr Freeman is using the expression 'piecemeal social engineering'. He criticizes Popper for using 'holism' in two senses, each of them inadequate; a strong sense, implying the aim of changing the whole of society, which is too strong to apply to Marx or any other important thinker; and a weak sense, implying piecemeal change lacking caution or self-criticism, which is too weak (since no one, presumably, wants to be incautious or uncritical) in that it does not allow us to settle the ideological controversy between radical revolutionism and liberal reformism. Though he rejects as defective both of the senses in which he claims Popper to have used the term 'holistic (or Utopian) social engineering', Dr Freeman supplies us with no criterion of demarcation between the two approaches to social engineering. The closest he comes to defining his alternative to Popper's piecemeal social engineering occurs when he acknowledges that there is a sense in which Marx can be described as a holist:

he ... wished to 'radically transfigure the whole social world' in the weak sense of whole, that is to say, in the sense of changing certain structural features deemed to be of critical importance for the distribution of power and life chances in society.<sup>33</sup>

By this criterion, social engineering ceases to be unacceptably piecemeal, reformist and incremental when it succeeds in changing 'certain structural features' of a society. What are these features? Plainly enough, any account of what are the aspects of a society's organization which are decisive for distributing life-chances within it cannot be other than conjectural. Accordingly, the description of a proposed social reform as radical and holistic, rather than piecemeal and reformist, presupposes the adequacy of an original conjecture regarding what are the decisive features of a society's organization: 'Utopian social engineering' therefore becomes a theory-impregnated term. Moreover, the conjectural character of any identification of a society's structurally decisive features suggests that social engineers must expect their experiments to disclose weaknesses — perhaps decisive weaknesses — in the original conjecture. In fact, it is Popper's view (to which I shall return shortly) that this is precisely what has happened in these societies whose rulers have attempted Utopian social engineering projects.

I have said that Popper's argument against Utopianism is largely an argument which appeals to the empirically necessary conditions of any kind



of effective social engineering. What are these conditions, according to Popper? Unsurprisingly, they are closely analogous to the conditions which he has postulated as favouring scientific progress:

... it is the public character of science and of its institutions which imposes a mental discipline upon the individual scientist, and which preserves the objectivity of science and its tradition of critically discussing new ideas.<sup>34</sup>

‘Ultimately, progress depends very largely on political factors: on political institutions that safeguard the freedom of thought: on democracy.’<sup>35</sup> In its application to political life, Popper's institutional theory of progress suggests that the opportunity for criticism of governmental policies must be protected by social and political institutions constructed (or reformed) so as to achieve that purpose. That all social engineering must be ineffective in the absence of constant criticism of its aims and methods follows directly from the Popperian conception of the growth of knowledge as an (ideally self-critical) error-elimination process, but the necessity for continual criticism of governmental policies grows also from the unintended (and often unwanted) consequences with which all political action is inseparably linked.

In particular, Popper advances several important hypotheses which suggest that large-scale social engineering designed to achieve far-reaching social changes is likely to be especially ineffective. In the first place, in any programme of social engineering carried out on a scale that approaches the holistic aspiration, so much will be done at once that it will be extremely difficult to determine which measures are responsible for any of the resultant changes. In the social sciences, just as in the physical sciences, the testing of theories normally requires stable background conditions against which the results of variant policies can be compared. As for the holistic argument that ‘the effects of small-scale changes are, in any society, swamped by the pervasive effects of the unchanged remainder of the social framework, and hence can neither be evaluated, nor be effective’,<sup>36</sup> it must be pointed out that any such argument has difficulty in accommodating that large measure of experimental knowledge of social life which is acquired in the absence of holistic experimentation. This is not to say that acquiring knowledge of a society through piecemeal engineering is ever a straightforward business. As Popper has said:

Many experiments which would be most desirable will remain dreams for a long time to come, in spite of the fact that they are not of a Utopian but of a

piecemeal character. In practice, he (the social scientist or piecemeal engineer) must rely too often on experiments carried out mentally, and on an analysis of political measures carried out under conditions, and in a manner, which leave much to be desired from the scientific point of view.<sup>37</sup>

To admit that the knowledge of society's workings gained from piecemeal social engineering is often sadly limited and inadequate to our purposes is not to imply, however, that we can learn nothing through such an approach. Still less does recognition of the limitations of a piecemeal approach show that any better exists.

In the second place, Popper advances a number of conjectures about the effects of attempts to undertake holistic social control and planning, which together go a long way toward establishing that such attempts cannot avoid being counter-productive. For, whenever attempts are made to implement a holistic plan for social reconstruction, they may be expected to encounter widespread opposition, partly because the interests of many people will be damaged by a holistic plan that is radical in conception and implementation, partly because it is unreasonable to suppose that any general consensus will exist on the desirability of the objectives of the holistic planners. If the implementation of the plan is not to be obstructed by such opposition, the revolutionary regime must become authoritarian and coerce recalcitrants into reluctant compliance with the plan. Once this has occurred, however, the revolutionaries will find themselves constrained to suppress criticism and dissent, no matter how well-intentioned and constructive, and they will soon lack the means of finding out how far their original objectives are actually being achieved. At this stage, the original conception of the Utopian plan is likely to be protected from all criticism (and, above all, from radical criticism), which increasingly will be characterized as traitorous and malicious. The process is summarized by Popper graphically in another context:

The most likely development is ... that those actually in power at the moment of victory ... will form a New Class; the new ruling class of the new society, a kind of new aristocracy or bureaucracy; and it is most likely that they will attempt to hide this fact ... the revolutionary ideology will serve then for apologetic purposes; it will serve then both as a vindication of the use they make of their power, and as a means of stabilizing it; in short, as a new 'opium of the people'.<sup>38</sup>

Having centralized power in order to prevent sabotage of the Utopian blueprint, and so effectively deprived themselves of much of the information relevant to the success of their plan, it is likely that the revolutionaries will resort to *ad hoc* measures ('unplanned planning') in order to maintain themselves in power. In this way, according to Popper, Utopian social engineering (or projects approaching it in scale and ambition, to be more precise) cannot avoid being systematically self-defeating.

It is, of course, a feature of Popper's hypotheses regarding the empirically necessary conditions of effective social engineering that, like all scientific hypotheses, they are conjectural and thus falsifiable. It will be objected, accordingly, that a critical approach to these conjectures dictates that we attempt to falsify them, and that such attempted falsifications would be none other than Utopian experiments. Such a rejoinder would, however, betray a basic misconception of Popper's theory of knowledge and its relations to practical life. For, though Popper's conjectures are no less falsifiable than any other scientific hypothesis, they are very well corroborated; and it is a cardinal tenant of Popper's philosophy (which distinguishes it from any kind of radical or Pyrrhonian scepticism, for example) that we are rational if we prefer the best-tested theory as a basis for action. As Popper has put it:

criticism will freely make use of the best tested scientific theories in our possession. Consequently, any proposal that ignores these theories ... will collapse under criticism. Should any proposal remain, it will be rational to adopt it.<sup>39</sup>

According to Popper's theory of pragmatic preference, then, rational choice in practical action consists in guiding our conduct by the best-tested theory. Popper's theory of practical rationality suggests how he can avoid Humean irrationalism while accepting Hume's negative results regarding inductions, but it also indicates why we are rational if we refrain from holistic-style social engineering. Furthermore, though many of Popper's most important arguments against Utopianism are indeed conjectural, they are so well corroborated that it is difficult to conceive conditions under which it would be rational to ignore them as a basis for action. One such situation can, indeed, be imagined: it is the situation in which we possess a theory, better than Popper's in that it has greater empirical content, explaining the degeneration of revolutionary regimes and the failure of

Utopian planning. Applying the method of reconstructing the logic of a situation he has often advocated,<sup>40</sup> Popper's conjecture regarding the origins of post-revolutionary tyranny appeals to the objective logic of revolutionary situations rather than to the alleged character defects of revolutionaries. As he has often emphasized, we are rational in 'rejecting' or 'abandoning' a theory only if we have a better one: that is to say, we must possess a theory which not only contradicts previous theories, but which also explains their successes. Popper is entitled to demand of Dr Freeman (and others who criticize his advocacy of piecemeal social engineering) that he advance a theory of the degeneration of revolutionary regimes which not only explains the successes of Popper's theory, but identifies conditions under which the Popperian theory would be falsified.

Dr Freeman has, to be sure, asserted dogmatically that 'it is simply not the case that Marxist or other utopian revolutionaries are not able or willing to learn from their mistakes',<sup>41</sup> but since he cites no examples we are unable to assess this claim critically. For what it is worth, the little we know of the revolutionary regimes in Russia, China, and Cuba makes Freeman's claim *prima facie* implausible. In order to support it at all adequately, he would need to supply evidence, not merely of occasional outbursts of 'self-criticism' on the part of revolutionary leaders, but of radical policy reversals occasioned by popular criticism. Notwithstanding token reforms initiated in response to massive working-class protest in Poland, the fate of the Hungarian Revolution, the Hundred Flowers Movement in China and the Prague Spring, all seem to corroborate Popper's conjecture that radical reform is extraordinarily difficult in societies which lack institutional safeguards for criticism of governmental policies. Freeman's claim looks still less plausible when one considers the strength, even in liberal democracies, of bureaucratic inertia which prevents the abandonment of policies (e.g. rent control and minimum-wage laws) whose counter-productiveness is notorious. Popper's thesis that the institutional preconditions of criticism, the growth of knowledge and of effective problem-solving by error elimination are closely analogous in science and society entails that no amount of moral fervour or purity of heart can make up for the lack of institutional protection of criticism and dissent. So far as I know, there is no plausible counter-example to Popper's conjecture that the conditions of scientific criticism (and so of successful problem-solving) are most closely approximated in liberal democracies, and are inescapably

disrupted by revolutionary upheavals in which a non-violent adversarial exchange of ideas is no longer a real option. Until Popper's theory is decisively falsified, and a better one is forthcoming, we are entitled to conclude that Popper's theory of piecemeal social engineering has resisted the attacks of its critics.

If my argument is sound, and we possess no theory of effective social planning more rational than Popper's account of piecemeal engineering, then Dr Freeman's characterization of Popper's social philosophy as a conservative ideology of the intelligentsia, or scientific class, is seen to be groundless. Equally unwarranted is Alastair MacIntyre's claim:

To adopt this [Popper's] view of the means available for social change is to commit oneself to the view that the only feasible ends of social policy are limited reformist ones, and that revolutionary ends are never feasible. To be committed to this is to be partisan in the most radical way.<sup>42</sup>

That Popper's advocacy of piecemeal engineering is not ideologically or politically partisan is confirmed if one recalls his insistence that such engineering may have the most diverse objectives, totalitarian as well as liberal.<sup>43</sup> In that attempts at Utopian engineering can be shown to lead to totalitarianism, it is of course true that only piecemeal engineering is appropriate to a liberal society, but this by no means implies that a Popperian social technology cannot be used to illiberal ends.

It may be worth remarking on the *prima facie* implausibility of the claim that Popper's liberalism, in so far as it assigns a moral and political priority to the value of intellectual freedom, expresses the sectional interests of the intelligentsia and the scientific class. If the experience of the twentieth-century shows anything, it is that (with honourable exceptions) intellectual and scientific elites are among the first social strata to be recruited as active servants of tyrannies and totalitarian regimes. In any case, the claim that intellectuals and scientists have a special and overriding interest in the preservation of liberal freedom of thought and expression betrays an elitist presumption that the rest of society will not suffer much if it is deprived of these freedoms. If Popper's alleged populism<sup>44</sup> amounts to the demand that the common people be protected in the enjoyment of liberal freedoms to which intellectuals have often shown themselves lamentably indifferent, it seems unexceptionable on moral grounds of equality of respect. Again, the criticism that Popper's belief that critical debates may replace violent revolutions as instruments of social progress embodies a Utopian form of

rationalism; in that it attributes to reason an exaggerated measure of political power, seems to rest on an elitist pessimism regarding the openness to rational persuasion of the majority of men. Whether or not such pessimism is warranted, it goes no way towards justifying that elitist optimism regarding the benevolence and efficacy of a violent revolutionary elite which, expressed most clearly in the writings of Herbert Marcuse, is (rather than any form of populism) the most distinctive feature of the political thought of the New Left.

Nothing in Popper's opposition to Utopianism commits him to condemning revolution in all circumstances: he has, in fact, specified circumstances in which he judges it to be desirable. It is a legitimate criticism of Popper's account, however, that his specification of the conditions under which revolution may be legitimate is somewhat unenlightening and might be too restrictive. As Gellner has noted,<sup>45</sup> Popper's account gives us little assistance in distinguishing between cases where revolution is justified and cases where it is not. In particular, it is a serious weakness of Popper's thought that it does not address itself to the problems of those societies — which probably comprise most contemporary societies — where the empirically necessary social, economic and cultural conditions of an open society are manifestly absent. Unlike Mill's, Popper's liberalism does not pronounce on 'those backward states of society in which the race itself may be considered in its nonage', in which the 'early difficulties in the way of spontaneous progress are so great that ... a ruler full of the spirit of improvement is warranted in the use of any expedient that will attain an end, perhaps otherwise unattainable', in which, indeed, 'Despotism is a legitimate mode of government ... provided the end be ... improvement, and the means justified by actually effecting that end.' We do not know, in other words, if Popper accepts Mill's dictum that 'Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion.'<sup>46</sup> If Popper's thought lacks a theory of political development, its critique of Utopianism nevertheless retains all its validity. For, though there are many peoples whose rulers are forced by circumstances to undertake vast schemes of social reconstruction, such projects always run the risk of bringing about a totalitarian nemesis in which neither reform nor revolution — the historic instruments of social progress — are any longer possible.



## Popper and Mill

It is still too little acknowledged<sup>47</sup> that it is a form of critical rationalism — in which openness to criticism and falsification, rather than justifiability of susceptibility to verification, is seen as the distinguishing feature of rationality, rather than any form of empiricism or inductivism — which is suggested by the account of the rational life given in Mill's *On Liberty*. It is such a critical, non-justificational and (with respect to empirical knowledge) falsificationist approach which is suggested by Mill's constant emphasis on the vital necessity of contestation, conflict, and dialectical argument in public discussion. Furthermore, Mill's emphasis on the permanent possibility of falsification as a necessary condition of the rationality of belief is brought out vividly when he proposes the institution of an *advocatus diaboli* wherever consensus has caused dialectical argument to wither away.<sup>48</sup> His fallibilist understanding of the growth of knowledge as proceeding by the rectification of mistakes, by an error elimination process in which an appeal to experience cannot be decisive by itself (contrary to naive empiricism), and which presupposes the existence of a diversity of rival theories (and so the rejection of any mono-theoretic account of the growth of knowledge), is repeatedly evidenced in the great second chapter of *On Liberty*, where many of Popper's epistemological conceptions are at once strikingly anticipated and illuminatingly applied in political contexts. One of my main theses with regard to Popper's work is that the defence of liberalism, which in Mill rests insecurely on a naturalistic conception of man with strong empiricist and determinist commitments, finds in Popper's philosophy a more appropriate metaphysical perspective. In Popper's thought, the tension between a liberal political outlook and an empiricist or naturalistic metaphysic of human nature, which has been noted in the philosophies of Mill and Russell by several recent writers,<sup>49</sup> is resolved by the abandonment of any crudely naturalistic conception of human nature. Specifically, Popper's pluralist ontology, in conjunction with a libertarian account of human action, composes a metaphysical perspective that accommodates without strain the liberal emphasis on personal autonomy, human dignity, and self-development. As several of his interpreters have pointed out,<sup>50</sup> Popper's liberalism is inextricably linked with his critical epistemology which denies authority to any of the sources of our knowledge. In Popper's philosophy,

then, positions in the theory of knowledge and rationality, the philosophy of mind and action and moral and political theory, which in Mill's eclectic thought are so much at odds with one another, cohere to form a single outlook.

What are the growth points in Popper's political thought? So far as I can see, a Popperian approach promises to contribute to the advance of knowledge in at least three of the problem areas of political thought. First, Popper's strictly deductivist account of reasoning suggests the question whether political argument can be cast in a deductive form. At least one influential moral philosopher has perceived analogies between Popper's account of scientific inquiry and moral reasoning.<sup>51</sup> it is interesting to speculate if it also has affinities with political argument. Second, Popper's suggestion that criticism in philosophy consists of identifying the problem-situation by which a philosopher was confronted, uncovering hidden assumptions in his conception of his problem-situation, and advancing novel solutions of the problems he faced, merits developing in its applications to political philosophy. At the very least, a problem-centred approach to the history of political thought looks worth exploring. Third, I suggest that Popper's conception of the Open Society designates a mode of social life which permits criticism and diversity, and in which the conventional status and alterability of basic social institutions is widely recognized. Popper's references to a perennial revolt against the 'strain of civilisation' imposed on men by life in an open society suggest the necessity for a programme of social and psychological research into the causes and character of this revolt. At a time when various forms of neo-tribal barbarism once again claim the allegiance of great masses of men, there can surely be no more pertinent research programme.

## Notes

- <sup>1</sup> J.S. Mill, *On Liberty*, (Everyman edition) p. 83.
- <sup>2</sup> Isaiah Berlin, *Karl Marx, His Life and Environment*, (Oxford: Oxford University Press 3rd edn, 1963).
- <sup>3</sup> Perry Anderson, 'Components of the national culture', in *Student Power*, (London: Penguin Books, 1969) p. 231.
- <sup>4</sup> Michael Ivens (ed.) *Prophets of Freedom and Enterprise*, (London: Kogan Page for Aims of Industry, 1975).
- <sup>5</sup> E.H. Carr, *What is History*, (Penguin edn, 1967) p. 156.
- <sup>6</sup> Lee W.W. Bartley III, 'Rationality versus the theory of rationality', in M.M. Bunge, *The Critical Approach to Science and Philosophy*, (New York: Free Press, 1964); and the writings of P.K.



Feyerabend, especially *Against Method*, (London: New Left Books, 1975).

- [7](#) Among Popper's radical critics are: James Petras, 'Popperism: the scarcity of reason', *Science and Society* (Winter 1966); Michael Freeman, 'Sociology and Utopia: some reflections on the social philosophy of Karl Popper', *British Journal of Sociology* (March 1975). Popper's advocacy of piecemeal social engineering has been subjected to a very different kind of criticism by two Wittgensteinian philosophers, Rush Rhees and Peter Winch, in *Mind* (1947), and P. A. Schilpp (ed.) *The Library of Living Philosophers, Philosophy of Karl Popper*, (La Salle, IL.: Open Court, 1974) pp. 889–904. Popper has himself answered these criticisms in the latter volume, pp. 1165–72.
- [8](#) I use the word 'proposal' advisedly so as to stress the normative character of Popper's falsificationism, which he himself stressed from the start, but which subsequent critics (e.g. Lakatos 'Popper on demarcation and induction', in *Library of Living Philosophers*) have not always fully acknowledged. See *Logic of Scientific Discovery*, (London: Hutchinson, 1972) pp. 50–6, for a criticism of naturalistic approaches to the problem of scientific method.
- [9](#) See L. Kowalski, *Positivist Philosophy*, (Harmondsworth: Penguin, 1970) where the account of Popper's positivism is still present.
- [10](#) The three-worlds terminology originates with Sir John Eccles.
- [11](#) See *Conjectures and Refutations*, (London: Routledge & Kegan Paul, 1963) pp. 193–200.
- [12](#) It has been argued that, insofar as any criticism of comprehensively critical rationalism only reinforces it by demonstrating its criticizability, the theory is self-validating and *therefore* self-defeating. On this, see J.W.N. Watkins, 'Comprehensively critical rationalism', in *Philosophy* (1969).
- [13](#) The expression 'dynamic scepticism' is Popper's. See *Objective Knowledge*, (Oxford: Oxford University Press, 1973) p. 99.
- [14](#) B. Magee, *Popper* (London: Fontana, 1973) p. 83.
- [15](#) B. Magee (ed.), *Modern British Philosophy*, (London: Seeker and Warburg, 1971) pp. 79–80.
- [16](#) *Archives Europeennes de Sociologie* (1970), vol. 11, p. 225.
- [17](#) *The Poverty of Historicism*, (London: Routledge & Kegan Paul, 1972) p. 3.
- [18](#) *ibid.*, p. 67.
- [19](#) Michael Freeman, 'Sociology and Utopia: some reflections on the social philosophy of Karl Popper', *British Journal of Sociology* (March 1975).
- [20](#) *ibid.*, 22, 31–2.
- [21](#) Ernest Gellner, *The Legitimation of Belief*, (Cambridge: Cambridge University Press, 1974) p. 172.
- [22](#) Freeman, 'Sociology and Utopia', 26.
- [23](#) *ibid.*, 27.
- [24](#) *ibid.*, 32.
- [25](#) *The Open Society and its Enemies*, (London: Routledge & Kegan Paul, 1972) vol. II, p. 187.
- [26](#) *Poverty of Historicism*, p. 63.
- [27](#) *ibid.*, pp. 79–80.
- [28](#) *ibid.*, p. 68.
- [29](#) Freeman, 'Sociology and Utopia', 26.
- [30](#) *ibid.*
- [31](#) *Poverty of Historicism*, p. 68.
- [32](#) *Objective Knowledge*, p. 22.
- [33](#) Freeman, 'Sociology and Utopia', 24.
- [34](#) *Poverty of Historicism*, pp. 155–6.
- [35](#) *ibid.*, p. 155.
- [36](#) Gellner, *The Legitimation of Belief*, p. 172.
- [37](#) *Poverty of Historicism*, p. 97.

- [38](#) *The Open Society and its Enemies*, vol II, p. 138.
- [39](#) *The Philosophy of Karl Popper, Library of Living Philosophers*, p. 1025.
- [40](#) *Poverty of Historicism*, Section 31.
- [41](#) Freeman, 'Sociology and Utopia', 25.
- [42](#) A.C. MacIntyre, 'Breaking the chains of reason', in E.P. Thomson (ed.) *Out of Apathy*, (London: New Left Books, 1966) p. 221.
- [43](#) *Poverty of Historicism*, p. 66.
- [44](#) Freeman, 'Sociology and Utopia', 29–30.
- [45](#) Gellner, *The Legitimation of Belief* p. 172.
- [46](#) *On Liberty*, (Everyman edn) p. 172.
- [47](#) Paul Feyerabend, 'Against method', in *Minnesota Studies in Philosophy of Science*, vol. 4, p. 112, footnote 52, is one of the few who have noted Mill's falsificationism in *On Liberty*.
- [48](#) *On Liberty*, (Dent edition, 1972) pp. 97–8.
- [49](#) For example, Martin Hollis, 'J.S. Mill's political philosophy of mind', in *Philosophy* (1973); Benhamin Barber, 'Solipsistic politics: Russell's empiricist liberalism', *Political Studies* (March 1975).
- [50](#) See, for example, W.W. Bartley III and M. Bunge, 'Rationality versus the theory of rationality', in *The Critical Approach to Science and Philosophy*, (New York: Free Press, 1964) p. 19ff.
- [51](#) R.M. Hare, *Freedom and Reason*, (Oxford: Oxford University Press, 1965) p. 88.

## Chapter three

# **Social contract, community and ideology**

It is widely recognized that the attempted revival by John Rawls and Robert Nozick of the contractarian tradition in political thought occurs at a propitious juncture in the history of ideas. In their writings, according to a popular view, political philosophy (recently pronounced dead) emerges from the neglect into which it had fallen as a result of the dominance of the linguistic schools and of positivism. *Anarchy, State and Utopia* and *A Theory of Justice* are viewed, then, as books in which the perennial questions of political philosophy are treated constructively and with all the sophistication achieved in other branches of philosophy. As against this widespread view, I claim these are works of salvage and reconstruction, applied to the liberal tradition, whose need of repair is notorious. My argument will be that whatever has value in these writings is obscured if we accept their authors' avowals that they exemplify the fruitfulness of the contractarian method. I shall contend that the contractarian credentials of the theories of Rawls and Nozick are dubious, and that such force as their arguments possess has other sources. In the course of my argument it will become clear why I regard the revival of interest in the contractarian approach as unfortunate. It will also become evident why I do not regard its attempted revitalization as fortuitous. Rather, it may be seen (though I cannot here show this) as an ideological manoeuvre, inevitably unsuccessful, undertaken in response to the current crisis of liberal society.

The avowed aim of Rawls's theory of justice as fairness is to show that there are principles of justice which must command the assent of all rational agents, in that they are demonstratively derivable by a species of contractarian argument from premises which are logically unexceptionable and morally non-partisan. My first objection to the Rawlsian programme is that, in so far as the design of the original position incorporates unexamined and controversial moral assumptions, the social contract which supposedly occurs within it cannot justify assent to the principles of justice. Importantly, I am assuming (which is far from selfevident) that rational choice can occur in the circumstances of the original position, that the principles chosen can somehow be shown to be principles of justice, and that they will be Rawls's principles. Equally importantly, my objection to Rawls's theory must be distinguished sharply from another, superficially similar objection, which I believe to be fundamentally misconceived. This latter objection has been made by W.G. Runciman in an exceptionally succinct form:

The fundamental objection to Rawls's idea of an 'original position' in which rational persons ignorant of their interests are supposed to have to decide on principles by which their social institutions will in due course be governed is that it already assumes that it purports to be used to demonstrate.<sup>1</sup>

As it stands, this objection to Rawls's theory is paradoxical; indeed, so far as it goes, such an objection constitutes a testimony to the success of Rawls's theory. For, as Runciman immediately goes on to acknowledge, it is precisely Rawls's claim that the principles of justice are derivable from, or yielded by, the conditions stipulated to hold in the original position. Runciman's objection to Rawls's theory plainly embodies a misconception of the role Rawls himself might reasonably claim to be performed in his theory by the original position. Rawls himself (it will be recalled) supposes the original position to be the most philosophically favoured interpretation of a hypothetical initial situation in which basic agreements would be fair. In answer to the question '... how are we to decide what is the most favoured interpretation?', which Rawls puts himself, he responds to the effect that 'the conditions embodied in the description of the original position are ones that we do in fact accept. Of, if we do not, then perhaps we can be persuaded to do so by philosophical reflection'.<sup>2</sup> The question of how we are to establish what is the most favoured interpretation of the initial situation is plainly a question of the first importance, since Rawls

later (after having acknowledged that there are many possible interpretations of the initial situation) conjectures that 'for each traditional conception of justice there exists an interpretation of the initial situation in which its principles are the preferred solution'.<sup>3</sup> These remarks make clear that there is a centrally important sense in which the entire burden of the justification of the principles of justice rests on the arguments Rawls adduces in support of the stipulations by appeal to which he characterizes the original position. The objection to Rawls's theory is not, then, as Runciman puts it, that 'the stipulated conditions are ... so framed to yield the outcome that he requires', but that Rawls's rationale for the stipulations regarding the conditions of the original position is unconvincing. This can, in fact, be easily shown.

It is a truth of capital importance for the understanding of Rawls's theory that intuitive judgments enter into it at two decisive points: in determining what are the appropriate stipulations regarding the conditions of the initial position; and in modifying these stipulations in accordance with our considered moral judgments. At both points it can be shown that Rawls's intuitive judgments fail to correspond with those that many reflective members of his own culture are inclined to make. Let us look first at Rawls's claim that the conditions of the original situation incorporate 'commonly shared presumptions' that principles of justice be chosen under certain conditions — a claim Rawls inflates into the claim that the conditions of the original situation incorporate what he describes as 'the circumstances of justice'. Rawls's motive in advancing this bolder claim is fairly transparent. Manifestly, in order to show that the choices his contractors allegedly make under the conditions of the original position are morally relevant, Rawls needs to establish the moral significance of the conditions under which the choices are supposed to be made, and this is what he tries to do by making the claim that the conditions of the original position comprehend typical circumstances of justice or, alternatively, that they represent the formal constraints on having a morality. However, the implausibility of any such claim must be apparent as soon as it is examined critically. There is an initial doubt as to whether the expression 'circumstances of justice' has any definite sense; but, granting that it does, it is surely incontrovertible that it does not typically designate a set of conditions in which men are ignorant of their own circumstances and abilities and in which their relationship with one another is one of fair

equality. Rawls might, no doubt, want to claim that the conditions of the original position represent formal constraints on the deliberations of the rational contractors — constraints of impartiality, for example — and that these constraints are synonymous with the conditions of having a morality. But, plainly, moral intuitions will be as decisive in ethical theory as linguistic practice is in grammatical theory, only if validity in moral theory is actually constituted by fidelity to the fixed points of moral sentiment and practice. Paradoxically, then, notwithstanding his frequent invocations of the Kantian interpretation of justice as fairness, Rawls's adoption of conformity with moral intuitions as a *criterion* of validity in moral theory warrants us to characterize him as an exponent of a moral-sense epistemology with evident Humean affinities.

So far, my criticism of Rawls's theory as incorporating unexamined and unjustified moral assumptions — assumptions which I have claimed correspond in Rawls's moral epistemology to basic intuitive judgements or ultimate moral responses — has proceeded at a somewhat abstract level. I want now to illustrate my claim by looking in greater detail at the design of the original position and to show how controversial judgements as to the value of equality and liberty are built into its very fabric. Somewhat platitudinously, it may be worth remarking that the general point of view of Rawls's theory is a strongly emphasized egalitarianism, according to which 'All social values — liberty and opportunity, income and wealth, and the bases of self-respect — are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage.'<sup>4</sup>

Now, as Kenneth Arrow has noted,<sup>5</sup> the generalized difference principle stated in this quotation is far from tautologous: it entails, for example, a widely accepted but still far from uncontroversial principle of *asset egalitarianism* which affirms that 'all the assets of society, including personal skills, are available as a common pool for whatever distribution justice calls for'.<sup>6</sup> Rawls actually makes explicit this asset egalitarianism when he says, in the course of discussion of the main grounds of the two principles of justice:

The two principles are equivalent ... to an undertaking to regard the distribution of natural abilities as a collective asset so that the more fortunate are to benefit only in ways that help those who have lost out.<sup>7</sup>

It is worth noting, parenthetically, the grossly counter-intuitive implication of the principle of asset egalitarianism — that the able and

gifted members of the human race (those endowed with extraordinary artistic talents, for example) are justified in enjoying the primary goods involved in developing and exercising their talents only if in so doing they benefit the rest of society, and, in particular, its least advantaged group.<sup>8</sup> Apart from the fact that Rawls's general point of view has counter-intuitive implications for many of his readers — a fact which casts serious doubt on the claim to adequacy of justice as fairness conceived as a quasi-empirical theory whose data are men's considered moral responses — his commitment to a stringent principle of asset egalitarianism helps to explain his otherwise unaccountable neglect of what Arrow has described as the productivity principle. This is a principle which is widely and unreflectively held, and often thought to be entirely self-evident, according to which an individual is entitled to what he creates.

Once again, it is not accidental that Rawls fails to consider a productivist alternative to his conception of justice: the neglect illustrates some of the most important features of his theory. As Robert Nozick has shown, the design of the original position excludes from initial consideration all 'historical' theories of distributive justice (such as Nozick's own quasi-Lockean entitlement theory) and restricts rational deliberation in the original position to critical evaluation of various 'end-state' theories. Nozick distinguishes between end-state and historical theories as follows: In contrast to end-result principles of justice, historical principles of justice hold that past circumstances or actions of people can create differential entitlements or differential deserts to things.<sup>9</sup>

Nozick distinguishes also between 'patterned' and 'unpatterned' principles of justice. A patterned principle is one according to which justice of a distribution varies according to some 'natural dimension', such as needs, which would yield an end-state patterned principle, or merit, which would yield a patterned historical principle. According to Nozick's own unpatterned historical theory, the justice of a distribution does not vary according to determinate features of men's actions or characteristics of these sorts. Nozick's argument is not the weak, paradoxical, and probably invalid one that Rawls's construction of the original situation is incapable of yielding any conception of justice other than that which it actually yields. Rather, it is that the veil of ignorance:

ensures that no shadow of entitlement considerations will enter the rational calculations of ignorant, non-moral individuals ... Since no glimmer of



entitlement principles is built into the structure of the situation of persons in the original position, there is no way these principles could be selected; and Rawls's construction is incapable in principle of yielding them.<sup>10</sup>

The significance of Rawls's neglect of entitlement and, in general, of historical principles of justice is that, since nowhere does he justify their absence from the list of alternative conceptions of justice, he has no independent chain of reasoning which might warrant adopting end-state rather than historical principles. The point, then, is not that Rawls's construction of the original position is designed to yield only end-state principles, nor yet that his list of alternative principles of justice is far from exhaustive (which Rawls readily admits), but that Rawls's reasoning becomes viciously circular, in so far as he can give no good reasons for accepting stipulations regarding the original position other than that they allow him to derive the outcome he wants.

I have called attention to an important feature of Rawls's approach to social justice — its *presumptivism* regarding the value of equality. Rawls assents uncritically to the view — endorsed by a long line of liberal thinkers, including Isaiah Berlin (in some of his writings), Bernard Williams, and Richard Wollheim,<sup>11</sup> according to which it is supposed that: though it is absurd to think that justice requires us to treat all men exactly alike, it does require that we give them equal treatment until we have good reason not to, so that ‘the burden of proof is on the person who wants to treat people differently from one another.’<sup>12</sup>

The most common line of criticism of this approach to equality is that it establishes only a weak, formal and question-begging approach to equality, so leaving the whole weight of justification of particular discriminatory policies to rest upon the criteria of relevance which are adduced to support them.<sup>13</sup> I want to contend that this criticism, though valid as far as it goes, is misconceived in so far as it endorses the egalitarian presumption which is expressed in Berlin's claim that ‘if I depart from [a] principle of equal division I am expected to produce a special reason’.<sup>14</sup> For, as Feinberg has pointed out, egalitarian presumptivism is open to the fatal objection that: Where the ‘burden of proof’ actually lies in a given case ... depends upon what is given (believed or known) about the relevant traits of the individuals involved, and also upon the particular context of justice and its governing norms and maxims. The presumption in favour of equal treatment holds when the individuals involved are believed, assumed or



expected to be equal in the relevant respects, whereas the presumption in favour of unequal treatment holds when the individuals involved are expected to be different in the relevant respects.<sup>15</sup>

Rawls's commitment to a narrow, dogmatic and vulnerable form of presumptivism regarding the value of equality is clearly revealed when he asserts that 'this principle [the first principle of justice requiring an equal distribution of all primary social goods] is so obvious that we would expect it to occur to anyone immediately'.<sup>16</sup> Interestingly, Rawls subsequently discloses that he is committed to an analogous form of presumptivism regarding the priority of liberty when he stipulates that the rationality of the contractors in the original position is *partly constituted* by their preference for liberty over other primary goods. Rawls's frequent resort to such presumptivist positions should occasion no surprise to those who accept the characterization of his moral epistemology as a variant of subjectivist intuitionism: for, after all, if such an epistemology be adopted, it follows that no argument can be adduced in support of basic principles, whose ratification can be conceived only in terms of their endorsement by pre-reflective moral sentiments. It is an implication of my account that Rawls's commitment to an intuitionist moral epistemology reinforces his indisposition to supply independent reasonings for adopting the stipulations regarding the original position in which are embodied the moral assumptions I have in mind. It is a further implication of my account that, if the stipulations expressive of these moral assumptions can be supported independently, then we have found direct moral arguments as to the value of equality and the priority of liberty, and the apparatus of the original position and the social contract is dispensable.

### **Presumptivism, universality and rationality**

My overriding objection to Rawls's programme — that it endorses a misconceived presumptivism in respect of liberty and equality and that its contractarian argument is superogatory in so far as it is not ultimately incoherent — has large consequences for social philosophy, and its ramifying reasonings may accordingly deserve some further elaboration. Rawls's account of rationality gives the reader the impression that he supposes that, from among the extended family of human activities in which reasons may be asked for or given, there might be selected some

which, since they are expressive of some of the natural necessities or generic features of human life, may be privileged over the innumerable local, culturally and historically variant practices in which men give an account of themselves and their actions to their fellows, and ponder dilemmas of choice. Indeed, Rawls's theory would plainly fail to achieve the universality to which it aspires if the picture of rationality which Rawls paints in it (especially in [Chapter 7](#) of *A Theory of Justice*) could be shown to be permeated by norms characteristic of his own (but not of all) cultures. In general, it is one of the oldest aspirations of philosophers to formulate criteria or legislate norms of deliberative rationality which will be universal and context-independent in that they reflect the natural necessities of man's life, and which (unlike the rules of inference of formal logic) will impose substantive restrictions on the conduct of practical reasoning. Notoriously, this perennial aspiration is open to the objection that the task of distinguishing between what is generic and what is specific in human life, between what is essential and what is accidental, between nature and convention, is (logically, or as a matter of fact) impossible to bring off. More plausibly, it is an objection to any such distinction as is involved in Rawls's attempt to isolate generically human and universally binding constitutive principles of practical reasoning, that such principles will either be truly universal in their application but empty of substantive, action-guiding content, or else specific in their practical implications but tainted by culture-dependent norms. I submit that Rawls's attempt to operate with principles of practical reasoning which have the universal validity of the inference rules of formal logic but are yet action-guiding, like that of Kant and H.L.A. Hart, falls between two stools. Specifically, Rawls gives the derivation of the principles of justice from the circumstances of the original position an appearance of plausibility only by building into the deliberative rationality of the contractors normative specifications (such as that embodied in the Aristotelian principle) whose culture-dependency is patent.

The pan-cultural aspirations of Rawls's theory are, however, most clearly visible in this theory of primary social goods, and it is there that the Rawlsian programme most obviously founders. It is the central claim of Rawls's theory that the concept of a rational life plan, in conjunction with the thin theory of the good that it comprehends, is such as to allow a reasonable choice to be made and for the choice problem posed by the original position to yield a determinate solution, while at the same time

being neutral as between rival conceptions of the good life. Are there, in fact, any 'primary goods' that are truly universal? Life and health look unexceptionable items on any list of true primary goods — though such an appearance may be delusive — but it is surely evident that the cultural relativity of the rest of Rawls's candidates restricts the class of primary goods and seriously impoverishes the notion of a rational life plan. Again, one must not follow Rawls in neglecting the possibility that the class of true primary goods is an empty one. After all, it is an implication of some understandings of human life — those of Hegel and the later Marx, perhaps — that human nature is always entirely constituted by a nexus of historically variant, culturally specific and alterable social relations. Admittedly, Hegel might well wish to present an explanation of the indeterminacy of human nature in terms of man's permanent liability to reflexive thought, while neither Marx nor Hegel could sensibly deny that man's biological constitution imposes significant constraints on the range of modes of social life that is open to him. Still, it is an implication of such an understanding of human activity that no distinction can be made between human wants and needs that are local or parochial and those that are generic or universal, such that the latter can be identified reliably and ranked morally over the former. If the forms of man's life are the creations of his own practice, constrained only by the facts of his constitution and by the circumstances he inherits from his forebears, then it will be seen that no conception of the good life can be privileged over others on the grounds that it is more deeply founded in man's nature.

If there are good reasons for supposing that Rawls's attempt to predetermine the outcome of the contractors' deliberations by supplying them with paradigmatic human wants, from which all traces of motives relating to culturally and historically variable forms of life have been erased, is a project that is doomed to failure, these reasons are only strengthened if we consider the restrictions which Rawls wishes to impose on the knowledge available to his covenantors. For, as several writers have perceived, Rawls's hypothesis of the original position is not (strictly speaking) coherent. It will be recalled that Rawls supposed that the contractors might be acquainted, for example, with the laws of psychology (including moral psychology), sociology, and economics, while being ignorant of any particular facts about themselves or their society. There is the profoundest doubt, however, whether it is at all conceivable that the veil

of ignorance could be thick enough to blot out knowledge of particular facts while being thin enough to let in knowledge of such laws. Even if such an objection of incoherence could be shown to be misconceived, it would still be the case that general knowledge let in through the veil of ignorance would be so vague as to be of little assistance in solving the choice dilemma. Since the contractors are, then, presumed to be ignorant of the stage of development of their own society, it follows that the 'laws of economics' and 'laws of sociology' with which they would be acquainted would be such as apply to all societies (whatever their stage of development) and, plausibly, they would be laws of such abstract generality as to be almost destitute of predictive or explanatory potency. More generally, I contend that, just as an understanding of the terms and notions used in empirical science (e.g. psychology and economics) logically presupposes some knowledge of particular facts, so an understanding of the general conditions of human existence presupposes an experience of living in definite forms of social life. This is only to express assent to the traditional criticism of social contract doctrines, recently powerfully restated,<sup>17</sup> that they attribute to the presocial abstract individuals who make the contract, qualities which are acquired only by living in society. To do this, however, is to say that the original position envisages a logically impossible circumstance, and that the supposition that deliberation and choice can occur within it is incoherent.

### **Rawls's theory versus contractarianism?**

If Rawls's hypothesis of the original position is an unintelligible one, we may be inclined to doubt that it has the central place in his theory that Rawls sometimes attributes to it. At first glance Rawls's claim that the theory of justice as fairness represents a revival of the contractarian tradition in political argument raises suspicions in anyone acquainted with the development of that tradition. After all, the traditional social-contract theory addressed itself to different problems from those to which Rawls's theory is intended as a solution. In the writings of Hobbes and Locke, for example, the device of the social contract is used not primarily as a test of the acceptability of candidate principles of social distributive justice, but rather as a metaphorical statement of a consensual theory of the grounds and limits of political obligations which itself comprehends an account of

justice. Even in the more favourable case of Rousseau's political thought, it might plausibly be contended that there are independent moral arguments for the value of equality and the principles of social justice, while the social-contract device retains its traditional role as a solution to the problem of political obligation by appealing to the actual or tacit consent of the representative rational agent. These doubts about the aptness of Rawls's characterization of his theory as contractarian are amply confirmed, if (disregarding the basic question of its coherence) we look at the logic of rational deliberation in the original position. A number of writers have remarked that, in so far as the contractors have access to the same general knowledge and are presumed to undertake the same deliberations, there is no need in Rawls's account of the original position for the supposition of a diversity of choosing selves coming to a unanimous public agreement. I suggest that the claim that Rawls's theory is not a variant of contractarianism can be made more sharply. I suggest that not only is it the case that Rawls does not need the device of social contract but that he cannot afford it. In other words, Rawls characterizes the original position in such a way as to exclude even the logical possibility of there being a diversity of choosing selves who come to an agreement. How does Rawls succeed in doing this? In the first place, by laying down stringent conditions regarding publicity of information, identity of motivation and values, and of the conduct of practical reasoning. Rawls effectively removes from the original position the possibility of privacy, diversity of motivation, and divergence in reasoning processes, which are among the logically necessary conditions of there being a diversity of selves. In noting as part of the logic of selfhood the necessary truth that a diversity of persons is composed of individuals with distinct and differing experiences, values, and motives, we see that Rawls cannot have the assurance that the choice problem posed in the original position will have the solution he desires while yet preserving the fiction of a diversity of reasoners and choosers. Another way of making this claim is to say that, in stipulating 'that the parties in the original position are theoretically defined individuals', Rawls deprives the contractors of criteria of identity without which they are interchangeable and indistinguishable.

Against those of Rawls's critics who have argued that the core of his theory is in the conception of the original position as posing a choice problem in which a hypothetical rational individual adopts principles of

action under conditions of ignorance and uncertainty, and who contend that this rational-choice core needs to be separated from the redundant expository device of the social contract, I contend that the incoherence of the supposition that there can be deliberation or choice in the original position entails that Rawls's theory is no more a rational choice theory than it is a species of contractarianism. (That the derivation of the principles of justice confessedly fails to be deductive should in any case incline one to be suspicious of the theory's rational-choice credentials.)

If Rawls's theory is neither of these things, then what is it? Paradoxical and implausible though such a characterization of his work appears, a close affinity exists between Rawls's theory and those theories of the moral sense which flourished during the period of the Scottish Enlightenment. Such an interpretation of Rawls's work is rendered less implausible, perhaps, when one recalls his account of moral theory itself as an elaboration of man's moral capacity, having a method and aim closely analogous to that of the ordinary empirical sciences (though having also important differences which Rawls does not fail to note). The tension between such an account of the final character of Rawls's theory with that which he claims for it himself is not inconsiderable, yet there are evidences in *A Theory of Justice* that (though he might be reluctant to accept many of the arguments I have adduced in support of my characterization of his theory) he would not find wholly repugnant the description of his work as a subtle, naturalistically based moral sense theory.

Given a sufficiently mature appreciation of the richness and complexity of Kant's thought, Rawls's appeal to a Kantian interpretation of his theory might be cited as evidence that he would admit some justice in a moral-sense interpretation of it. For it is a feature of at least some of the classical exponents of moral-sense theories that, while they made a primary appeal to the sentiments of sympathy and benevolence as sources of the moral point of view, they recognized also that moral reasoning has constitutive principles and inference rules of its own. Rawls's neo-Kantian critical rationalism is not implausibly construed, accordingly, as a resumption of the Kantian project of displaying the congruence of the intimations of man's fully developed moral sensibilities with the dictates of the principles of practical reasoning.

## **The incoherence of Rawls's project**

Once Rawls's programme is so characterized, it becomes apposite to restate and expand the central objection to all arguments having this general character. It is two-pronged. First, as the ineradicable instability of the thin theory of the good reveals most vividly, any research programme in social philosophy which takes as its basic data the deliverances of 'our fully developed moral sensibilities' may expect to achieve determinate results only if it rests on the (erroneous) supposition, clearly endorsed by Hume, that, in essential respects, 'mankind is much the same in all times and places'. Second, a presumptivist fallacy is committed whenever the attempt is made to derive substantive action-guiding maxims from principles of moral reasoning, the denial of which would involve self-contradiction or the abandonment of the moral point of view. Since this fallacy is all but ubiquitous in recent writings on questions of distributive justice, it may be worth attending to those features of genuinely formal principles of justice which distinguish them plainly from those principles, at once avowedly presumptive and allegedly action-guiding, which have been acclaimed by a number of recent writers as expressive of some of the constitutive inference rules of 'our moral reasoning'.

As Katzner<sup>18</sup> points out, genuinely formal (or 'formalist') principles of justice are endorsed by Aristotle, when in [Chapter 5](#) of the *Nicomachean Ethics* he explicates justice in terms of the notion of proportion, and by Perelman when he characterizes formal justice as treating all those who belong in the same essential category in the same way. Such genuinely formal non-presumptivist principles of justice clearly embody a weak ideal of impartiality, in that they require us to treat relevantly similar cases alike, and it is not utterly implausible to regard subscribing to such genuinely formal principles as partly constitutive of the notion of a rational (rule-following) agent; but they make no presumption in favour of (or against) equality, requiring only that beings in the same categories be treated the same and those in other categories differently.

In other words, such formalist principles of justice differ from such principles as those of Berlin or Benn and Peters. These latter principles require us to treat all beings alike unless good reason can be provided for treating them differently, and stipulate that the *onus probandi* lies on those who advocate discriminatory treatment. For, whereas the former are exceptive principles enjoining that we treat all men alike, save where there are differences between them, the latter are presumptive principles



demanding that we treat all men alike until it has been shown that they are relevantly different. I contend that the former are genuinely formal principles, in that they can plausibly be represented as being used in any kind of moral reasoning, whereas the latter are substantive principles embodying a controversial (and in some cases grossly counter-intuitive) egalitarian presumption.

Given the easily demonstrated extensional inequivalence of the two sorts of principles, I submit that presumptive principles are fraudulently represented as defining features of the moral point of view. Rather, the egalitarian and libertarian presumptions embodied in such principles as 'treat all men equally until they have been shown to be relevantly different' and 'do not restrict men's liberty until you have been shown a good reason for doing so' endorse a definite form of moral life whose rivals are no less entitled to claim that their practices satisfy genuinely formal rules of moral reasoning. It is to beg the question in favour of the moral standards of a liberal society to characterize the dispute between its supporters and its enemies as a dispute between men who subscribe to common principles regarding liberty and equality but who assent to divergent criteria of relevance for their correct application.

What are the implications of my argument so far for the valuation of Rawls's theory? First, I wish to emphasize that recognition that the contractual aspect of deliberation in the original position is delusive has substantive and important implications for the evaluation of the character and merits of Rawls's theory. Significantly, Rawls himself lays considerable stress on the claim that his theory has a contractualist aspect, alleging that it is this aspect of his theory which distinguishes it most sharply from utilitarianism. He tells us that:

whereas the utilitarian extends to society the principle of choice for one man, justice as fairness, being a contract view, assumes that the principles of social choice, and so the principles of justice, are themselves the object of an original agreement. There is no reason to suppose that the principles which should regulate an association of men are simply an extension of the principle of choice for one man. On the contrary, if we assume that the correct regulative principle for anything depends on the nature of that thing, and that the plurality of distinct persons with separate systems of ends is an essential feature of human societies, we should not expect the principles of social choice to be utilitarian ... from the standpoint of contract theory one

cannot arrive at a principle of social choice merely by extending the principle of rational prudence to the system of rational desires constructed by the impartial spectator. To do this is not to take seriously the plurality and distinctness of individuals, nor to recognise as the basis of justice that to which men would consent.<sup>19</sup>

In view of the arguments I have adduced regarding the logical impossibility of there being a diversity of selves in the original position, it is ironical to find Rawls insisting on the supposed contractarian aspect of his theory and utilitarian theories of justice. The dissolution of the contractual aspect of justice as fairness may also bring it much closer to a Kantian position than Rawls himself would allow. Rawls tells us:

I have departed from Kant's views in several respects ... The person's choice as noumenal self I have assumed to be a collective one. The force of the self's being equal is, that the principles chosen must be acceptable to other selves ... This means that, as noumenal selves, everyone is to consent to these principles.<sup>20</sup>

Interestingly, Rawls seems to be aware that the original position might be interpreted in such a way as to omit any reference to a contractual component: for he goes on to say, 'Later I shall try to define a clear sense in which the unanimous agreement is best expressive of the nature of even a single self.'<sup>21</sup> When he comes to this, however, Rawls at no point acknowledges that his design of the original position might rule out any possibility that it contains several reasoning, choosing selves.

Second, I want to suggest that the considerations which lead me to question the absence of the supposition that there could be rational deliberation in the circumstances of the original position are destructive of state-of-nature arguments, whether or not they contain reference to contractual agreement. Why is this? Clearly, when the contractors consider the merits of rival conceptions of social justice, they are engaged in a species of practical reasoning; they are deliberating a problem of choice, about which they seek to come to a decision. Given the practical character of reasoning in the original situation, it is striking to note the logical oddity of Rawls's references to 'persons' who compose a society, who yet have no knowledge of their own particular abilities or values, or any acquaintance with specific forms of social life. For, according to one widely influential account of the sense of those concepts which apply peculiarly to human involvements — concepts to do with intending, acting, hoping, or

regretting, to take a few examples — it is said that their meaning is partly constituted by the circumstances in which they are learnt. To understand such a concept, to use it correctly, in this account, is inconceivable without a grasp of the cases in which its typical uses occur. As Pitkin has put it: Meaning is compounded out of cases of a world's use, and what characterises these cases is often the speech situation, not the presence of something being referred to. As a consequence, the significance for meaning of situation, of circumstances, of context, is much greater than one might suppose.<sup>22</sup>

If, then, there is a non-contingent connection between grasping the sense of a concept and knowing the cases in which to use it, then the following supposition breaks down — i.e. that one might (as do the contractors of the original position) employ concepts used to characterize human actions (say) without having learnt their uses in the particular circumstances of human life. Specifically, Rawls's account invites the question: how can I be sure I would attach such a high value to liberty, when, as Rawls makes clear, liberty is partly constituted by the immunities and security provided by such artefacts as constitutions and bills of rights — if I were ignorant of the character of a liberal civilisation? This question, in turn, suggests the aptness of Steven Lukes's judgement on Rawls, whose achievement, he says,<sup>23</sup> is ‘to have produced *a* theory of justice — a theory of liberal democratic justice’.

Third, it is, of course, a traditional criticism of social contract theories that they attribute to the pre-social abstract individuals who make the contract, qualities which are acquired only by living in society. Alastair MacIntyre has said of Hobbes, for example, that he: makes two incompatible demands of the original contract: he wishes it to be the foundation of all shared and common standards and rules; but he also wishes it to be a contract, and for it to be a contract there must already exist shared and common standards of the kind which he specifies cannot exist prior to the contract. The conception of an *original* contract is therefore ruined by internal self-contradiction and cannot be used even to frame a metaphor of a coherent kind.<sup>24</sup>

MacIntyre's argument applies with even greater force to Rawls than it does to Hobbes. The hypothetical rational choosers of the original position are supposed by Rawls to be able to make an intelligent decision regarding the principles by which their conjectural society will be governed, though

they are denied all knowledge of particular features of any historic society. Like Hobbes' original contract, but perhaps more obviously, Rawls's original position is a metaphor ruined by its internal contradictions. I have claimed that the state-of-nature arguments adduced by many liberal theorists suffer from this kind of incoherence, regardless of whether they comprehend contractual deliberations. It is important to note parenthetically that the contractarian credentials of Nozick's derivation of the State are as dubious as those of Rawls's principles of justice. Certainly, as a number of recent writers have pointed out, Nozick's invisible-hand account of the emergence of the State goes no distance forward in justifying its existence against the claims of the individualist anarchist. The real force of Nozick's argument must derive from a theory of inalienable human rights, which is presupposed rather than stated in *Anarchy, State and Utopia*, and whose consistency with the argument for the minimum State is questionable. More specifically, as Murray Rothbard has argued in a recent critique<sup>25</sup> of Nozick's argument for the State, there is a tension between Nozick's endorsement of the classic liberal position on self-ownership and his treatment (under the murky category of 'compensation') of basic human rights as alienable. As Rothbard puts it, according to classical liberal theory: the only valid (and therefore binding) contract is one that surrenders what is, in fact, philosophically *alienable*, and ... only specific titles to property are so alienable ... While, on the contrary *other* attributes of man, specifically, his self-ownership over his own will and body, and the *rights* to person and property which stem from that self-ownership, are 'inalienable' and therefore cannot be surrendered in a binding contract.

In general, Nozick's derivation of the State fails because, first, no invisible-hand process could constitute or give rise to a contractual agreement authorizing a transfer of rights;<sup>26</sup> second, Nozick's own account of such rights shows them to be inalienable and so insusceptible, even in principle, to transfer by contractual agreement; and, third, since no theory of human rights is ever adumbrated in *Anarchy, State and Utopia*, Nozick must perforce invoke an incoherent state of nature in which narrowly conceived rational economic agents are supposed to give rise to the State via their self-interested decisions.

My third and final point about the attempted revival of liberal contractarianism in the writings of Rawls and Nozick follows directly from these criticisms of its internal cogency. It is that their obscurities and

inconsistencies become fully intelligible only when they are seen against the background of the current crisis of liberal thought. My aim has been to show that Rawls's theory of justice as fairness and Nozick's derivation of the State are failures in their own terms. I wish to suggest, in conclusion, that they are best understood as responses to the desuetude of liberal institutions under the impact of external challenges and their own internal contradictions. They are to be regarded, accordingly, as contributions to liberal ideology rather than as works in political philosophy as it has been classically conceived. They explore a particular moral and political perspective — that of liberal society — rather than elucidate its presuppositions and they give it no transcendental justification. If anything, the revival of liberalism attempted in the works of Rawls and Nozick must be judged to have obstructed rather than assisted the improvement of our understanding of the crisis of liberal society.

## Notes

- [1](#) 'Moral intuitions, procedural rules and social justice', a paper delivered by W.G. Runciman to the Scots Philosophical Club Conference, University of Stirling, 10 September 1975. I have found this one of the most instructive of recent writings on questions of distributive justice, and I owe much of my understanding of them to it.
- [2](#) J. Rawls, *A Theory of Justice*, (Oxford: Oxford University Press, 1972) p. 21; see also p. 587.
- [3](#) *ibid.*, p. 121.
- [4](#) *ibid.*, p. 62.
- [5](#) K. Arrow, 'Some ordinalist-utilitarian notes on Rawls's theory of justice', *Journal of Philosophy* (May 1973).
- [6](#) *ibid.*, 248.
- [7](#) Rawls, *A Theory of Justice*, p. 179.
- [8](#) On this point I have profited from L. Holborow, 'Desert, inequality and justice', *Philosophy* (1975) 50.
- [9](#) R. Nozick, *Anarchy, State and Utopia*, (Oxford and New York: Basil Blackwell, 1974), p. 155.
- [10](#) *ibid.*, p. 204.
- [11](#) For Berlin's variant of presumptivism, see his 'Equality as an ideal', in *Proceedings of the Aristotelian Society* (1955–56), p. 56.
- [12](#) Joel Feinberg, *Social Philosophy*, (Englewood Cliffs, NJ: Prentice-Hall, 1973) p. 100.
- [13](#) For example, J.R. Lucas, *Principles of Politics*, (Oxford: Oxford University Press, 1966) Section 56.
- [14](#) See Berlin, 'Equality as an ideal', for a development of this claim.
- [15](#) Feinberg, *Social Philosophy*, p. 101.
- [16](#) Rawls, *A Theory of Justice*, p. 151.
- [17](#) For example, by M. Teitelman, 'The limits of individualism', *Journal of Philosophy*.
- [18](#) See Katzner, in J. Feinberg, *Social Philosophy*, p. 100.
- [19](#) Rawls, *A Theory of Justice*, pp. 28–9.
- [20](#) *ibid.*, pp. 256–7.
- [21](#) *ibid.*, Section 85.

- [22](#) H. Pitkin, *Wittgenstein and Justice*, (Berkeley: University of California Press, 1973) p. 71.
- [23](#) S. Lukes, 'No Archimedean point' (review of *A Theory of Justice*), reprinted as [Chapter 10](#) of *Essays in Social Theory* by Steven Lukes (London: Macmillan, 1977).
- [24](#) A. MacIntyre, *A Short History of Ethics*, (London: Routledge & Kegan Paul, 1968) p. 137.
- [25](#) M. Rothbard, 'Robert Nozick and the immaculate conception of the state', *Journal of Libertarian Studies* 1 (1) (Winter, 1977).
- [26](#) On this point I am indebted to Hillel Steiner's paper: 'Can a social contract be signed by an invisible hand?', in Birnbaum, Lively and Parry (eds) *Democracy, Consensus and Social Contract*, (London and Beverley Hills: Sage Publications, 1978) pp. 295–316.

## Chapter four

# On negative and positive liberty

It is the argument of an influential school of philosophers, working within a tradition of thought strongly influenced by logical positivism and by linguistic analysis, that disputes about the nature of freedom may be resolved conclusively and to the satisfaction of all reasonable students of the subject. Among such exponents of what I shall henceforth call a *restrictivist*<sup>1</sup> approach to the subject of freedom, there are wide differences as to the nature of freedom and about the means whereby discussion about its nature is to be rationally foreclosed. Some writers are prepared to treat as decisive the production of a stipulative definition of freedom backed by weighty arguments about its operational utility. Others make their ultimate appeal to intuitions about freedom which are supposed to be embedded in ordinary thought and practice, or to allegedly standard uses of the concept in classic texts of social and political thought. Whatever their disagreements in these areas, restrictivists all hold that it must in principle be possible to elaborate a preferred view of freedom against the background of an authoritative elucidation of the concept of freedom, so that the resultant theory of freedom will commend itself to all reasonable men. What restrictivists have in common, in other words, is a rejection of the claim that freedom is what has been called an *essentially contestable concept*.<sup>2</sup>

Typically, though not perhaps necessarily, restrictivists also take up three secondary positions on the subject of freedom. First, they are inclined to



view freedom as primarily a *descriptive* concept, to which evaluative connotations have become attached in ordinary usage; they repudiate the contention that evaluative judgements and moral and political commitments must inevitably inform any judgement we make about freedom. Second, as well as holding that discourse about freedom is, or might in certain contexts someday become, evaluatively neutral, restrictivists characteristically affirm that rational consensus on the proper uses of the concept of freedom can be reached in the absence of any prior agreement on broader issues in social and political theory: they deny that differing uses of the concept of freedom can be shown to hinge on divergent conjectures about man and society in such a way that uses of it are always theory-loaded. Third, restrictivists are disposed to reject the claim that metaphysical views about the self and its powers are germane to disputes about the nature of social freedom: like the theoretical commitments of the social sciences, such metaphysical commitments are held to be immaterial to the conduct of disputes about freedom.

Restrictivist theses about freedom demonstrably endorse naïve and superseded positions in the philosophy of mind and action and in the theory of our knowledge of the social world. At the same time, much argument in favour of the essentially contestable character of moral and political concepts seems to break down, inasmuch as it turns on a central paradox. This paradox may be expressible in the question whether the notion of an essentially contestable concept may itself be incoherent. For how can it be the case that arguments and considerations are available in terms of which a contest can be carried on about the proper use of a concept, if it is also supposed that none of these considerations is capable of settling the contest? I have elsewhere argued that some notions of the essential contestability of concepts may be free of this obscurity.<sup>3</sup> Whether or not my own attempted rehabilitation of essential contestability theses is successful, it seems important to note that the difficulties my contribution was intended to resolve are not decisive in the evaluation of Berlin's argument about freedom. For while it is implicitly acknowledged in his 'Two concepts of liberty' that disputes about the notion of freedom cannot be resolved by methods of conceptual analysis or stipulative redefinition which are neutral with respect to rival moral and political commitments, Berlin does there insist that there are arguments which favour one view of freedom over the others he considers. It is the burden of 'Two concepts of liberty' that these

are precisely arguments invoking substantive moral and political values, drawing on controversial positions in social theory and involving metaphysical claims.

In that lecture Berlin develops an argument of unsurpassed perspicuity which suggests that judgements about freedom cannot be insulated in restrictivist fashion from evaluative questions, from disputes in social theory or from metaphysical commitments. In this chapter I want to ask what are the principal theses of Berlin's argument about liberty, and how far his account is acceptable. My conclusion is that, whereas Berlin's argument is not vulnerable to most of the objections its critics have advanced, yet the logic of his argument compels Berlin to acknowledge the relevance to questions of social freedom of considerations having to do with the conditions of rational choice and with the real will — considerations germane to positive conceptions of freedom of just the sort whose role in political thought Berlin judges to have been lamentable. Further, I consider Berlin's assumption that negative conceptions of freedom have some sort of special congruence with the mainstream of the liberal tradition. Here, I shall give reasons for thinking it is a view of freedom as consisting in the non-restriction of options that is most germane to liberalism's central concerns. It is this conception of freedom rather than any narrowly negative view which expresses the spirit of Berlin's account most adequately. I shall conclude by contending that, whereas this view may appear to contain one of the important elements of the positive conception in that it is concerned with internal as well as external conditions of free choice and action, it remains none the less recognizably a variant of the negative view. It also represents the best point of departure for further work in the theory of social freedom.

My examination of Berlin's account will be in six sections. First, I will consider Berlin's conceptual analysis of freedom, concentrating on the relation between elucidations of the concept of freedom and arguments about what is the preferred conception of freedom. Second, I will look at Berlin's account of the relations between freedom and the values which freedom may serve, and, more broadly, between judgments about freedom and evaluative judgments generally. Third, I will examine Berlin's distinction between questions about freedom (on the one hand) and questions about power and ability (on the other), looking most closely at the connections, if any, between judgments about social freedom and judgments

about the conditions of rational choice and about the real will. Fourth, I will address myself to Berlin's views about the role of social theory in making judgments about freedom, and, especially, to his arguments about the place of conjectures about causality and intentionality in such judgments. Fifth, I will consider Berlin's account of the place of negative and positive views of freedom in the thought of central exponents of the liberal intellectual tradition, arguing that, as in Bentham, severely negative conceptions of liberty tend to support authoritarian rather than liberal political theories. Sixth, and last, I will consider briefly the dependency of Berlin's account of freedom on the claim, reiterated throughout his writings and in my view a contribution to social and political theory of the first importance, that some moral and political values which are fundamental in our thought about human conduct are incommensurable with one another. I will suggest that it is this break with the monist tradition in ethics and philosophy that we inherit from the classical period of Platonic and indeed Socratic rationalism which motivates Berlin in assigning to liberty a privileged place among the political values he judges to be worthy of promotion. For, as Berlin sees it, it is an inexorable result of the truth that some basic moral and political goods are incommensurable, and the central excellences of human life competitive and sometimes uncombinable, that moral and political dilemmas are insusceptible of any definitively rational solution. The concept of a perfect man, like that of a perfect society, has, accordingly, no clear application and must be judged to be incoherent. The privileged status of freedom among the ends of political life derives for Berlin from the constitutive role he conceives moral conflicts to have in political life, and from the source of such conflict in the ineradicable diversity of men's purposes. Berlin's advocacy of the priority of liberty is grounded, then, in the doctrine of value-pluralism which he has always promoted.

### **Freedom: the concept and its rival conceptions**

The distinction between a concept and its rival conceptions is one which has been introduced into social philosophy by John Rawls, though similar distinctions may be found earlier in philosophy. 'It seems natural', Rawls writes, 'to think of the concept of justice as being specified by the role which these different sets of principles, these different conceptions, have in common.' Later, he writes that the various conceptions of justice are:

the outgrowth of different notions of society against the background of opposing views of the natural necessities and opportunities of human life. Fully to consider a conception of justice we must make explicit the conception of social cooperation from which it derives.<sup>4</sup>

Now it is plain that, when Berlin speaks of two concepts of liberty, he intends us to understand this as a reference to what Rawls would call two *conceptions* of liberty. Indeed, Berlin acknowledges that they have a common root, when he says that, ‘“positive” and “negative” liberty, in the sense in which I use these terms, start at no great logical distance from each other’.<sup>5</sup> Again, in the first paragraph of his introduction to the book in which the lecture is collected, Berlin says of it that it is concerned with ‘the importance of two major *conceptions* of liberty in the history of ideas’.<sup>6</sup> When he later speaks of the competition between positive and negative conceptions as involving ‘not two different interpretations of a single concept, but two profoundly divergent and irreconcilable attitudes to the ends of life’,<sup>7</sup> he is not departing from his earlier claim that the concept of liberty has spawned two rival conceptions. Rather, he is asserting that *some* positive conceptions mistakenly identify distinct political values with freedom or liberty. In making this assertion, however, unlike many of his critics, Berlin does not commit the error of supposing that it is an easy and unproblematic matter to identify the distinguishing features of the *concept* of liberty. That this is so may be seen by considering briefly G.C. MacCallum's criticism of Berlin's account.

In conformity with his aim of producing a formal scheme within which all discourse about social freedom may be framed, MacCallum urges us to treat liberty as a concept always designating a triadic relation which holds between agents, constraints, and acts, and which has the general form: This or that person (or persons) is free (or not free) from this or that constraint (or set of constraints) to do (or not to do) so and so. As MacCallum himself puts it:

Whenever the freedom of some agent or agents is in question, it is always freedom from some constraint or restriction, interference with, or barriers to doing, not doing, becoming or not becoming something. Such freedom is thus always *of* something, an agent or agents, *from* something, to *do*, not do, become or not become something; it is a triadic relation. Taking the format ‘X is (is not) free from Y to do (not do, become, not become) Z’, X ranges

over agents, Y ranges over ‘preventing conditions’, and Z ranges over actions or conditions of character or circumstances.<sup>8</sup>

Several points need making at once about MacCallum's analysis. First of all, just as it can be shown that any elucidation of the *concept* of justice which (like Rawls's) incorporates strong requirements of impartiality and of equal consideration of human interests is unacceptably restrictive in that it limits the range of coherent conceptions of justice, so MacCallum's triadic analysis of the concept of liberty may well be non-neutral with respect to rival conceptions of liberty. In so far as MacCallum's analysis of the concept of freedom has substantive implications for the conduct of disputes about how freedom is to be conceived, his proposal must be judged to have a measure of inherent disputability about it — no less, indeed, than is possessed by proposals regarding the preferred conception of freedom. Filling in the blank spaces in MacCallum's analysis involves committing oneself to specific uses of other, no less disputed concepts. It is partly in virtue of the contestability of these latter concepts, which collectively constitute the criteria of correct application of the concept of freedom, that the concept of freedom is itself so contestable and may be used to promote opposed conceptions of freedom. Further, Berlin has given us a reason for thinking that MacCallum's analysis cannot possibly comprehend exhaustively all intelligible locutions having to do with freedom. For, as he has observed,<sup>9</sup> a man or a people struggling against impediments which they judge to be restrictive of their freedom need not aim, consciously or unconsciously, at any other state; having attained their freedom, they may behave in every respect as before. If a man may wish to be rid of his chains, without having in mind any ulterior end apart from the freedom he gains in attaining this, it seems that freedom must be regarded as basically a dyadic rather than as a triadic concept.

Finally, it seems hard, if not impossible, to accommodate within MacCallum's triadic analysis the conception of individual freedom as possessing a certain social status, which Berlin later discusses in another context.<sup>10</sup> As C.S. Lewis has noted, in its early uses to call a man free was simply to describe his legal rights and duties, and to contrast them with those of a slave: unlike a slave, a free man was entitled to take part in the political life of his city and to affect the workings of its legislative institutions.<sup>11</sup> It is true enough that the idea of freedom as the entitlement to participate in political decision-making was not the only conception of

freedom current among the Greeks. As Berlin has himself characterized it, freedom was contrasted by the Stoics with the heteronomous condition of a man whose choices go against the universal rational order and are accordingly immoral; for the Stoics, as for Rousseau, who revived this understanding of freedom, it is none other than obedience to laws which one prescribes to himself. Again, we find in Plato a strongly positive, intra-personal conception of freedom, which commits that bifurcation of self which Berlin regards as the seminal error of positive libertarianism. Now, both the understanding of freedom as consisting in the entitlement to a voice in political decision-making and the understanding of freedom as rational choice in accordance with standards which are one's own and which accord with a natural moral order are present in the modern liberal tradition, but, as Berlin has emphasized, neither is distinctive of it. In its seventeenth-century exponents, for example, to demand that men be set free was to demand that their inner life, spontaneous associations, and productive endeavours be protected from the encroachments of Church and State. Clearly enough, this liberal conception of freedom as non-interference within a protected sphere of life differs from both of the conceptions of freedom that were current among the Greeks, since a society of free men in both Greek senses would be compatible with the absence of typical liberal immunities. A modern conception of freedom as independence or autonomy, in which a free man is characterized as one who governs himself and is governed by no one else, must equally be distinguished from all the views of freedom we have considered so far. For a man who is autonomous in this modern sense, which is intimated in the writings of Kant, Humboldt, Tocqueville, and Mill, enjoys immunities which the Greek citizen lacked, and has capacities of rational self-determination which the Greek free man need not have possessed. We can see now how, without indulging in paradox, Socrates could have claimed to have remained a free man throughout his imprisonment, since at no time did he exchange his status for that of a slave. If I am right in supposing that MacCallum's scheme cannot accommodate such usages, it is clearly defective.

At this point in my argument it may be worth pointing out that, while it is true that Berlin nowhere claims that his contrastive analysis of the concept of liberty is jointly exhaustive of all coherent conceptions of liberty, and, indeed, explicitly acknowledges that the boundary between the concept of liberty and other, cognate, concepts is a shifting and variable one

which can never be definitively specified, it is also true that, contrary to the imputations of several of his critics, Berlin nowhere claims that negative and positive conceptions of liberty are mutually exclusive. Marshall Cohen, for example, has argued that Berlin neglects or undervalues the fact that deprivation of the 'positive' freedom to be one's own master may be judged an infringement of a man's 'negative' freedom, if his desire for self-determination has been thwarted by the interferences of others.<sup>12</sup> Berlin's thesis, however, is not that negative and positive liberty are antinomies or contraries, but that, while their subject matters *may* overlap, they need not do so, and as a rule do not. An example of this truth is that, while having a voice in the affairs of the community in which he lives may assist a man to attain the status of an autonomous agent, the overall effect of a democratic regime may be to obstruct his efforts to achieve that status. This is only to say that liberal writers of the seventeenth century were not inconsistent in promoting liberal freedoms of thought, expression, and association, while repudiating democratic institutions. In general, Berlin's claim is not that the questions, 'Who is master?' and 'Over what area am I master?' are always entirely distinct in their significance, but that they are generally distinguishable, and that much of importance in social and political thought hangs on the difference between them. His claim is that the answers to these questions capture opposed conceptions of freedom, each of which constitutes a coherent and legitimate application of the generic concept of freedom which is their common source.

### **The concept of freedom: descriptive or evaluative?**

That freedom is primarily a descriptive concept has been argued persuasively, though not in the end successfully, by Felix Oppenheim in a valuable book.<sup>13</sup> 'Meaningful disagreement about the value of freedom depends', he argues, 'on agreement on that about which one disagrees'. Our aim must to 'arrive at a system of definitions acceptable to everybody because they do not conflict with anybody's political ideology'. He summarizes his own position as follows:

Thus, in the case of the concept of social, political and inter-personal freedom, the expression we must explicate is, 'With respect to B, A is free to do X'. This expression can be defined by 'B makes it neither impossible nor punishable for A to do X'. Not only does this definition remain close to



ordinary usage, it is also descriptive, and in two ways: the defining expression consists exclusively of descriptive terms, and it is 'value-free' in the sense that it can be applied to determinate states of affairs by anyone independently of his political convictions.<sup>14</sup>

Accordingly to this view, advanced also (though in different variants) by such writers as J.P. Day and W.A. Parent,<sup>15</sup> the judgment that a man is free to do something neither entails nor presupposes any judgement about that being the right thing for him to do, that it is in his real interest for him to do it, or that such an action forms part of a good or praiseworthy way of life. Answering the question whether a man is free to do something, on this account, does not (or need not) involve making an evaluative judgment of any sort. The question is an empirical question, sometimes (it is true) a peculiarly difficult one, to which there is always a single right answer. As against this view, W.E. Connolly has argued, convincingly to my mind, that 'The positive normative import of "free" ... is not attached to it accidentally but flows from its identification of factors pertinent to human well-being in situations where something is absent'.<sup>16</sup> Significantly, Connolly's position on this matter is not importantly different from Berlin's. It is expressed by Berlin in an important footnote where the evaluative character of judgments about freedom is explicitly acknowledged:

The extent of my freedom seems to depend on (a) how many possibilities are open to me (though the method of counting these can never be more than impressionistic. Possibilities of action are not discrete entities like apples, which can be exhaustively enumerated); (b) how easy or difficult each of these possibilities is to actualize; (c) how important in my plan of life, given my character and circumstances, these possibilities are when compared with each other; (d) how far they are closed and opened by deliberate human acts; (e) what value not merely the agent, but the general sentiment of the society in which he lives, puts on the various possibilities.

Berlin continues:

All these magnitudes must be integrated', and a conclusion, necessarily never very precise, or indisputable, drawn from this process. It may well be that there are many incommensurable kinds and degrees of freedom, and that they cannot be drawn up on any single scale of magnitude ... Total patterns of life must be compared directly as wholes, though the method by which we make the comparison, and the truth of the conclusions, are difficult or impossible to demonstrate. But the vagueness of the concepts,

and the multiplicity of the criteria involved, is an attribute of the subject-matter itself, not of our imperfect method of measurement, or incapacity for precise thought.<sup>17</sup>

A similar, though more restricted point is made by Hart, when in a forceful argument,<sup>18</sup> he says of Rawls that:

He admits that different opinions about the value of conflicting liberties will affect the way in which different persons view this conflict [between them]. Nonetheless, he insists that to arrive at a just resolution of the conflict we must try to find the point at which the danger to liberty from the marginal loss in control over those holding political power just balances the security of liberty gained by the greater use of constitutional devices (p. 230). I cannot myself understand, however, how such weighing or striking of a balance is conceivable if the only appeal is, as Rawls says, to 'a greater liberty'.

Three aspects of Berlin's position as to the relevance of evaluative judgments about the goodness of entire ways of life to judgments about social freedom may be noted at this point. First, Berlin's position is strengthened when it is noticed that writers<sup>19</sup> in the restrictivist tradition differ deeply among themselves as to what may constitute a preventing (liberty-limiting) condition. The great majority, of whom Oppenheim may be taken as a typical but unusually fairminded and clear example, contend that being free to perform an act entails not only that it has not been rendered physically impossible by the intervention of another, but that other agents have not rendered it ineligible by applying coercion or invoking sanctions. Being free to act, then, on this view, involves the absence, not just of force, but also of coercion (which comprehends, among other things, the threat of force). More recently, however, a number of writers have sought to undermine this commonsensical view, according to which being free to act implies the non-punishability of the act as well as the absence of forcible restraint with respect to it. The arguments of these writers, whose lineage extends back at least as far as Hobbes, for whom freedom to act was no more than the possibility of unimpeded motion, are worth careful attention despite their obvious counter-intuitive aspects. Their claim is that coercion cannot itself be restrictive of social freedom, which consists simply in the absence of forcible restraint of bodily movement. Those who hold that force alone can be restrictive of liberty often hold also that social freedom is not a variable magnitude. They claim that freedom, unlike utility

(say), can be neither increased or diminished, but only redistributed within the universe of agents. It seems that this is, in part at least, a conceptual claim, trading on the fact that whenever we have an instance of social unfreedom, we find someone unable to perform some sort of action in virtue of his standing in a relationship with someone else whose actions or omissions bear decisively on his inability to perform the act in question. Connected with this is the claim that social freedom itself cannot be in competition with any other value so that liberalism cannot be characterized as a philosophy which stipulates that liberty is accorded priority over other values.

Arguably, if such arguments are valid, then they constitute a *reductio ad absurdum* of this species of stringent negative libertarianism. For, in leaving us no way of characterizing freedoms except in the physicalistic language of unimpeded behaviours, this approach ignores the vital truth that the subject matter of freedom is action rather than behaviour. As Berlin has intimated, if the subject matter of freedom is action rather than behaviour, it may be that the disputable character of judgments about freedom has its source in the fact that we possess no principle of counting for free actions which is not also a principle of evaluating their worth or significance for human well-being. Overall comparative judgments about the freedom of an individual or a society cannot then avoid being evaluative judgments about the relative value of the actions that freedom comprehends. The ineliminable evaluative dimension of comparative judgments about on-balance freedom thus derives from two sources, which may not be wholly unrelated: from the difficulty in determining what is to count as a constraint and the impossibility of characterizing constraints on liberty in purely physical terms; and from the difficulty of aggregating particular liberties to act into the subject of an overall judgment. Again, a conservation-of-freedom thesis seems to have strongly counter-intuitive implications. Consider two cities, otherwise identical, in one of which there are traffic control regulations and in the other of which there are none. It seems absurd to say that in the latter city, in which chaos reduces everyone's prospect of personal mobility, there is as much freedom as in the former, but that it is differently distributed. Further, even if social freedom were a zero-sum concept, comparative judgments about it would be required by any principle specifying its just distribution. Finally, if social freedom is a variable magnitude, then equalizing liberty will sometimes conflict with the

objective of maximizing it, and a choice between the two policies will have to be made. (Inasmuch as differing distributions of liberty will have widely differing effect on other values, a competition between liberty and other values may re-emerge here.) If this is right, then Rawls's greatest equal liberty principle conceals a crippling ambiguity, even if it is true (which may well be doubted) that the expression 'the greatest liberty' stands for anything very determinate.

Second, and no less crucially, an argument recognizing that judgments about freedom are inescapably evaluative does not commit us to the absurd but perennially popular view that freedom cannot compete with other values. If we acknowledge that individuating options with a view to comparing different states of affairs as to the magnitude and distribution of freedom within them always involves invoking our evaluative commitments to one way of life among others, we are not thereby bound to endorse the mistaken view that all bona fide freedoms cohere to compose the good for man. This can be seen from the fact that asserting as a necessary truth the proposition that an option, and a free act, must appeal to some good or value, does not entail the Socratic paradox that an agent cannot choose what is bad. For the resultant onbalance of a free act is not precluded from being a bad state of affairs. As Berlin has always emphasized, the values and virtues of different ways of life may not ultimately be combinable, so the claim that everything that deserves to be accounted a free act must be expressive of a value in no way supports the very different claim that freedoms cannot embody values which are inescapably in conflict with one another. This must be evident from Berlin's reiterated emphasis that freedoms may have to be curtailed, either because their exercise conflicts with that of other, perhaps incommensurably valuable freedoms, or because they compete with other values that are largely distinct from those comprehended in typical judgments about freedom. An example of a conflict of the latter kind is suggested by F. A. Hayek, when he compares the situation of a conscripted soldier, well-fed and comfortably housed, with that of a wandering vagabond, dependent for his survival on his wits.<sup>20</sup> Recognizing, as both Berlin and Hayek do, that the vagabond's freedom may have little or no value to him, is not to deny that it is his freedom that is lost when he is eventually conscripted. Such cases as this only point to the relevance of the distinction often made by writers in the liberal tradition, and clearly stated by Berlin, between a man's having a freedom and his

enjoying conditions in which its exercise is on balance valuable to him. The fact that evaluative differences may exist even in this paradigm case of the freedom of little value, with some men judging the circumstances of the conscripted soldier unfavourably in comparison with that of the wandering vagabond, only reinforces the insight that there is an inherently disputable character in judgments about freedom, and that one of the sources of this is in divergent moral and political commitments.

Third, Berlin's explicit recognition of the ways in which evaluative judgments about the merits of rival forms of social life inform the comparative judgments we make about freedom in no way commits him to any reductionist thesis about the value of freedom. It simply does not follow from the claim that all judgments about freedom are inescapably normative that there is not a distinguishable domain of evaluative considerations salient to the use of the concept of freedom. How is this? It might be supposed that, if the magnitude of freedom depends on other judgments about relative values of available options, then comparative judgments about freedom tend to be collapsed into judgments about the ability of sets of social arrangements to satisfy these other values. If this is so, the claim that judgments about freedom cannot help being evaluative might seem to set in motion a reductionist thesis about the value of freedom, after all, and this thesis seems dubiously consistent with any value-pluralism such as Berlin's. Such an objection to Berlin's account is misconceived, however, inasmuch as it is no part of Berlin's arguments that comparative judgments about freedom are uniquely determined by reference to the values freedom is thought to serve. Much of the time, Berlin is concerned to stress that our judgments about freedom are underdetermined by our other evaluative commitments: he insists that each thing is what it is and not another thing. This is not incompatible with his claim that our broader moral and political commitments necessarily inform and constrain our judgments about freedom. Along with most classical liberals, Berlin contends that wealth and power, for example, are not typically to be regarded as values which should inform our assessment of the magnitudes of freedom. Disagreements arise among liberals, not primarily as to whether any other values enter the comparative judgments about freedom, but mainly as to the range and content of these values. None of the participants in such disputes need commit the error of supposing freedom to be reducible to the other values he specifies as the most relevant to freedom. Thus no one who thinks as

Berlin does about the evaluative aspects of judgments about liberty is committed to the view that judgments about social freedom are 'reducible without remainder' to appraisals of the excellence of rival ways of life. Some such *disappearance thesis* about the concept of liberty is plainly endorsed by Dworkin. He argues in support of his claim that there is no right to liberty that, given there is no element or ingredient common to the basic liberties, comparative judgments of different societies in respect of their sponsorship of these liberties are to be cashed out wholly in terms of their promoting equality of consideration.<sup>21</sup> But equality will remain as indeterminate an idea as liberty, and must equally be the subject of a disappearance thesis, unless uses of it can be shown to hinge upon some one feature, or tightly-knit family of features, characteristic of a worthwhile life. Again, it is necessary to stress that the content of our judgments about freedom is not exhausted by the other values that inform them, and not all our other values are in the same degree salient to our judgments about freedom. Alan Ryan has observed that locutions in which the word 'free' occurs outside of any moral or political context may illuminate the word's central moral and political uses, by showing that it presupposes a circumstance in which something valued is lacking.<sup>22</sup> Once the evaluative dimensions of discourse using the concept of freedom have been noted against descriptive accounts of the concept, we need to follow Connolly in taking up Ryan's suggestion, and go on to try to delimit areas of human interests and needs relevant to questions of social freedom from areas that are not. Only if we are successful in doing this can we avoid the wildly counter-intuitive results of reductionist theses such as Dworkin's.

### **Freedom, power and the real will**

It is Berlin's central claim that, whereas there are two distinct and coherent conceptions of liberty, 'negative' and 'positive', positive liberty suffered a transformation as a result of which values other than liberty, such as the values of self-realization and of an integrated community, came to be misrepresented as aspects of liberty itself. While the idea of negative liberty, too, is recognized by Berlin to have been gravely abused as a licence for exploitation, there is a sense in which the perversion of the positive conception is morally and logically more culpable, since it involves the metamorphosis of a doctrine of limitation on political authority into a

doctrine of the equivalence of authoritarian determination with individual self-mastery. Berlin distinguishes as ‘the essence of liberty, both in the “positive” and “negative” senses’ what he calls ‘the holding off of something or someone ... of others who trespass on my field or assert their authority over me, or of obsessions, fears, neuroses, irrational forces ... intruders and despots of one kind or another’.<sup>23</sup> It is the mutation in the concept of liberty in its positive variants in their legitimate form as conceptions of self-determination in such writers as Spinoza and Kant into the idea of government by objective reason as expressed in the institutions of the State which we find in the later Fichte and in the English Idealists that warrants Berlin's claim that:

It is only the confusion of desire for liberty with this profound and universal craving for status and understanding, further confounded by being identified with the notion of social self-direction, that makes it possible for men, while submitting to the authority of oligarchs and dictators, to claim that this in some sense liberates them.<sup>24</sup>

While what Berlin says here seems to me to be both true and important, I want to draw attention to what I think is an unresolved (and perhaps insuperable) difficulty in one variant of the negative conception of liberty, which he contrasts with the authentic germ of the positive notion of rational self-determination. This is that no viable conception of liberty can altogether dispense with considerations deriving from the difficult idea of the real or rational will. Speaking of the way in which the positive conception of freedom as self-mastery has supported the division of the human personality into two parts, one transcendental and rational and the other empirical and contingent, Berlin comments that this fact illustrates the obvious truth that ‘conceptions of freedom directly derive from views of what constitutes a self, a person, a man’.<sup>25</sup> Later, in criticism of Kantian positive libertarianism, Berlin says that ‘the authority of reason and the duties it lays upon man is identified with individual freedom, on the assumption that only rational ends can be the “true” objects of a “free” man's “real” nature’. He comments:

I have never ... understood what reason means in this context: and here wish merely to point out that the *a priori* assumptions of this philosophical psychology are not compatible with empiricism: that is to say, with any doctrine founded on knowledge derived from experience of what men are and seek.<sup>26</sup>



Now it is undoubtedly true that some positive conceptions of liberty depend crucially on a rationalist philosophical psychology in which a noumenal or rational self can be distinguished from a phenomenal empirical personality. This seems to be true of Rawls's theory of justice as fairness, for example, in that there the project of developing a 'moral geometry', in which questions of rightness and distributive justice are definitively answerable, appears to founder unless a conception of the rational self is invoked and given philosophical plausibility. Again, in the case of J.S. Mill, to whom Berlin<sup>27</sup> attributes a mainly negative conception of liberty, it is arguable that the idea of a free man which is at the centre of *On Liberty* requires for its support a philosophical psychology decisively different from, and incompatible with, that empiricist view of the self expounded (with some reservations) in Mill's 'official' philosophical writings (such as the *System of Logic* and *Hamilton*).

Whilst it is importantly true then, that questions about liberty cannot be insulated from controversial metaphysical commitments in the areas of the philosophy of mind and action, it remains the case that there are good reasons to doubt that any coherent conception of liberty can avoid incorporating requirements to do with the conditions of rational choice. One set of reasons why this is so is suggested by Benn and Weinstein, who in a well-known paper reject the conception of freedom as the absence of impediments or restraints and develop the most systematic argument we have so far for an account of freedom as the non-restriction of options. Claiming that it is apposite to discuss whether a man is free to do something only if it is a possible object of reasonable choice, they declare programmatically that: 'Our conception of freedom is bounded by our notions of what might be worthwhile doing ... Incomprehension, not hostility, is the first obstacle to toleration.'<sup>28</sup> Now it might seem that we are here approaching a conception of freedom as rational self-determination of just the sort Berlin has always resisted. The claim we are advancing is that comparative judgments about freedom always invoke judgments about the preferences of the standard rational chooser, and the suggestion I am noting is that there is something at least problematic about counting as a freedom an opportunity to act which no reasonable man would ever take. Are we not approaching a conflation of acting freely with acting reasonably? In his important paper, 'From hope and fear set free',<sup>29</sup> Berlin has criticized the belief that individual and social freedom are necessarily or always

augmented by an increase of knowledge and has attacked the identification of the rational life with the life of a free man. He has emphasized, there and elsewhere, that the freedom of societies, as well as of individuals, must comprehend opportunities for actions which are wilful, perverse, and even consciously irrational. It might seem then that Berlin is at one with those (often moral and practical) sceptics, who sever freedom to act from any requirements of rationality. Such a position, it seems to me, is stronger than any that Berlin explicitly embraces in his writings. In 'From hope and fear set free', the object of his criticism is a thesis of metaphysical rationalism which implies, in the area of practical reasoning, that every dilemma of choice has one right answer. Certainly, Berlin is committed to repudiating any view of freedom as the non-restriction of options which incorporates such a rationalist picture of practical deliberation. This is not the same as denying the relevance to questions of social freedom of any of the requirements of rational choice. Further, I suggest that the conception of rational choice that is appropriate is a minimalist and meagre one, stipulating only that an agent should *have a reason* for what he does. What such a requirement disqualifies as rational conduct is only the behaviour of a delirious agent, where no goal or end may be imputed to him which renders intelligible what he does. True, this minimal requirement of rational choice is liable to be extended so as to disqualify the incorrigibly delusional, the phobia-ridden and the hypnotized agent, and such as extension undoubtedly revives some notion of the rational or real will. My claims are, first, that we need to invoke this difficult notion since no viable conception of social freedom can altogether dispense with it. Second, I suggest that some useful variant of the idea of a real or rational will may survive the demise of the rationalist metaphysics and philosophical psychology in which it has traditionally been embedded. Third, whereas Berlin has nowhere endorsed this line of thought about freedom, I claim there is nothing in his writings which is strictly inconsistent with it.

One way of making these points is to say that, while the distinction between social freedom and power or ability is an important one, it is one which is difficult or impossible to make where the powers and abilities in question have to do with the subjective conditions of choice. Nor is this conclusion surprising when we recall Berlin's observation that conceptions of freedom derive directly from views of the self. Once Berlin has recognized that options are not discrete, countable entities like apples, but

are individuated by reference to evaluative judgments endorsing disputable views of the nature of the self, it seems intuitively incongruous that he goes on to deny that whether a man really has an option to do something depends, in part, on whether that action is subjectively available to him. Feinberg has pointed out that much will turn on how we draw the boundaries of the self, and there are obvious difficulties in using a purely spatial criterion to do so.<sup>30</sup> Any view of freedom as the non-restriction of options is bound to remain radically incomplete, however, in the absence of an account of the nature and powers of the self whose options it is that are opened and closed by human action and omission.

These questions arise clearly in the problem — as yet unresolved, in my view — of the avowedly contented slave. As Berlin recognizes in the introduction to the revised version of his lecture,<sup>31</sup> his original definition of negative freedom as the absence of the interferences of others in the area in which an individual wishes to act, though it identifies a paradigm case of freedom, has damagingly paradoxical implications. For it makes the measure of an agent's freedom relative to his desires. Since it can never be assumed in advance of empirical research what are a man's desires, there is an important sense in which negative freedom (as Berlin originally conceives of it) is consistent with the presence and absence of any conditions whatsoever. In other words, except in so far as they contain references to the state of mind of the agent, or presuppose the truth of some general proposition about human wants, attributions of negative freedom or its absence can (logically) tell us nothing informative about the actual alternatives available to an agent. Since, on Berlin's original account, the degree of a man's freedom is the extent to which his desires are frustrated by the interferences of others, a man may always increase his freedom by trimming his desires. And this has the consequence that we are precluded from describing as unfree the wholly contented slave — or, more generally, from lamenting the lack of liberty in a perfectly engineered *brave new world* in which desires and opportunities always coincide. Nor does Berlin's revised account, in which possible desires are included in the judgement, satisfactorily resolve the question. For, unless we have some principle of counting which is non-neutral, as between the slave and the non-slave, there will be desires which the slave could satisfy, and which in the non-slave will necessarily be frustrated. Only by invoking some norm of human nature which is discriminatory as to the wants which are to be counted, and

which includes evaluations of the agent's states of mind, can the intuition that the wholly contented slave remains unfree be supported. This suggests that what we might call the phenomenological and the sociological aspects of freedom cannot, after all, be hermetically sealed off from one another. It must be pointed out, however, that since invoking a norm of human nature in the way I have suggested is bound to be a highly questionable procedure, Berlin's account of this matter is not without difficulties. They are not difficulties peculiar to his account, however, but rather obstacles in the way of any political theory which recognizes the dependency of views of freedom on conceptions of man.

### **Freedom and social theory**

One of the most striking features of Berlin's argument is its explicit acknowledgement that controversial questions in social theory are decisively relevant to questions of social freedom. This emerges in the course of his attempt to render more precise the boundaries of the negative conception. Characterizing negative freedom as the area within which a man may act unobstructed by others, Berlin comments: 'If I am prevented by others from doing what I could otherwise do, I am to that extent unfree; and, if this area is contracted by other men beyond a certain minimum, I can be described as being coerced, or, it may be, enslaved.' Berlin goes on to point out that coercion is not a term that covers every form of inability: 'Coercion implies the deliberate interference of other human beings within the area in which I could otherwise act.'<sup>32</sup> That is to say that coercion is distinguishable from other, cognate concepts, such as power, force, and violence, in that every instance of coercion presupposes an intention on the part of the coercer to secure the compliance of the coerced agent in a course of conduct which he would not otherwise follow (or which it would be incongruous for him to follow in so far as he is a normally constituted human being). So, in the absence of an intention on the part of another person that he should act otherwise than he desired to act (or might be expected to act in his capacity as an agent with standard human interests and motivations), a man can be prevented from acting as he might otherwise do, but he cannot be said to have been coerced. A man is not coerced, then, unless his action complies with the intention of another person (and unless several other necessary conditions are satisfied).

Berlin makes it clear that he rejects the view which identifies freedom with the absence of force and coercion: the test of unfreedom, he says, is 'the part that I believe to be played by other human beings, directly or indirectly, with or without the intention of doing so, in preventing me from doing what I might otherwise do'.<sup>33</sup> Here the requirement of intentionality built into the concept of coercion is being disavowed and replaced by a requirement of causality — in which the role of *preventive* causation is crucial, and in which the relevance to questions of liberty of social arrangements no one has designed, and which accord with no one's intentions — is determined by their *alterability* or *remediability*. The remediability or alterability of social arrangements, like the avoidability of any given governmental policy, can, in turn, only be determined with the assistance of a social theory. As Berlin puts it:

It is only because I believe that my inability to get a given thing is due to the fact that other human beings have made arrangements whereby I am, whereas others are not, prevented from having enough money with which to pay for it, that I think myself a victim of coercion or slavery. In other words, this use of the term depends on a particular social and economic theory about the causes of my poverty or weakness.<sup>34</sup>

The aptness of Berlin's construal is seen when we apply it to debates between *laissez-faire* liberals and Marxists, for example, about whether a man's suffering the evil of unemployment in an unregulated market economy may count as a restriction of his freedom. It is clear that the disagreement between the libertarian and the Marxist turns, at least in part, on a divergence in their respective theories of unemployment. For the *laissez-faire* liberal, there is a natural rate of unemployment in every complex society, and attempts to reduce unemployment below that point can only result in inflation, under-employment and diminution of living standards. For the Marxist, on the other hand, unemployment is a feature, not of every complex society, but only of complex societies which are pre-socialist. As Berlin's remark that the argument for socialism may be couched wholly in terms of its contribution to negative liberty suggests, the Marxist is wholly justified in judging that the unemployment in capitalist societies restricts freedom, *provided* his account of its origins is accepted. It will not always be easy, of course, to apply the test of alterability or avoidability to specific social arrangements and governmental policies, since even well-formed theories may be unable to give decisive guidance in

some cases. Could the mass unemployment of the 1930s, for example, be considered restrictive of negative liberty? It might be so considered, even by a *laissez-faire* liberal, if it could be shown that it resulted from misguided monetary policies whose application was in no way inevitable. These difficulties aside, the important point about Berlin's account is that it allows that even 'impersonal social forces' may be restrictive of (negative) freedom, always providing they are demonstrably avoidable and remediable. In this respect, his account differs markedly from other, superficially similar accounts (such as that of Oppenheim).<sup>35</sup>

### **The concept of freedom and the liberal tradition**

One of Berlin's most controversial claims is that there is some special kinship between negative views of liberty and the intellectual traditions of classical liberalism. Much here depends on how widely we construe the negative conception. It may be true that thinkers such as Hobbes and Bentham embraced a severely negative view of liberty, but neither of these is indisputably a liberal. Equally, neither Locke's nor (as Berlin acknowledges) Kant's view of liberty was negative: each saw the loss of liberty as consisting in the submission to arbitrary will, and liberty as being preserved and enlarged by conformity to rational law. Nor can J.S. Mill finally be characterized unequivocally as a negative libertarian. For, despite the classical-liberal subject matter of *On Liberty* on the grounds and limits of political obligation, the conception of freedom at work there is one, deriving as much from Tocqueville as from Humboldt, of which it is the notion of a free or autonomous man rather than that of a free act or a free society that is centrally constitutive.

Apart from such historical considerations, my argument so far has been that a freedom-promoting policy is one which expands the options open to men, and this (on Berlin's own account) must include diminishing internal and subjective restrictions on the availability of options. Against those classical liberals who insist that their intellectual tradition is partly defined by advocacy of a narrowly negative view of liberty, I would argue that the general commitment to freedom actually comprehends a commitment to an open society in which rival modes of thought and life conflict and compete. It is only via such competition and conflict, indeed, that options become available to free men, and only thus that one dimension of their freedom

can be enlarged. It is a disadvantage of the position of those who attach a stringent negative libertarianism so closely to classical liberalism, that the link between endorsing the priority of liberty and supporting cultural pluralism is severed. At this point a contrast between Berlin's views and those of F.A. Hayek may be helpful. While Hayek's conception of freedom has some strongly positive connotations, it is akin to Berlin's in rejecting any necessary connection with wealth or power. It differs from Berlin's, however, in that Hayek sometimes writes as if the institution of predictable and uniform laws protecting the basic liberal freedoms is a sufficient condition of social freedom. Hayek's view appears to be that a liberal social order may be, and perhaps must be, a society in which a dominant moral and intellectual tradition drastically curtails the options open to its members. Berlin's view is surely more faithful to liberalism's classical concerns in recognizing that, though the institution of predictable and uniform laws is a necessary condition of the promotion of liberty through the enlargement of options, it is not sufficient to render a diversity of options and lifestyles subjectively accessible to men, without which they must fail to attain the status of free men.

Berlin's claim about the necessary connection holding between classical liberalism and negative libertarianism becomes plausible once we allow that the negative view may encompass a conception of freedom as the non-restriction of options. It would be an implausible claim if Berlin were to be interpreted as contending that the severely negative view which some scholars find in Hobbes and Bentham was partly constitutive of liberalism. Against the objection that, on this interpretation of his argument, Berlin leans too far in the direction of a positive conception, I contend that the positive conceptions to which he objects are still excluded by the conception of freedom I ascribe to him. This is suggested by Berlin's favourite example of the mutation of the concept of freedom in the intellectual development of Fichte. In the later work of Fichte, we find a strong positive view of freedom deeply embedded in rationalist metaphysics, and it is this variant of positive libertarianism that Berlin seeks to subvert. It may be true that the version of negative freedom as the non-restriction of options I have attributed to Berlin is not easily distinguishable from some variants of the positive view in which the rationalist heritage has been abandoned. I do not regard this as a serious defect in my account, however, since Berlin has never unreservedly endorsed a negative conception, or



maintained that the distinction between negative and positive conceptions can always be applied uncontroversially.

### **Freedom, reason and the incommensurability of values**

Berlin's arguments against adopting as our preferred conception of freedom the positive view are not arguments which appeal to ordinary usage, or which profess to employ any evaluatively neutral method of conceptual analysis. It would, in any case, be surprising if such a pre-eminently distinguished historian of ideas were to adopt this approach, displaying as it does an insensitivity to the sources of past and present dispute about the nature of freedom in opposed moral and political commitments. Berlin's arguments for the negative view are, rather, substantive moral and political arguments, appealing to values and considerations which, it is to be hoped, he shares with the majority of his readers. To this extent, Berlin's mode of argument distinguishes his position clearly from that of those in the restrictivist tradition. At the same time, it is a central feature of his argument against adopting the positive view that it has long been supported by an immemorial error — the error of supposing that values cohere in a harmonious whole. Berlin's opposition to this view, his repudiation of monism in philosophy, undoubtedly constitutes his master idea. It is an idea which is subversive of the dominant tradition in Western thought, and which has the most profound import for the enterprise of social and political theory. Berlin's thesis, which so far as I know has no precedent in the history of ideas, is that the conflict of values, though it may be more readily visible in societies (such as our own) which contain a diversity of moral traditions and which possess a highly developed historical sensibility, is an ineradicable feature of human experience. Its implication is that we must dismiss once and for all the reigning illusion of the Enlightenment, the chimera of a rational morality, and its step-child, the project of a science of politics. From the incoherence of the notion of a supreme good, of a perfect man or perfect society, we must deduce the incoherence of the idea of a society which, in transcending fundamental conflicts, has abolished politics and ended history. A frictionless Utopian society in which all good things co-exist must, then, be abandoned as an object of moral and political endeavour; not because its achievement would violate sociological or historical laws, or go against the grain of human nature, but because it is strictly unintelligible. A liberal society in which moral conflicts are openly

revealed is commended to us, not because it alone satisfies the demands of human nature, but because in it the competition of goods which is an unalterable feature of the human predicament is not shirked or evaded, but actively embraced.

At this point it may be worth summing up my conclusions about Berlin's argument, and indicating what are the outstanding problems that remain. First, I have claimed that Berlin sees the two specific conceptions of liberty with which he is primarily concerned as issuing from a common source in the generic concept of liberty. Each of the two conceptions captures a legitimate interpretation of the shared concept, but it is Berlin's thesis that genuine variants of the positive conception soon suffered a transformation in which value largely distinct from liberty came to be misrepresented as an aspect of it. Second, I have contended that, whereas comparative judgments about freedom are in Berlin's account inescapably evaluative, this does not commit Berlin to a reductionist view of the value of liberty or in any way compromise his doctrine of value-pluralism. Third, I have suggested that Berlin's own variant of the negative conception is a view of freedom as the non-restriction of options. Some specification of the conditions necessary for rational choice must be comprehended in any such view, and I have submitted that such a specification will make use of a notion of the real or rational will without endorsing the rationalist doctrines with which it has usually been associated. Fourth, I have noted Berlin's acknowledgement of the dependency of judgments about freedom on controversial positions in social theory. Berlin's account is distinguished from other, superficially similar accounts, in that it allows that impersonal social forces may restrict liberty, providing they are humanly alterable. Fifth, I have argued that Berlin's thesis that there is a close connection between negative libertarianism and classical liberalism is most plausible if we adopt his variant of the negative conception. For purposes of exposition, I have contrasted Berlin's view with that of F.A. Hayek. Sixth, I have identified as the primary source of Berlin's liberalism and anti-utopianism his doctrine of value-pluralism. A liberal society in which a wide diversity of ends is promoted is recommended to us as being most in accordance with this basic truth.

I do not doubt that difficulties remain for Berlin's account of the concept of freedom, and for any similar account. It might be thought, for example, that the advocacy of value-pluralism and of the priority of liberty are not

mutually supportive in the way I have sketched, but rather pull in different directions. If such fundamental values as freedom, equality, and welfare may compete, and if there is no common unit in terms of which the competition may be resolved, what sense can there be in attaching priority to liberty? Indeed, if (as Berlin suggests) different freedoms might have incommensurable values, how are we to make even the impressionistic judgments of on-balance freedom of which he speaks? Berlin's advocacy of value-pluralism may even raise the spectre of relativism once again. For, if men hold deeply divergent views of the ends of life, between which reason is incompetent to arbitrate, are they not likely also to hold rival views of human nature? If so, we cannot expect the emergence of any common conception of man. In this case, however, given the dependency of rival views of freedom on different pictures of man, what grounds can be given for favouring any one view over any other? Does not Berlin's value-pluralism actually tend to support a thesis of the essential contestability of the concept of freedom, after all?

These are large and complex questions, a proper treatment of which must (at best) await further work in this area. It is not self-evident that they are fatal to Berlin's account. Whether or not the problems such questions pose are really crucial for Berlin's argument, the magnitude of his achievement cannot be doubted. If, as I have argued, no viable view of liberty can fail to accommodate some of the conditions of rational choice, then some variant of the view of freedom as autonomy which abandons the rationalist heritage may turn out to be the preferred conception. But, if further progress is attained in the theory of freedom, however, it will be against the background of Berlin's work. For, in demonstrating the error of assimilating liberty to morality, and of supposing that morality forms a coherent system, he has made a permanent contribution to reflection on freedom, and to social and political thought in general.

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## Notes

- [1](#) I owe the term 'restrictivist', and its use in these contexts, to W.L. Weinstein, who employed it in an unpublished paper on 'The variability of the concept of freedom', delivered to the Political Thought Conference in Oxford, January 1975. I have profited greatly from Weinstein's important paper, a copy of which he has been kind enough to give to me. I do not claim, however, that my use of the term 'restrictivist' always corresponds with his intention in coining the term. Different versions of the restrictivist thesis may be found in F. Oppenheim, J.P. Day, and W.A. Parent, referred to in notes 14 and 15 below.
- [2](#) The notion of an essentially contestable concept owes its currency to W.B. Gallie's paper, 'Essentially contested concepts', *Proceedings of the Aristotelian Society*, 56, (1956) 167–98.
- [3](#) See my paper 'On liberty, liberalism and essential contestability', *British Journal of Political Science*, 8 (1978) 385–402. For an argument against the utility of any notion of essential contestability, see my 'Political power, social theory and essential contestability', in D. Miller and L. Siedentop (eds) *The Nature of Political Theory*, (Oxford: Oxford University Press, 1983) pp. 75–101.
- [4](#) These quotations come from J. Rawls, *A Theory of Justice*, (Oxford: Oxford University Press, 1972) pp. 5–6 and 9–10.
- [5](#) I. Berlin, *Four Essays on Liberty*, (Oxford: Oxford University Press, 1968) p. xliii.
- [6](#) *ibid.*, p. ix.
- [7](#) *ibid.*, p. 166.
- [8](#) See G.C. MacCallum, Jr., 'Negative and positive freedom', *Philosophical Review*, 76, (1967) 312–34.
- [9](#) Berlin, *Four Essays*, p. xliii.
- [10](#) *ibid.*, p. 156 *et seq.* I am not sure if Berlin is ready to consider any conception of a man as having a certain individual status a coherent conception of social freedom.
- [11](#) C.S. Lewis, *Studies in Words*, (Cambridge: Cambridge University Press, 1961)
- [12](#) See Cohen's paper, 'Berlin and the liberal tradition', *Philosophical Quarterly*, 10, (1960) 216–27.
- [13](#) Felix Oppenheim, *Dimensions of Freedom*, (New York: St Martin's Press, 1961).
- [14](#) Felix Oppenheim, 'Facts and values in politics', *Political Theory*, 1, (1973) 56.
- [15](#) For J.P. Day's account, see his 'On liberty and real will', *Philosophy*, 95, (1970) 177–92, together with his 'Threats, offers, law, opinion and liberty', in *American Philosophical Quarterly*, 14, (1977) pp. 257–72; and for W.A. Parent's, see his 'Recent work on the concept of liberty', *American Philosophical Quarterly*, 11, (1974) 147–67.
- [16](#) W.E. Connolly, *The Terms of Political Discourse*, (Lexington, Mass.: D.C. Heath, 1974) p. 141.
- [17](#) Berlin, *Four Essays*, p. 130.
- [18](#) H.L.A. Hart, 'Rawls on liberty and its priority', in N. Daniels (ed.) *Reading Rawls*, (Oxford: Basil Blackwell, 1975) p. 241.
- [19](#) See especially Hillel Steiner, 'Negative liberty', *Proceedings of the Aristotelian Society*, 75, (1974–5) 33–50.
- [20](#) F.A. Hayek, *The Constitution of Liberty*, (London: Routledge & Kegan Paul, 1960) p. 18.
- [21](#) R.M. Dworkin, *Taking Rights Seriously*, (London: Duckworth, 1978) [Chapter 12](#).
- [22](#) See Alan Ryan, 'Freedom', *Philosophy*, 40, (1965) 93–112.
- [23](#) Berlin, *Four Essays*, p. 158.
- [24](#) *ibid.*, p. 158
- [25](#) *ibid.*, p. 134.
- [26](#) *ibid.*, pp. 153–4 (footnote).
- [27](#) *ibid.*, p. 137.
- [28](#) S.I. Benn and W.L. Weinstein, 'Being free to act and being a free man', *Mind*, 80, (1971) 194–211.

- [29](#) 'From hope and fear set free', in I. Berlin, *Concepts and Categories*, (London: Hogarth Press, 1978) pp. 173–98.
- [30](#) See Joel Feinberg, *Social Philosophy* (Englewood Cliffs, NJ: Prentice-Hall, 1973) [Chapter 1](#).
- [31](#) Berlin, *Four Essays*, pp. xxxii–xl.
- [32](#) *ibid.*, p. 122 *et seq.*
- [33](#) *ibid.*, p. 123.
- [34](#) *ibid.*, p. 123.
- [35](#) On Oppenheim's account, see Connolly, *The Terms of Political Discourse*, pp. 162–4.

## Chapter five

# **Freedom, slavery and contentment**

In the introduction to the revised version of his lecture ‘Two concepts of liberty’, Sir Isaiah Berlin seeks to correct what he judges to be an error in his original account. He suggests that his first definition of negative freedom as the absence of the interference of other agents in the area in which a man wishes to act has damaging and paradoxical implications. For, though it captures as a paradigm case of negative unfreedom the case of the imprisoned man who is prevented by the deliberate interferences of others from doing as he wishes, it makes the measure of a man's freedom relative to the nature of his desires. Indeed, it is an acknowledged feature of Berlin's original conception that, since we cannot know in advance of empirical research what it is that a man wants, negative freedom is consistent with any social circumstance. This is to say that attributions of negative freedom can (logically) tell us nothing informative about the alternatives actually available to anyone except in so far as they contain references to the state of mind or feeling of the agent, or presuppose the truth of some general propositions about human wants. Since the degree of a man's negative freedom is the extent to which his desires are frustrated by the interferences of others, he may always increase his freedom by trimming his desires. As he recognizes, Berlin's original account has the consequence (a consequence he regards as paradoxical and damaging in the case of

‘positive’ conceptions of freedom) that it precludes our characterizing as unfree a wholly contented slave.

His recognition of this error in his original account leads Berlin to modify his conception of social freedom. As he puts it:

This [social freedom] entails not simply the absence of frustration (which may be obtained by killing desires), but the absence of obstacles to possible choices and activities, absence of obstructions on roads along which a man can decide to walk. Such freedom ultimately depends not on whether I wish to walk at all, or how far, but on how many doors are open, upon their relative importance in my life ...

The extent of my social or political freedom consists in the absence of obstacles not merely to my actual, but to my potential choices, to my acting in this or that way if I choose to do so. Similarly, absence of such freedom is due to the closing of such doors or failure to open them, as a result, intended or unintended of alterable human practices, of the operation of human agencies....<sup>1</sup>

Berlin is joined in this view by J.P. Day.<sup>2</sup> He argues that whether a man wants to do something is irrelevant to whether or not he is free to do it. He goes on to suggest that it was through confusing being free with feeling free that Epictetus was misled into the paradoxical view that freedom is achieved through the removal of desires rather than through the securing of opportunities for action in which they may be satisfied. The teaching of Epictetus, Day concludes, though it ‘probably provides the best anodyne available to despairing slaves, ... has nothing to say to those who hope to become, or to remain freemen’.

According to such writers as Day and (with important reservations) Berlin, being free to do something is not to be identified with doing what one wants to do, or with feeling free to do it, and it presupposes neither of these things. Nor should being free to do something be equated with having the ability to do it. The logical relation of freedom to ability, unlike that of freedom to desire or to will, is that the former presupposes the latter: a man must be able to do something before he can be free or unfree to do it. Lastly, according to this view, the answer to the question of whether a man is free to do something does not depend in any way on answers to such questions as whether it would be right for him to do it, or whether it is in his real interests that he do it. On the contrary, it is insisted that questions of the morality or the prudence of a man doing something cannot sensibly be



raised unless he is free to do it. On this view, answering the question whether a man is free to do something does not involve making an evaluative judgment of any sort. The question is an empirical question, though sometimes, perhaps, a peculiarly difficult one, to which there is always a single right answer. Accordingly, to say of a man that he is a free man is not to appraise the value of his way of life; it is not to say, for example, that his way of life is worthy of respect, or that it expresses his nature as a man better than any other could. It is to say, in the first instance, that he possesses certain legal rights, centrally important among which is the negative right not to be treated as a chattel. Now, since a slave is precisely one who lacks these basic rights, themselves partially constitutive of social freedom, it follows inexorably that a slave, however contented, cannot be free. Epictetus' notion of the contented slave who may be freer than his master is thus simply incoherent, or else a misleading metaphor.

This argument, which henceforth I shall call the *definist* argument, is certainly swift, and it looks pretty conclusive. Is it the end of the matter?

### **A counter-argument**

In a recent paper,<sup>3</sup> G.W. Smith tries to show, not just that the definist argument is not as conclusive as it seems, but that it is impossible to guarantee logically the falsity of the claim that an avowedly contented slave is socially free. Taking as his departure-point the view that the measure of an agent's social freedom is the only extent of the range of options open to him, Smith considers (only to reject) several proposals about how this range can be delimited so as to ensure that the contented slave's options are indeed foreclosed.

In summary, Smith considers first the most obvious move of defining the range of options counterfactually. The contented slave is unfree because, if (contrary to fact) he were to try to do what the law (or his master) forbids, he would be frustrated. Such a counterfactual construal of the agent's options may be interpreted more or less strongly, but neither way yields a satisfactory account of how the happy slave's options are restricted. If the counterfactual definition is applied weakly, so that it covers only wants the slave could actually conceive, and which we cannot be sure he won't conceive, then it will give the desired result in the case of many living slaves, but it breaks down in the case of those slaves who live and die

contented with their lot, since we cannot here say that their condition of servitude was ever an obstacle to their doing something they wanted to do. Nor can the desired result be obtained by strengthening the counterfactual definition so that it comprehends wants the slave never conceived, and perhaps never could have conceived. Admittedly, such a strongly counterfactual definition will yield the conclusion that a lifelong contented slave *may* be described as socially unfree, but nothing so far *compels* us so to describe him. True enough, imputing appropriate counterfactual wants will yield the required conclusion, but imputing different wants will produce just as easily the contrary description. A wholly *formal* approach of this kind is unsatisfactory, according to Smith, since, while it permits us to describe the contented slave as socially unfree, it allows us also to describe the contented free man in the same way.

Smith goes on to consider D.R. Raphael's attempt to remedy the defects of a purely formal account of social freedom by specifying the hypothetical desires in respect of which the contented slave is judged unfree. These are specified not just as desires he might conceive, but as desires conceived in special and privileged circumstances, namely, circumstances where he has experienced both slavery and emancipation. As it had been expounded so far, Smith suggests, Raphael's account fails to serve its purpose. There is nothing unintelligible in the supposition that an emancipated slave might positively prefer to return to slavery, and, having done so, might live and die without ever regretting his decision. In such a case, Raphael's account cannot resist the counter-intuitive implication that the slave is socially free. As Smith makes clear, however, there is more than this to Raphael's account: it involves an appeal to 'a norm of human nature in which the desire for self-fulfillment *would* be restrained by conditions of slavery', where this norm is understood to designate 'the natural character of an average human being in normal circumstances'. But just how is the norm of human nature related to the idea of social freedom?

Smith suggests three ways in which such a norm might be invoked to answer questions about social freedom, none of which (he says) guarantees the social unfreedom of a contented slave. First, the norm might be construed *inductively* as encapsulating *evidence* about the dispositions of average human beings, upon which are based *predictions* about the chance to make an informed choice between slavery and emancipation. Once again, this will not defeat the claim that a contented slave is socially free

wherever, knowing both conditions, he displays a positive preference for slavery over emancipation. Secondly, the norm of human nature may be construed as *constitutive* of the concept of social freedom. Here social freedom is characterized as the absence of obstacles to a specific range of actions identified by reference to the characteristic desires of the normal man: the hypothetical desires relevant to judgments about the social freedom of a contented slave are those of a normal, selffulfilled individual, regardless of whether the slave is, or could ever become, such an individual. Like the purely formal approach examined earlier, this approach is strongly counterfactual, but as Smith observes, it aims to avoid the arbitrariness of that approach by regulating the counterfactual imputation of wants by reference to the material content of the norm of human nature. The difficulty is to find a decision-procedure for norms of human nature which excludes such judgments as those embodied in the Stoic view that the wise slave is freer than his master.

Smith rejects the most obvious procedure in which what is treated as decisive is the choice of individuals who have been adequately acquainted with the various kinds of experience endorsed by the competing norms. This, he says, requires what is logically impossible. For, whereas the constitutive view of the rule of a norm of human nature in making judgments about social freedom expresses the conviction that the agent's own preferences are to be overridden if they fail to conform to the norm, the content of the norm cannot itself be explicated solely by reference to agents' preferences if it is to be invoked to sanction discounting such preferences. Moreover, Smith emphasizes the independence of agents' preferences, without which the norm of human nature cannot perform this function of supporting the overriding of preferences, renders it necessarily non-empirical in character.

There is a third view, however, expounded by Raphael. Here social freedom presupposes not merely the availability of alternative courses of action, but the ability to choose between them: a degree of rational choice-making competence, or *autonomy*, is taken to be one of the logically necessary conditions of social freedom. The norm of human nature is connected non-contingently with the concept of social freedom, then, in that it supplies us with *criteria for the identification of autonomy*. Thus Winston Smith in Orwell's *1984* is said by Raphael to be 'dehumanized' and (when he comes to love Big Brother) to lack the natural competence of a rational

chooser. Equally, if a slave (having experienced both) were to prefer slavery to emancipation, Raphael would say that the slave's preference revealed a psychological disability, doubtless attributable to his social conditioning, as a result of which he is incapacitated for autonomous choice. In this version of the definist argument, where the norm of human nature is taken as furnishing criteria for the identification of autonomy, the problem of the contented slave appears to be dissolved. For it is the preference expressed by the slave in the crucial situation of choice between emancipation and slavery that determines whether or not he is autonomous. Since autonomy is one of the logically necessary conditions of social freedom, those who prefer slavery demonstrate their heteronomy and so cannot (logically) be free in the slavery to which they return.

As Smith goes on to argue, however, the appearance that the problem has been dissolved may once again be deceptive. The solution works only if we are ready to identify autonomy by reference to *what the agent chooses* rather than by reference to *how he makes his choices*. The force of Raphael's conception of autonomy is that slavery cannot be a possible object of autonomous choice. However, this conception has all the difficulties, which Raphael himself acknowledges, of Idealist conceptions of the 'real will'. Nor does Smith find inherently plausible the idea that a decision to return to slavery is bound to be less than fully autonomous: for an agent might surely have good reasons for making such a choice — reasons entirely appropriate as grounds of action to an autonomous agent. In any case, an approach which identifies autonomy by reference to the ends an agent adopts is generally uncongenial to liberal thought, which is reluctant to identify freedom of choice with choosing what is right.

Smith comments that there is here a dilemma for liberals, which he characterizes as a tug-of-war between reason and freedom. If the ultimate principles of morals and politics are matters of reason, and it is possible to determine whether an agent is autonomous by reference to the ends he adopts and the choices he makes, then it follows that one cannot disagree persistently and fundamentally with others about such issues without coming eventually to challenge their status as autonomous agents, or to doubt one's own. If, on the other hand, liberals reject the idea that autonomy involves finding rational answers to basic moral and political questions, then they acknowledge that social freedom is an *essentially contestable concept*<sup>4</sup> — that is to say, a concept whose subject matter is such that it is

inherently liable to intractable and rationally unresolvable dispute about its proper applications. If they do this, however, then they must accept that a slave might autonomously choose to return to slavery, and they must swallow the paradox that a contented slave enjoys social freedom. In the one case, a (highly implausible) conception of autonomy resists the counter-intuitive conclusion only by definitional fiat; in the other, a less demanding conception of autonomy, conjoined with the view that there is no way rationally to settle disputes between exponents of rival conceptions of social freedom, leads directly to the absurd result. As Smith puts it:

An examination of the idea of social freedom applied at its limits, as it were, to the problem of the perfectly contented slave, thus implies that Berlin's stricture about it being necessary to distinguish the Stoic sense of freedom from the concept of social freedom is totally without force. If the principle of distinction is taken to be conformity with liberal political values, they *ought* not to be distinguished; and if the point of it is the description each produces of the contented slave, they cannot be distinguished.<sup>5</sup>

Either way, the conclusion stands: no way exists whereby the contented slave can be shown to be unfree.

What are we to make of Smith's argument? Certainly it is both ingenious and provocative. Exploiting a plausible-looking understanding of social freedom as a conjunct of two things, a range of legal rights securing certain important opportunities to act and a measure of rational choice-making competence (autonomy) assuring that a span of alternatives is subjectively available to him, Smith claims that the fact that the slave lacks these rights cannot be shown to diminish his options, and argues that no way exists (which is not arbitrary and question-begging) of defining autonomy that guarantees its incompatibility with slavery. Yet, for all its ingenuity, it's hard to resist the intuition that Smith's argument fails to give the conception of social freedom which is its departure-point — freedom as the non-restriction of options — a fair run for its money. After all, since he lacks the legal rights of a free man, a slave will be liable to punishment in areas where a free man has immunity, and his status will deprive him of certain powers — such as the power to transmit property — which a free man has even if he never uses them: aren't these genuine restrictions of the slave's options? Again, isn't it a little cavalier to repudiate without further ado as dubiously definist and unacceptably stipulative the claim that there is a

conceptual connection between autonomy and the idea of a free man? Might not a conception of human nature be elaborated and given rational support which licenses such a conception? The difficulty, of course, is that it is not clear if the intuitions which these objections express can be cashed out in arguments more persuasive than Smith's. More specifically, is there an account of freedom as the non-restriction of options that is less vulnerable to Smith's objections than the views he canvasses?

### **Freedom as the non-restriction of options**

In a well known paper,<sup>6</sup> S.I. Benn and W.L. Weinstein reject the conception of freedom as the absence of impediments or constraints and develop the most forceful argument we have so far for the account of freedom as the non-restriction of options. Claiming that it is apposite to discuss whether a man is free to do something only if it is a possible object of reasonable choice, they declare programmatically that: 'our conception of freedom is bounded by our notions of what might be worthwhile doing ... Incomprehension, not hostility, is the first obstacle to toleration.'<sup>7</sup> According to Benn and Weinstein, then, the concept of freedom in moral and political contexts has uses which are typically normative rather than merely descriptive: to refer to freedom in these contexts is to invoke a principle, to identify a range of considerations salient to policy in the circumstances under discussion. More particularly, they claim that 'whenever we say of a person that he is free from X, or free of X ... it is some condition contrary to that person's supposed interest'.<sup>8</sup> In this they follow Spinoza, who says that 'children, though they are coerced, are not slaves', because 'they obey orders given in their own interests'. If, then, judgments about social freedom are evaluative judgments informed by a view of human interests, we need to be clear about the concept of having an interest if we are to be clear about the relation between slavery and social freedom. A brief glance at the literature on interests in politics,<sup>9</sup> however, confirms that once again we are in search of a decision-procedure for norms of human nature.

Speaking generally, elucidations of the concept of having an interest tend to span a range of conceptions extending from a behaviouralist extreme to one which is only vestigially behavioural in denotation. The term 'interests' has been used, at one extreme, for example, to denote the

expressed preferences of an individual or a group; but in this use (straightforwardly want-regarding) it is impossible for an agent to be mistaken about his interests, since these are (definitionally) constituted by whatever it is that his preferences show he wants. This understanding of what it is to have an interest, then, while it identifies a legitimate use of the term 'interest' does not capture much of the sense of talk about interests, in which it is often proper to say that, if they are based on misinformation, faulty reasoning, or an inadequate grasp of the available alternatives, satisfying an agent's expressed preferences may not be 'in his interests'. Also, this first understanding makes it impossible to say that a man has interests of which he is ignorant, and it commits us to saying that, whenever a man changes his mind about what it is that is in his interests, it is his interests that have changed. In disallowing statements to the effect that a man made a mistake in identifying his interests, this conception is clearly of no assistance in showing that a condition of slavery, because it is prejudicial to a man's interests, must be restrictive of his freedom; for it leaves no way in which a man's own preference-judgments may be overridden by others as part of a policy designed to protect his interests.

In order to remedy these limitations, a second understanding of interests is often proposed: in this conception, expressions referring to interests are used in the evaluation of policies and institutions, for example, with a view to assessing how far they maximize the agent's opportunities to obtain whatever it may be that he wants. This second understanding is an improvement on the first, since it allows us to say that a man is mistaken about his interests, or that he has interests of which he is unaware. It has been objected, however, that it is still inadequate, in that it does not permit us to say of an agent who is not somehow radically cognitively deficient that changing the character of his wants is a condition of promoting his interests; and this is something we must say if we are to be able to object to voluntary servitude on the ground that it permits an agent to injure his interests even when he never regrets his choice.

A third understanding of interests has accordingly been proposed, according to which promoting someone's interests is synonymous with maximising the fulfilment of his needs, or of his opportunities for needfulfilment. Now, admittedly, we do speak about policies being designed to further men's understanding of their own needs, and about institutions (such as educational institutions) being constructed so as to enable men to



discover that they have needs of which they would otherwise be unaware. It is not clear to me, however, that such policies must or can be justified by considerations to do with the protection or promotion of human interests. After all, even if a man may be said to have an interest in satisfying his needs, that cannot be his only interest, since he will also, presumably, have an interest in satisfying his mere wants. Promoting someone's interests cannot be synonymous with maximizing the fulfilment of his needs. Nor is it obvious to me that anything of value is achieved by linking interests to needs. For, in the first place, in considering the proposal that there is an internal link between the notion of interests and needs, we must beware of an ambiguity which often haunts talk about needs, and which damages many accounts of the concept.<sup>10</sup> Sometimes 'need' is used as a noun denoting inclinations whose thwarting results in felt frustration. Used in this fashion, however, the notion of having a need fails to elucidate that of having an interest in the desired way. For, whereas there is nothing incoherent in the supposition that it might be in the interest of an agent (none of whose inclinations are suppressed or thwarted) to develop capacities and form need-patterns that would make possible for him a way of life he would value highly once he had experienced it (but which he would never seek out if none of his existing needs were ever frustrated), this is a supposition the first understanding of needs does not allow us to entertain. Sometimes 'need' is elucidated as a verb whose uses make a reference to 'those conditions instrumental to the attainment of one's full development as a person'.<sup>11</sup> As Connolly (to whom I owe this understanding) makes clear, in this account, need-statements will always be triadic: a person will need something in order to do, be, or become something. The trouble with this account, however, when considered in the context of an elucidation of what is to have an interest, is that it is altogether formal — a feature of similar accounts which has led some writers to stigmatize the notion of a need as so irremediably porous as to be almost useless in political thought. Further, if the notion of interests is so closely tied to the notion of a need, interests' must be similarly stigmatized.

A fourth understanding of interests (elaborated by Connolly) seeks to salvage the notion from hopeless indeterminacy by making it once again want-regarding. In this account, a man has an interest in whatever it is that he would choose, having experienced the results of a relevant range of appropriate policies. The concept of having an interest remains tied

logically to the choices an agent makes (as shown in his behaviour), but the choices he makes once he has experienced the full range of genuine and relevant alternatives are privileged over others. The wants which are extensionally equivalent with his interests are, then, the counterfactual wants he will have if he has a clear awareness of the full range of alternatives, based on an experience of their consequences. It will be objected at this point, no doubt, that all of Smith's arguments may be invoked with undiminished force against this fourth understanding of interests. The trouble with the *choice criterion of interests*, whose affinities with Mill's *preference criterion of the higher pleasures* will be obvious, is that it will yield a result that defeats the counter-intuitive view about slavery and social freedom only on very dubious assumptions about the uniformity of human nature. Have we any more reason to suppose that everyone will prefer emancipation to slavery than we have to think that all who have tried both will plump for chess in preference to soap operas? We will have this assurance only if we make the preference for emancipation over slavery a criterion for the identification of the privileged choice conditions in which a man's (true or real) interests are revealed. But isn't this, as Smith has argued, just another definist manoeuvre? Hitherto, we found ourselves in a position where the emptily formal character of a notion (that of having a need) could be obviated only by attaching to it a substantive view of human nature — of human potentialities and human flourishing, which, in its very nature, is bound to be disputable. At that point, we found, arbitrariness appeared to have crept back in. The inherently controversial aspect of conceptions of interests cashed out in terms of needs deprived us of any rational assurance that well-founded judgments about social freedom and the condition of slavery were mutually exclusive. Now, with respect to the concept of autonomy, we have an emptily formal concept, a notion liable to yield a diversity of rival conceptions, a choice between which can be made only by invoking a substantive conception of human nature — which is bound to have an inherently disputable character.

The argument appears to have run full circle. Turning to Benn and Weinstein for an account of freedom as the non-restriction of options, we found that questions of social freedom arise only in respect of possible objects of reasonable choice, where the standards of reasonableness derive (at least partly) from norms about human interests. Surveying accounts of what it is to have an interest, we found that the conception of interests most

intuitively germane to the question of slavery and social freedom is cashed out in terms of a view of autonomy that looks suspiciously question-begging. Further, since there is a range of conceptions of autonomy, resting on different views of human nature and specifying different and incompatible accounts of the autonomous man's preferences, nothing has been said so far that decisively counts against the Stoic view, with its unacceptably problematic consequences. If the concept of autonomy is thus an essentially contestable concept, then the idea of a free man, the concept of social freedom and the definition of liberalism, will be similarly contestable. Different views of human nature, arising no doubt from rival moral and political commitments, will specify different and perhaps incommensurable views of the conditions and nature of autonomous choice, and, so, at several removes, of the nature of social freedom. It will be seen that the source of the unacceptably permissive implication of Smith's argument is the essentially questionable character of views of human nature themselves. A presupposition of Smith's argument, however, is that judgments about social freedom are not, in fact, solely judgments about what is the case (which some writers assert they are). If they are factual rather than evaluative judgments, and refer primarily to the objective circumstances of action, then the purely formal argument which Smith dismisses will be seen to be unexceptionally (because inevitably) definist. Let us consider, then, whether a definist argument cannot be rehabilitated.

### **The definist argument re-stated**

Crudely, the definist position is that, for a man to be free to do something, it must be true of him that he is not obstructed in doing it by the intervention of other agents. Different definist positions are yielded by different views of what can count as obstruction, but all definist views express the necessary truth that, if social freedom involves a range of rights to act, and if the condition of slavery comprehends the absence of these rights, then a slave cannot enjoy social freedom. Again, the definist position presupposes that the question, *whether or not* the agent under consideration possesses the rights of a free man, is an empirical question. To answer the question, whether a man is a free man or a slave, does not on this account, commit us to any evaluative judgment about that man or his deeds. Nor is the question about a man's status as a slave or a free man one which requires reference to his psychological condition: it is a question about his social (and legal)

circumstances, *simpliciter*. It is impossible, on this view, for there to be unsettlable disputes about a man's status, once the relevant facts are known.

Writers in this tradition differ among themselves as to what may constitute a preventing (liberty-limiting) condition. The great majority, of whom Oppenheim<sup>12</sup> may be taken as a typical but unusually fair-minded and lucid example, contend that being free to perform an act entails, not only that it has not been rendered physically impossible by the intervention of another, but that other agents have not rendered ineligible the relevant alternatives to it. Being free to act, then, on this view, involves the absence, not just of force, but also of coercion (which comprehends, among other things, the threat of force). More recently, however, a number of writers<sup>13</sup> have sought to undermine this widely accepted, commonsensical view, according to which being free to act implies the non-punishability of the act as well as the absence of forcible restraint with respect to it. I shall consider briefly the arguments of the boldest and most ingenious of these recent writers so that I can then examine their cogency as supports of the definist view.

In his paper, Steiner acknowledges that it is a well-supported conclusion of the literature on the subject that the distinction between interventions that are threats and interventions that are offers presupposes a standard of normalcy specifying the expected and morally required course of events which is the point of the intervention to alter. In the received view, it may be said that refusing an offer doesn't diminish my welfare, whereas threats make a worsening of my condition a consequence of non-compliance. Offers expand options, but threats restrict them: for, while option X would be open to me in the ordinary way, only option X plus a penalty will be available to me once it is covered by a threat. It is in virtue of their relation to this standard of normalcy that threats, but not offers, are generally thought to be restrictive of liberty. Now, as Steiner observes, it is necessarily true that, since the non-compliance condition of an offer is the norm itself, complying with an offer makes one better off than does complying with a threat, but it is not true that offers are always more resistible than threats. Speaking generally, threats and offers affect an agent's practical deliberations by changing the desirability of doing an action relative to that of not doing it. From the agent's standpoint the force of the intervention depends, not on its distance from the norm, but on the difference in desirability between the two sets of consequences it generates.

It is true both of threats and offers that compliance will leave the agent better off than he would otherwise have been (given the intervention), and nothing here hinges on the intervention's relation to a standard of normalcy. Since it is by appeal to this standard that threats are distinguished from offers, and no other way has been shown to exist in which these interventions affect the practical deliberations of the agent, Steiner concludes that the negative libertarians have given us no reason for supposing that threats, but not offers, can be restrictive of liberty.

What is the relevance of Steiner's argument to the question of slavery and social freedom? First, in restricting discourse about social freedom to circumstances where one man's acting in a certain way is rendered *physically impossible* by the intervention of another, it licences the inference (as Steiner makes clear) that freedom is the personal possession of physical objects. Why is this so? Steiner's case against the orthodox version of negative libertarianism is that no good reason can be given within such a perspective for treating threats as restrictive of liberty and that, accordingly, a consistent negative libertarian will allow only physical force to be restrictive of social freedom. If the only preventing condition which can affect a man's liberty is one that renders certain actions physically impossible to him, then, Steiner reasons, to be free to do something is simply to have the 'physical components' of that action at one's disposal — to have unimpeded motion in the area of physical space occupied in the action and unobstructed control over the particular material objects disposed of in the action. But, Steiner continues, the relation between an agent and a portion of physical space which he occupies, and between an agent and a material object of which he disposes, is commonly called *possession*. Thus, he says:

Statements about the freedom of an individual to do a particular action are therefore construable as claims about the agential location of possession of the particular physical component of that action. The statement that 'X is free to do A' entails that none of the physical components of doing A is possessed by an agent other than X. The statement that 'X is unfree to do A' entails that at least one of the physical components of doing A is possessed by an agent other than X.<sup>14</sup>

Steiner's argument, then, proceeds by way of a criticism of the conventional conception of negative liberty to the proposal that such liberty be identified with the control of material things.

Second, since on this view (as on others) freedom (that is to say, possession) is a triadic relation obtaining between an agent, an object, and all other agents, so that any agent's augmentation of freedom entails a corresponding diminution of the freedom of another, it follows (according to Steiner) that aggregate group freedom is not a variable magnitude.<sup>15</sup> Third, and as a consequence of the second point, liberalism is best characterized, not as a political philosophy in which liberty is assigned lexicographical priority over other political goods, but rather as a doctrine which requires that freedom be distributed equally among men. The legal condition of slavery is excluded by liberalism, then, because its defining feature, the possession by one man of property rights in another, is inconsistent with the central, equal-freedom principle of liberalism.

Does Steiner's reconstructed negative libertarianism permit a restatement of the definist argument less vulnerable than Berlin's to Smith's strictures? I think not. For, in the first place, it is not altogether clear in Steiner's account how we are to make comparative judgments regarding aggregate individual freedom, and it is, accordingly, a matter of legitimate and perhaps unresolvable disagreement whether the equal-freedom principle is satisfied in any particular case. The inherently controversial aspect of judgments about freedom, its magnitudes and distribution, arises from the circumstance that the subject matter of discourse about freedom is actions rather than behaviour, and actions (unlike behaviour) are conventionally (and often normatively) constituted entities. This is indicated obliquely in Steiner's remark that '... to act in *among other things* [my italics] to occupy particular portions of physical space and to dispose of particular material objects, including, in the first instance, parts of one's own body'.<sup>16</sup> The problem concealed by the phrase I have emphasized is that an action bears no determinate relation to the behaviours in which it may be performed and, therefore, no one-to-one identity relation. Steiner's equivocation between action and behaviour is shown in his discussion of an incarcerated individual who, while prevented from performing an indefinitely long list of actions, is according to Steiner, 'not prevented from jumping up and down, nor from singing *Waltzing Matilda*, nor from twiddling his thumbs in a counter-clockwise direction, and so on'.<sup>17</sup>

If the subject matter of freedom is action rather than behaviour, then it will be seen that the disputable character of judgments about freedom has its source in the fact that *we have no principle of counting for free actions*

*which is not also a principle of evaluation of their worth or significance.* Nor will this appear particularly surprising when we reflect that some of the centrally important areas of controversy about freedom have been historical disputes about whether certain classes of individuals should be enabled by law to perform certain actions (e.g. to marry) whose performance had hitherto been restricted by some dominant group. Any judgment comparing the overall freedom of an agent, a group, or a whole society with that of another, or at another time, cannot avoid being an evaluative judgment about the relative value of the actions it comprehends. Interestingly, this was clearly recognized by Berlin, when in a crucially important footnote in *Four Essays* he acknowledged the evaluative character of judgments about freedom, and a similar, though more restricted point was made by Hart in his 'Rawls on liberty and its priority'.<sup>18</sup>

It must not be thought that Steiner's argument, in denying that individual freedom is a variable magnitude, escapes the problems created by the indeterminacy of the expression 'a greater liberty'. For, Steiner's principle of the conservation of freedom notwithstanding, these problems break out in any judgment concerning the distribution of freedom. No scientific, value-free artificial language can be constructed in which egalitarianism — whether about freedom, or about any other good — can become a descriptive notion.<sup>19</sup> This crucially implies, further, that since slavery may be and has been a matter of degree, there may be deep disagreements — and disagreements having an ineradicable evaluative dimension — about whether or not the restrictive institutions in which a man lives are such as to render him a slave.

The difficulties inherent in making judgments about degrees of slavery are well illustrated by the case of the Mamelukes,<sup>20</sup> slaves who succeeded in establishing dynasties of their own, both in India and in Egypt, and who preserved their power under Ottoman rule by the expedient of securing for the sons — who as Muslims were free-born — the rights and privileges hitherto enjoyed only by slaves such as themselves. Examples such as that of the Mamelukes display the difficulties which will often be found when attempts are made to apply the concept of slavery to concrete historical groups. They confirm that the definist argument — even when restated ingeniously by such as Steiner — begs important questions, which no consideration of slavery and freedom can afford to ignore. Indeed, inasmuch as Steiner's reconstructed negative libertarianism cannot account



for, or support, the well-founded comparative judgments about social freedom which we continually make, it must be rejected as providing an account of the concept of freedom which collapses into incoherence. Despite his clear awareness that comparative judgments present a difficulty for his account, Steiner offers no plausible account of their status, having recourse to the oblique and unsatisfactory claim that, though actions are not themselves countable, yet there may be some common element in situations where discourse about freedom is appropriate which allows for some measure of quantifiability. My contention is that this common element will be found to be precisely that which the definist position as restated by Steiner excludes, namely, a range of evaluative judgments tied to a conception of a worthwhile human life. The conclusion is inescapable that the definist position can be made consistent only by the heroic move of claiming that comparative judgments about social freedom are, despite appearances, impossible. Such a move has the consequence, however, of rendering rational discussion of degrees of slavery in their relation to social freedom equally impossible. The upshot of these reflections is that, far from any convincing testament of the definist position emerging in Steiner's account, we find there is good reason for supposing the definist standpoint to be ultimately self-defeating.

### **A naturalist solution**

The hinges on which Smith's argument swings are two: first, the claim — which I endorse — that the formal notions of freedom and autonomy cannot by themselves guarantee an incompatibility with slavery; and second, the contention that the views of human nature which inform these bare notions and render them substantive are essentially contestable. It is this latter, second claim which I propose to question as a preliminary to elaborating my own naturalistic resolution of the problem of slavery and freedom. I wish to point out to start with that there is a deep gulf between the view (surely an uncontroversial one) that conceptions of human nature have always an inherently questionable, corrigible, disputable aspect, and the claim — which I take is the one made by those who contend that the concepts of moral and political thought are all of them essentially contestable — that no considerations can ever be found which so inform our assessment of the merits of rival conceptions of human nature that one view of human nature stands out as clearly rationally preferable. Smith's

argument, as I see it, requires that the second of these claims be endorsed. My contention, on the contrary, is that the problem of the contented slave can be resolved by supplementing the bare notion of autonomy with an account of human nature that is bound to have a disputable character, but which is in no way beyond criticism or rational support.

That uses of the notion of autonomy in moral and political contexts always endorse some account of human nature suggests that we will be wise if we consider what it is for *a man* — rather than, say a dolphin — to be autonomous. This involves recognizing that there are certain activities and involvements which are constitutive of human social life. Without such complex reactive attitudes as resentment and gratitude, without such involvements as friendship and rivalry, there would be nothing we can recognize as a human society. I suggest that the capacity for sustaining complex emotional relationships, to harbour long-range projects and to resent their frustration, be accounted among the *symptoms*<sup>21</sup> of autonomy in a man. I suggest that, confronted with a man who cared nothing for natural beauty, parental affection or sexual love, who sought no satisfactions in the life of the mind, in the development of his bodily powers or in religious devotion, we would be disinclined to qualify him as autonomous; and the source of our disinclination is not any logical property of the bare formal notion of autonomy, but rather our invocation of the concept of a human life. A man's life, we may say, has characteristic phases and aspects; these define what may be called the *necessary form* of a human life. Our doubt that a cocaine addict, who says he cares for nothing but the euphoria produced by his drug, may be accounted autonomous, can, I believe, be explained satisfactorily only by invoking the concept of a happy human life. When we judge that a man cannot enjoy great happiness even if the narcotic euphoria be prolonged indefinitely, such a judgment — like many judgments of importance in ethics — must be supported by appeal to an idea of the kind of happy life that only an autonomous man can have. Such considerations deriving from the notion of a happy human life frame *boundary conditions* within which the concept of autonomy is at home: they furnish criteria for the application of that concept in social contexts. I contend, then, that the concept of a human life enters into any judgment we make about the autonomy of human beings; and considerations deriving from the concept of human life support our disinclination to account some behaviours — such as that of the cocaine addict — features of the life of an

autonomous man. It is by invoking those considerations, I suggest, that we override the avowals of the slave that he is content with his lot, and dismiss the claim that there could be a 'truly contented' slave.

It is those aspects of a human life, helping to define its necessary shape, that inform our judgments when we distinguish an imposition of a cost upon a man's activities from a restriction of his options, which we appeal to when we individuate options and aggregate them so as to produce some view of a man's overall freedom. The slave's options are restricted in that, regardless of his own preferences, his status deprives him of the opportunities he would need if he were to have a chance to flourish as a man. There will no doubt, be hard cases, where we are unable to make confident comparative judgments about an agent's chances of flourishing in diverse conditions of restraint and restriction of options; but, *contra* Smith, the fact that concepts such as that of a human life are open-textured does not mean that they are quite bereft of any criteria of proper application. It is to some such distinction between concepts whose applications are inherently disputable and concepts that are so deeply contestable in character that any wager on an eventual convergence in their uses would be unreasonable that Stuart Hampshire may be presumed to invoke when, in his book, *Thought and Action*, having asserted that 'there are some concepts that are permanently and essentially subject to question and dispute and are recognized to be at all times questionable',<sup>22</sup> and having included among these concepts the concepts of mind and action, he goes on to support a definite metaphysical view of the nature of mind and action. Nor can it reasonably be thought to be a powerful objection to my account that no complete and fully determinate list can ever be given of the marks of a happy life. As Strawson observes in the context of an important argument for the constitutive role of the reactive attitudes of resentment and gratitude in moral personality and moral community:

The central commonplace that I want to insist on is the very great importance that we attach to the attitudes and intentions towards us of other human beings, and the greater extent to which our personal feelings and reactions depend upon, or involve, our beliefs about these attitudes and intentions. I can give no simple description of the field of phenomena at the centre of which stands this commonplace truth, for the field is too complex. Much imaginative literature is devoted to exploring its complexities; and we have a large vocabulary for the purpose.<sup>23</sup>

The point that our inability to settle in advance all reasonable disputes about what are the indispensable defining features of human social life does not undermine the enterprise of elucidating the concept of a human life has been made forcefully by Peter Winch in the context of a criticism of some traditional approaches to the metaphysics of human nature:

If one recognised the possibility of being mistaken in one's initial belief that one had understood what was said, or that one had shown it to be unintelligible, one can equally, after discussion, recognise that one may have over-estimated the difficulties which have emerged in its course. But that does not mean that one's views are subject to the test of some ultimate criterion, the criterion of what does and what does not belong to human nature. It means only that new difficulties, and perhaps new ways of meeting the difficulties, are always lurking below the horizon, and that discussion continues. Sometimes, if one is lucky, the discussion clarifies or extends one's conception of what is possible for human beings. But it is no use saying that this is contingent on what *is* or *is not* possible for human beings: for our only way of arriving at a view about this is by continuing to try to deal with the difficulties that arise in the course of discussion.<sup>24</sup>

The upshot of the work of Strawson, Hampshire, Winch, and others influenced to varying degrees and in different ways by the philosophy of the later Wittgenstein is that certain practices and reactive attitudes are so central in our thought that any approach to moral and political dilemmas which neglect their relevance is soon bound to run into conceptual difficulties. Plainly, the account of man and society elaborated by writers in this tradition breaks with the notion of necessity as consisting simply in analyticity which was propagated by some of the positivists of the Vienna Circle. Their claim is that, in the area of social practices and reactive attitudes with which we are concerned, the distinctions between natural and conceptual necessity and between a priori and synthetic truths no longer have force or utility. The links that hold between moral, political, and (in general) practical concepts germane to those areas must be regarded as internal or criterial, but this is not to say that such concepts are altogether mutually constitutive. It would be wrong to suppose, accordingly, that, in working out these in respect of the problem of the lot of the contented slave by the research programme intimated in this philosophical tradition, I have accorded to the relations between autonomy and happiness (for example) any character of vicious circularity. Some degrees of circularity is inevitable

(and virtuous) whenever an internal link is postulated between concepts, but it is no part of my argument that autonomy and happiness are concepts identical in meaning or equivalent in extension.

One illustration of the fact that my argument in no way commits me to the (surely unacceptable) view that statements about autonomy and happiness are intertranslatable may be found by noting the point that nothing I have said entails that a choice of slavery must be heteronomous. Like Smith, I find no difficulty in the proposition that an autonomous agent might freely choose to forfeit his autonomy and thereby to relinquish some of his prospects of happiness, but I see no necessity in the claim that what a free man chooses when he does this must be conceived as freedom. We can imagine easily enough, after all, reasons that might move an autonomous man to prefer slavery, and we need not suppose any of them to make reference to his concern for his own freedom. My claim, then, is not the implausible one, canvassed by Smith, that a free man could not (logically) display a preference for slavery; it is, rather, the claim that a man who acts successfully upon such a preference at once ceases to be a free man and forecloses some of his chances of happiness. Nor is it true that my account commits me to the Socratic paradox that an agent cannot freely choose what is bad. For, while my argument claims as a necessary truth that a free act, and an option, must contain or presuppose some good or positive value, the resultant on-balance of a free act is not thereby precluded from being a bad state of affairs. It seems clear, in fact, that some such account as mine is intimated by the prohibition of voluntary servitude endorsed by most writers in the liberal tradition, which (as J.S. Mill's discussion of the question makes particularly clear) has its source in a concern that men should not relinquish their own freedom, an action which Smith's account has the disadvantage of rendering logically impossible in the contexts with which we are here concerned.

While my argument is not vulnerable to such objections, I do not want to deny that areas of difficulty remain in my account — difficulties which perhaps infect all that has so far been written on these issues. It might be admitted, for example, that freedom and happiness are concepts criterially connected in the way I claim, and yet denied that anything substantive follows from this connection for theoretical and practical dilemmas in morals and politics. For, while freedom and happiness may perhaps be linked together in any intelligible moral outlook, there could yet turn out to

be an irreducible diversity of moral practices, each conceiving freedom and happiness differently. In that case, human flourishing would stand for nothing definite, and could not usefully be invoked to settle the question of the social status of the happy slave. More radically, it could be objected that the distinction between essential corrigibility and essential contestability which have put to work in my account has no application in the areas of thought and practice with which we have been concerned. It might be urged against my account, indeed, that in supposing any elucidation of the concept of a human life to be available which is neutral as between rival metaphysical accounts of human nature, it is failing to take seriously the limitations of conceptual analysis identified by those who emphasize the essential contestability of moral and political concepts. Accordingly, it cannot be denied that if, as Smith and others have suggested, metaphysical views of human nature occupy a logical space of deep contestability, then, like the solutions of the problem of the contented slave that Smith criticizes, my own solution is saved from being empty formal, definist, and question-begging only at the cost of being inherently and radically contestable. If this last objection to my account can be made out, no way remains whereby we can resist the paradoxical and disturbing implications of Smith's arguments.<sup>25</sup>

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## Notes

- <sup>1</sup> I. Berlin, 'Two concepts of liberty' in his *Four Essays on Liberty*, (Oxford: Oxford University Press, 1969).
- <sup>2</sup> J.P. Day, 'On liberty and the real will', *Philosophy*, 45, (1979) 177–92.
- <sup>3</sup> G.W. Smith, 'Slavery, contentment and social freedom', *Philosophical Quarterly*, 27, (1977) 238–48.
- <sup>4</sup> The term is used first by Gallie in his 1956 *Aristotelian Society* paper on 'Essentially contested concepts'.
- <sup>5</sup> Smith, 'Slavery, contentment and social freedom',

- [6](#) S.I. Benn and W.L. Weinstein, 'Being free to act and being a free man', *Mind*, 80, (1971) 194–211.
- [7](#) *ibid.*
- [8](#) *ibid.*
- [9](#) I am particularly indebted to W.E. Connolly's treatment of the concept of interests in his *Terms of Political Discourse*, (Oxford: Martin Robertson, 1983).
- [10](#) Connolly is clearly aware of this damaging equivocation, which he discusses in *Terms of Political Discourse*, pp. 59–62.
- [11](#) *ibid.*
- [12](#) See F. Oppenheim's *Dimensions of Freedom*, (London: Macmillan, 1961).
- [13](#) Such as W. A. Parent, *American Philosophical Quarterly*, 11, (1974) 149–67; and H. Steiner, *Proceedings of the Aristotelian Society*, 75, (1974–5) 33–50.
- [14](#) Steiner, *Proceedings of the Aristotelian Society*, 75, 48.
- [15](#) *ibid.*, 48–9.
- [16](#) *ibid.*, 47.
- [17](#) *ibid.*, 45.
- [18](#) Berlin's and Hart's arguments are cited and discussed in [Chapter 4](#) of this book on pp. 52–3.
- [19](#) For my understanding of a descriptive approach to these questions, I am indebted to Felix Oppenheim's paper, '“Facts” and “values” in politics: are they separable?', in *Political Theory*, 1, (1973).
- [20](#) I am grateful to Nick Bunnin for drawing my attention to this example. The information derives from the *Encyclopaedia Britannica*, Vol. 2, (1974) p. 399 *et seq.*
- [21](#) I use 'symptom' here in the sense in which Wittgenstein intended in his discussion of 'criterion'. On this, see R. Albritton, 'On Wittgenstein's use of the term “criterion”', *Journal of Philosophy*, 56, (1959) 845–57.
- [22](#) Stuart Hampshire, *Thought and Action*, (London: Chatto and Windus) p. 230.
- [23](#) P.F. Strawson, *Freedom and Resentment*, (London: Methuen, 1974) p. 5.
- [24](#) Peter Winch, *Ethics and Action*, (London: Routledge & Kegan Paul, 1972) p. 88.



## Chapter six

# Hayek on liberty, rights and justice

In the history of political thought, controversy about how liberty is to be conceived has typically been conflated with debate about the sources of the value of liberty and the principles of its just limitation. Although the classical theorists may have differed both as to the proper conceptual analysis of liberty and as to the role in political life of principles about its value and equitable distribution, it has been supposed that a comprehensive and systematic theory of liberty is in principle available, and that such a theory could have a universal application in which it might inform and guide political practice. One aspect of this traditional aspiration is displayed in Rawls's search for a *moral geometry* in which questions about the scope and distribution of liberty are susceptible of a single authoritative answer. But we find political sceptics such as Michael Oakeshott denying that anything very substantive follows from conceptual truths about liberty and repudiating the view that rational reflection can uncover universally applicable principles for the arbitration of conflicting claims about liberty. The main interest of Hayek's work in social and political philosophy lies in his attempt to marry these two approaches to political theory, the classical and modern, the rationalist and sceptical, so as to produce a framework of ideas whose role is at once explanatory and normative. His attempt is, as I shall try to show, foredoomed to failure and issues in a confusion of categories. It is an impressive failure, none the less, in that it teaches us

much about the proper concerns of political theory and contains much of intrinsic interest as well. Hayek's writings compose one of the most ambitious efforts at a liberal ideology made this century, and a critical scrutiny of the reasons for its inevitable failure cannot fail to be instructive.

### **Liberty, justice and the rule of law**

Though Hayek nowhere denies intrinsic value to liberty, his *argument* as to its value is one aiming to show that: 'liberty is not merely one particular value but ... the source and condition of most moral values'.<sup>1</sup> So far as his argument is concerned, then, his account of the value of liberty is wholly instrumental. Rather in the manner of John Stuart Mill,<sup>2</sup> Hayek notes that 'there are those who do not value the liberty with which we are concerned, who cannot see that they derive great benefits from it, and who will be ready to give it up to gain other advantages: it may even be true', he goes on, 'that the necessity to act according to one's own plans and decisions may be felt by them to be more of a burden than an advantage'.<sup>3</sup> So, whereas Hayek warns that it would be a misunderstanding of his position if he were interpreted as believing that the value of liberty is solely a matter of its expediency, he acknowledges that nothing in his argument depends on the treatment of liberty's value as 'an indisputable ethical presupposition'.<sup>4</sup> The argument does not, then, depend on the assumption that most people want liberty for themselves, or even on the claim that most people recognize its beneficial effects in their lives. It remains a consequential argument, none the less, in that Hayek contends that it is in a regime of liberty that human purposes are best served and other important goods most effectively promoted. Indeed, Hayek seems generally to want to work with a concept of individual freedom that is value-neutral inasmuch as it is intelligible and useful to all, regardless of their view of the nature and sources of liberty's value.

For this last reason and some others, Hayek thinks that (in the idiom coined by Sir Isaiah Berlin) his conception of liberty is a negative one. It is a negative conception, he says, because: 'it describes the absence of a particular obstacle — coercion by other men', and it 'becomes positive only through what we make of it'.<sup>5</sup> Lionel Robbins authoritatively endorses this self-interpretation, asserting that Hayek's 'conception of liberty, like that of the great liberal thinkers of the past, runs in terms of absence of arbitrary

coercion ... it is the negative conception.’<sup>6</sup> What are we to say of this characterization? Plainly, there are many tests of whether a view of liberty is a species of the negative conception, and I do not say that Hayek's view fails all of these tests; but, on balance, it is a positive conception, and shares with some of the most radical forms of positive libertarianism a number of important defects. Let us examine in what respect Hayek's view deviates from the negative conception and how this affects his theory of liberty.

Among negative libertarians, freedom is conceived as an inter-personal rather than as an intra-personal relationship; it designates some aspects of the relations men have with one another, rather than any sort of rational self-direction. For negative libertarians, conceptions of freedom as rational self-direction, which may be found in Plato and in Stoic writings, are objectionable on several counts. A man may order his life rationally even when he is subject to severe coercive restraint, and the antithesis of individual liberty is servitude to another rather than inability to govern oneself. Again, ideas of freedom as rational self-direction seem peculiarly prone to generate a bifurcation of the self into rational and non-rational, noumenal and phenomenal parts. The next step of assimilating the imputed dictates of the rational self with the commands of positive public authority has long been a support of despotism in the modern world. Now on this dimension there is no doubt that Hayek's conception belongs in the negative camp. He contrasts notions of ‘inner’, ‘spiritual’, or ‘psychological’ freedom sharply and unfavourably with the concept of individual freedom in its primary, literal and inter-personal sense. He protests, also, against any conflation of liberty with power — a conflation which, when wealth is given a central place among the forms of ability and power, supports the view of the market order as necessarily involving severe and unequal abridgements of liberty. Finally, he distinguishes questions of individual freedom from questions of the range or eligibility of an agent's options. A man's freedom is not thereby restricted, even if his options are few and unattractive to him.

On several other important dimensions, however, Hayek's conception falls decisively into the positive libertarian camp. A central feature of the negative view, for example, is that freedom is acknowledged to be a distinct political value or virtue, which may in principle compete with other values such as justice, security and welfare. In Hayek's theory of the rule of law, however, a necessary connection is postulated between liberty, justice, and

welfare. How is this? Hayek observes that: ‘the definition [of liberty] will not be precise until we have also examined such other almost equally vague terms as “coercion”, “arbitrariness” and “law”, which are indispensable in a discussion of liberty’. His most explicit definition of individual freedom is that it is: ‘the state in which a man is not subject to coercion by the arbitrary will of another ...’.<sup>7</sup> Later, he specifies that: ‘the conception of freedom under the law rests on the contention that when we obey laws, in the sense of general abstract rules irrespective of their application to us, we are not subject to another man's will and are therefore free’. These statements show that, for Hayek's view, much turns on the claim that it is subjection to *arbitrary will* that constitutes unfreedom and that such subjection is avoided if, and only if, a man lives under a regime of general and abstract rules which are equally applicable to all. Here Hayek comes close to endorsing a Rousseauesque or Kantian essentialist or formalist thesis about law and liberty in which it is held that, since it expresses a general will, ‘true law’ cannot limit freedom. For Rousseau, as for Kant, a man's will is not arbitrary if a rational agent can recognize it to be expressive of a just maxim. In this account, freedom is obedience to laws which one has prescribed to himself; but it is assumed that, once certain formal requirements have been satisfied regarding their generality and equality of application, a narrowly limited range of laws will be endorsed by all men not blinded by partiality or prejudice. Here we have the thesis, reiterated in the three volumes of *Law, Legislation and Liberty*, that ‘true law’ must pass a test of universalizability.

What, though, makes such law just? For Hayek, the ultimate test of justice of rules is ‘nothing else than the self-consistency of the actions which these rules allow if applied in the circumstances of the real world’.<sup>8</sup> Hayek's universalizability test is not a purely formal one, then, in that it is supposed that systems of rules which might yield a conflictfree order in some imaginable circumstances will be disqualified by features of our own world.<sup>9</sup> As with H.L.A. Hart's ‘minimum content of natural law’,<sup>10</sup> however, it is the case that, even after the formal universalizability test has been supplemented by a test demanding consistency of a pragmatic sort in real-world circumstances, many different sets of rules will be left in the field. If we ask how the range is to be narrowed so that only a very small family of such systems of rules remains, we find that, for Hayek, promotion of the common good is the utilitarian criterion whereby a system of rules is

entitled to be regarded as just. Hayek's argument is here akin to that of Hume, who recognizes that, whereas it makes little sense to speak of an aggregate utility being yielded by a system of rules, yet we may compare different *systems* of rules with a view to assessing their role in facilitating the achievement of human purposes. In allowing that the defence of rules of justice is finally to be conducted in terms of their promotion of desirable consequences, Hayek (like Hume) must in this (very extended) sense be regarded as a utilitarian theorist.

There are, admittedly, serious difficulties in determining the form and content of Hayek's utilitarian outlook. He has made clear that for him 'utility' has no connotation of pleasure or happiness: indeed, when speaking of the liberal economy as an instrument of progress, he has emphasized that, whereas it may make us wiser, progress does not often make us happier men.<sup>11</sup> Further, he has disavowed both the 'act' and 'rule' variants of utilitarianism, discerning in both traces of the constructivist fallacy.<sup>12</sup> Yet his recent extended discussion of utilitarianism<sup>13</sup> supports my claim that, these important reservations notwithstanding, Hayek's moral theory remains a sort of traditionalist or evolutionary-system utilitarianism. For, even though an appeal to utility is not in Hayek an appeal to pleasure or happiness, his argument is that goods other than the satisfaction of human purposes — goods such as the promotion of knowledge — are best achieved in the liberal society. Again, though he denies that there is any sense in talk about maximizing aggregate social utility, he does suppose that it is an intelligible and important claim that in a liberal order the chances are maximized of anonymous individuals obtaining their unknown purposes. In virtue of these commitments, and of the unimportance in Hayek's argument of any side-constraint principles, I do not see how it can be denied that the moral outlook in which Hayek's utilitarian argument for liberty is embedded is itself a utilitarian outlook.

What we have is a puzzling, multi-layered argument, which (as Ronald Hamowy has demonstrated in his powerful criticism)<sup>14</sup> disintegrates under sustained criticism. At one level it is suggested that rules possessing certain formal attributes (generality, equality) cannot restrict liberty inasmuch as they cannot be treated as truly coercive. Thus taxation and conscription, for example, will not restrict liberty if their incidence on the population is predictable and in accordance with rules having these properties. Here we see what J.W.N. Watkins has characterized as Hayek's 'desire to assimilate

impersonal social forces and general civil laws to non-coercive forces and laws of nature'.<sup>15</sup> Behind this desire we find in Hayek an *avoidability criterion* which he uses to identify what is truly coercive and restrictive of liberty. As he puts it:

Provided that I know beforehand that if I place myself in a particular position I shall be coerced and provided that I can avoid putting myself in such a position I need never be coerced (i.e. I need never have my freedom curtailed).<sup>16</sup>

How can Hayek have overlooked the obviously counter-intuitive aspects of a conception according to which my freedom cannot be diminished, providing only that I *know* I will be coerced if I choose to act in certain avoidable ways? In part the answer lies in his use of a Kantian test of universalizability, whose insufficiency as a criterion of substantive justice is an ancient truth, and whose inadequacy as a filter for policies limiting freedom should be no less patent when the Kantian test is supplemented by a less formal test to do with the practical non-conflictability of rules. In part, however, Hayek relies on a distinct test, that of consent: this provides that anyone approving a measure of policy or legislation must allow its application to his own case. At times, Hayek seems to treat this as simply a fallible decision procedure, whose general utility rests on certain well-established facts of human nature. In this interpretation, his test of consent for legislation is not intended to provide an indefeasible guarantee against limitation of liberty. Rather, it embodies a procedure which turns to general advantage the fact that repressive legislation is not typically initiated or endorsed by those whose freedom it limits. Perhaps, also, Hayek concurs with Lon Fuller that 'evil cannot stand the light of day'.<sup>17</sup> Repressive measures are less likely to be approved if their full force must be explicitly spelled out in the shape of general and abstract provisions of policy which are intelligible to all. In fact, as Hayek himself does not fail to acknowledge, the test of consent cannot practically assume the form of a rule of unanimity but must have a majoritarian form. In this case, as Hamowy's example<sup>18</sup> of miscegenation laws in a racially divided society suggests, it is not simply that we can conceive of circumstances where the consent test will not safeguard freedom against limitation but that there will plausibly occur in the real world instances when oppressive measures pass the test. This is a weighty matter, when we recall that the tone of Hayek's account generally expresses the belief that no policy which passes the test



can restrict liberty — a surprising confusion of procedural with substantive values in one who (rightly) accords to democratic institutions a purely instrumental role.

Hayek is mistaken, then, in supposing that anything very substantive issues from the Kantian requirements of abstraction and generality which he seeks to apply to law. They are not sufficient conditions of a legal framework having recognizably a liberal character. Nor are they even a necessary condition of a legal code sufficiently stable and predictable in its judgments that it provides a reliable framework for individual action and social co-operation: a common-law tradition, whose maxims are so indeterminate as to be incapable of universality, may yet (as Bruno Leoni has perceived)<sup>19</sup> be more reliable as providing a background of secure expectations than any sort of liberal legislation. Further, we can find examples in history of tyrannies wholly unrestrained by law whose arbitrary depredations are so infrequent and limited in nature that liberty is less curtailed than it might be in a Hayekian regime. Again, Hayek is equally wrong in thinking that much that is important is constrained in the demand that laws be equal in application. As both Leoni and Raz recognize,<sup>20</sup> men can be classified according to an indefinitely large system of categories, and any system will satisfy some principles of equality. Principles specifying that all men possess the same civic and political rights, and that these be the rights recognized in classical liberalism, will satisfy some equalitarian canons; and there is no doubt that Hayek takes for granted the justice of such liberal principles. principles of this sort cannot be deduced from any of the requirements of the rule of law, unless the step is taken of embracing a fully fledged theory of natural law. This step Hayek resolutely refuses to take.<sup>21</sup> For, though he insists that *nomoi* (the laws of liberty) are discoveries rather than decisions of legislatures, he insists also that such laws are discoverable in the traditions of some but not of all peoples. Hayek is not here affirming, with Aquinas, that natural law may be permissive in relation to different practices and cultures, so long as they do not violate its basic prohibitions; he is contending that the laws of liberty, whose negative prohibitory character he correctly identifies, are aspects only of a highly limited range of peoples. Hayekian legislators who seek to constrain their policies by reference to the canons of just conduct intimated by the moral traditions of their people will conform to Hayek's own requirements only if their societies are already infused with liberal principles.



Hayek is no less in error in his assumption that his Humean defence of rules of justice will ground a system of principles according priority to the protection of liberty. It will do so, if at all, only in extremely limited circumstances, where other moral rights can reasonably be judged to have weaker utility-promoting side-effects. As I shall later try to show, this strand of argument in Hayek is by no means to be dismissed cavalierly, inasmuch as most arguments about the necessary incompatibility of affirmations of moral rights with a utilitarian commitment are groundless; but certainly, the Humean argument is insufficient to support the defence of a liberal regime. It could equally well, if taken by itself, support a stable tyranny, in which ordinary liberal freedoms are severely curtailed but in which property rights and contractual obligations are securely upheld. Neither the Kantian nor the Humean argument in Hayek is adequate defence for a liberal regime.

What is the upshot of these criticisms? So far as I can see, Hayek commits the cardinal error of inverting the proper relationship between law and the moral rights that the rule of law protects. In his conception, moral as well as legal rights fall out of the rule of law as variable and defeasible guarantees of protected areas of action, subject to an overriding test of their utility-promoting effects. Classical liberals will find Hayek's account radically unsatisfactory, whether they be legal positivists or natural lawyers. Positivists will object that, in allowing any laws that satisfy his formal requirements to be features of the liberal order, Hayek disables moral criticism of the law. Natural lawyers will note that Hayek's writings lack any account of the moral rights from which, in conjunction with other principles, a more complete theory of the law and of law's necessary connection with morality can be derived.

Hayek's liberal critics may and do differ about the grounds of the moral rights which are recognized in a liberal code of law. Some will attempt an eudaemonistic derivation of moral rights whose lineage can be traced back to the late Scholastics and which receives full expression in the political philosophy of John Locke. In this tradition, rights are rounded in the striving for well-being of individual human agents and are conceived as framing side-constraints on any morally tolerable policy for the promotion of general welfare. Others, within a modern tradition to which Hume, Bentham and, in my judgment, John Stuart Mill belong, construe moral rights as self-denying ordinances on the unconstrained pursuit of utility

which are nevertheless grounded ultimately in utility. Here the claim is that men have certain vital interests and that the central place of these interests in their welfare warrants us in erecting them as bars to any direct appeal to utility. There are, then, plausible theories of moral rights within the utilitarian tradition itself, to which Hayek himself generally belongs. Such theories are not, in their most plausible forms, variants of rule-utilitarianism. The most powerful utilitarian theory of justice and of moral rights — John Stuart Mill's — is a sophisticated version of indirect utilitarianism.

Utilitarian theories of justice have their earliest and most subtle form in Hume. There, a claim is made about the self-defeating effect of direct appeal to utility. It is Hume's thesis in the *Treatise*<sup>22</sup> that, owing to certain contingent (though possibly unalterable) features of the human predicament, features having to do primarily with limited information, partial altruism and the conditions necessary to social co-operation, utility itself requires the adoption of side-constraint principles limiting its acceptable pursuit. It is important to note that this claim is in Hume an empirical and not a conceptual thesis. Hume does not suppose justice to be reducible to utility or analysable in terms of it: his thesis, rather, is that rules of justice conferring liberty-rights on individuals are defensible or justifiable in terms of their tendency to promote utility. This is the thesis, transmitted to him via Bentham and James Mill, that John Stuart Mill defends in his *Logic*, in the last chapter of *Utilitarianism*, and in his essay *Liberty*, where it is combined with a complex Aristotelian and Humboldtian theory of human happiness as essentially involving the cultivation of individuality. Here liberty is argued for by appeal to its role in promoting something taken to be the only thing having intrinsic value, namely, happiness. A utilitarian theory of moral rights of this sort, in which the right to liberty has priority and in which departures from the rules of justice are as a matter of utilitarian strategy admitted only to avert large-scale catastrophic losses in the average level of utility (summed across all affected persons), may not finally be the most adequate theory of justice. It has a far more limited range of plausible application than any committed liberal would wish. But there is nothing inadvertent or incoherent in the enterprise in which Hume and Mill were engaged, and Hayek might have strengthened his own argument had his hostility to utilitarianism not inhibited his recognizing that his own project had been anticipated, and

more consistently realized, by earlier writers. It is a pity that Hayek's misreading of the intellectual history of utilitarianism prevented him from examining utilitarian efforts as a theory of moral rights, since incorporating such a theory into his argument might have strengthened it. As it is, Hayek can claim only that illiberal policy is inexpedient — which is true enough, but which ignores the fact that a direct appeal to inexpediency is too weak a reed for legislators (or citizens) to depend on.

Hayek's argument is complicated by his attempt to combine a Humean theory of the utility-promoting functions of rules of justice with a Kantian analysis of the formal properties of the concept of justice itself. Its main defects are that it needs highly implausible empirical assumptions if rights to liberty are to have the priority within the theory that Hayek stipulates for them and that he makes an unfounded assumption that rules having the Kantian features he specifies are bound to preserve liberty. It would be a mistake to suppose that this is all there is in Hayek's theory, however, since embedded in his Hume-Kant synthesis is a conception of freedom whose lineage Hayek himself correctly identifies as Lockean.<sup>23</sup> Like Locke, Hayek contrasts liberty or freedom (understood as involving the absence of obligation and a right to act) with licence, or acting as one wills. Despite his assimilation of his conception of liberty with the tradition of negative libertarianism, and notwithstanding his occasional intimations that a conception of liberty ought to be evaluatively neutral, his own conception is a normative one in which to be free means to have an entitlement or right to act. For Hayek, then, liberty is a moral notion. Nor is there anything objectionable in that: for, despite great and subtle efforts, no convincing conception of freedom that is value-neutral has yet been articulated. Hayek's error lies not in working with a normative conception of freedom, but in attempting to derive the right to act in which liberty consists from a wholly consequentialist argument. In Hayek's theory, a man possesses a right to act when his actions are governed by a system of rules which conduces to the common good. In neglecting the importance of side-constraint principles in any viable conception of freedom, Hayek commits that blurring of freedom with welfare which takes his theory out of the negative-libertarian tradition and which constitutes the chief fallacy in his social and legal philosophy.

The nub of the weakness of Hayek's theory of liberty may now be stated summarily. His conception of individual freedom, defined as it is solely by

reference to the formalistic Kantian requirements he mentions, is underdetermined: in order to be filled out persuasively, his conception would need to draw on a substantive view of justice and rights which his conflation of liberty with the rule of law disqualifies him from advancing. Hayek's error lies not in connecting judgments about individual freedom with normative judgments about individual rights, but in inadequately specifying the latter in almost entirely procedural terms. The conceptual connections which hold between liberty and justice thus become, in Hayek's doctrine, relations between mutually constitutive concepts; and justice itself (which, as I have noted above, is in Hume's doctrine a wholly distinct notion from that of utility) is in Hayek's writings collapsed into general welfare.<sup>24</sup>

‘Everything is what it is, and not another thing.’ The upshot of my argument is that, in blurring the boundaries of individual freedom and assimilating it to other goods such as the rule of law and social stability, Hayek's account of law and liberty runs the risk of losing the peculiar importance of individual freedom conceived as a virtue of political order.

### **Liberty, tradition, and cultural evolution**

Thus far I have commented critically on Hayek's formalistic Kantian theory of the rule of law and on the unsoundness of his supposition that, when taken in conjunction with certain utilitarian claims, his theory of law grounds a secure and determinate right to liberty. There is in Hayek another strand of argument to the value of liberty, however, which represents a working up of theories intimated in many other liberal writers. This is the evolutionist argument for liberty. It is not easy to characterize this argument briefly. On the one hand, Hayek sees a danger to liberty in the aspirations of all those (termed by him ‘constructivist rationalists’) who, neglecting the importance in society of undesigned and self-sustaining spontaneous orders, seek to reconstruct society according to a preconceived rational plan. His argument against any such project is here more radical than Popper's case against Utopian social engineering. It is not simply that no plan can ever be implemented without constant interference with men's voluntary exchanges, nor that the unintended consequences of their interventions always compel social planners to act in a piecemeal fashion. Instead Hayek's main point is that no one can attain a point of Archimedean leverage on and distance

from society such that any synoptic knowledge of it is available to him. The planner himself is the meeting ground of many intellectual and moral traditions, and his criticism of them can only be an immanent criticism, invoking one part of the stock of inherited notions and standards to appraise the rest. Thus comprehensive planning is, first and foremost, an epistemological impossibility. It further exemplifies an important error, emanating originally in the Greek Sophists' distinction between nature and convention, according to which social order must always be a direct expression of man's unchanging biological endowment or else a product of conscious contrivance. On the contrary, Hayek tells us, social institutions — money, the common law, language, and science being obvious examples — are undesigned products of human action, sustaining themselves in spontaneous order through a pragmatic competition of practices and conventions.

Hayek frequently affirms that the sheer persistence of a tradition or a form of life suggests that it must possess some general utility.<sup>25</sup> The presumption he makes is of forms of life entering into a sort of Darwinian competition for survival. The problems inherent in this sort of evolutionary functionalism in the social studies are, of course, many and obvious. First, we lack anything resembling a criterion for the cultural 'fitness' or utility of forms of life, and we are no less in need of a measure for it. Second, we have nothing in society akin to the mechanism of natural selection of genetic accidents in Darwinian theory which guarantees the survival of useful social practices (however utility be defined). Third, and most crucial for Hayek's purposes, there is nothing to support the belief that an unplanned social order (or 'cosmos') will always or typically be a liberal order. Most stable tyrannies, and most bureaucratic interventionism in hitherto liberal societies, grow spontaneously, rarely constitute the implementation of anyone's intentions, and, indeed, are often largely unintelligible so far as those participating in them are concerned. Statism and tyranny are, in general, ideal-typical instances of Hayekian spontaneous social orders.

We begin to see the results of Hayek's errors in these areas when we consider his views on the character of the liberal state. Generally, Hayek commends a sort of Kantian *Rechtsstaat* as most conducive to the protection of liberty. More recently, however, he has come to acknowledge that Anglo-Saxon common law may be more reliable as a safeguard against

tyranny than the sort of liberal legislation and constitutional provision he used to favour.<sup>26</sup> The key point which Hayek misses, however, is that in the modern European state, as elsewhere, traditions of liberty have always been in competition with other traditions. This point is most profoundly explored in the best study we have of these matters by Michael Oakeshott. In Oakeshott's *Human Conduct*<sup>27</sup> an illuminating distinction is drawn between *nomocratic* political orders (defined by reference to non-instrumental, purpose-independent rules) and *teleocratic* orders (in which there exists a hierarchy of ends subordinate to some overriding goal). Oakeshott's insight is the crucial one that, from the start, these two traditions of civil and political association defined themselves in opposition to one another, and there is nothing to support the hope that the tradition of civil association among men united by respect for the authority of non-instrumental rules will ever come to prevail finally over the tradition in which the authority of the State is seen as that of an enterprise-association. Even within the context of modern Europe, then, Hayek's ideal of a limited, non-purposive state can claim less than universal acceptance.

In Hayek's appeal to evolution we see him trying to plug the hole in his theory created by the inadequacy of his marriage of a Humean and Kantian view of justice with a Lockean conception of freedom. The central defect of Hayek's theory is its lack of any substantive conception of individual rights, and it may reasonably be asked how such a conception might be defended. In the context of Hayek's system of ideas, the conclusion is unavoidable that Hayek's lingering commitment to a rationalist reconstruction of political life motivates his search for universal principles which might sustain the defence of liberal society. What Hayek resists is the recognition that a conception of individual rights can be defended only as abstraction from political experience. A liberal conception of individual rights must accordingly be seen as no more (and no less) than an abridgement of maxims and considerations intimated in a historically specific political tradition. It can have no justificatory force for anyone who is not already in some measure attached to the tradition it seeks to explore.

The result of my discussion of the various strands of argument in Hayek's case for liberty is that, quite apart from the inadequacies of his conception of liberty, none of his arguments to its value secures the universality and certainty that he seeks for liberal principles. The programmatic conclusion of any critical appraisal of Hayek's social



philosophy is that its failure illustrates the confusion of categories involved in any attempt to develop a liberal ideology with claims on the allegiance of all rational men. Liberalism is to be regarded as a form of moral and political practice, a species of partisanship, rather than as a deduction from conceptual analysis or from rationally certified principles. Arguments and considerations may move people to adopt liberal positions on specific issues, and they may deepen (or weaken) liberal commitment where it already exists. No sort of reasoning is available, however, which can bring about unity among exponents of rival political and moral traditions. Thus it has been justly said: ‘For the man devoted to liberty, there is nothing which *makes* liberty important. And he has no reason for his devotion.’<sup>28</sup>

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## Notes

- <sup>1</sup> F.A. Hayek, *The Constitution of Liberty*, (Chicago: University of Chicago Press, 1960) p. 6.
- <sup>2</sup> J.S. Mill, *On Liberty*, (London: Everyman edn, 1972) p. 115.
- <sup>3</sup> Hayek, *The Constitution of Liberty*, p. 18.
- <sup>4</sup> *ibid.*, p. 6.
- <sup>5</sup> *ibid.*, p. 18.
- <sup>6</sup> Lionel Robbins, *Politics and Economics*, (London: Macmillan, 1963) p. 92.
- <sup>7</sup> Hayek, *The Constitution of Liberty*, p. 11.
- <sup>8</sup> F.A. Hayek, *Studies in Philosophy, Politics and Economics*, (London: Routledge & Kegan Paul, 1967) p. 166.
- <sup>9</sup> See F.A. Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy*, vol. 2, *The Mirage of Social Justice*, (London: Routledge & Kegan Paul, 1976) p. 24, for his explication of this point: ‘The consistency or compatibility of the different rules which make up a system is not primarily logical consistency ... Whether any two or more rules are consistent or not will... depend in part on the factual conditions of the environment ...’
- <sup>10</sup> See H.L.A. Hart, *The Concept of Law*, (Oxford and New York: Oxford University Press, 1961) pp. 189–95.
- <sup>11</sup> See Hayek, *The Constitution of Liberty*, p. 41: ‘Progress is movement for movement's sake’. It should be noted that, whereas Hayek argues for the growth of knowledge on the ground that it confers material benefits on all (p. 43), his later admission that most men do not want progress while many are made miserable by it (p. 50) is consistent with the view that knowledge is an intrinsic good.



- [12](#) See Hayek, *Law, Legislation and Liberty*, p. 20.
- [13](#) *ibid.*, pp. 20–4.
- [14](#) R. Hamowy, ‘Freedom and the rule of law in F.A. Hayek’, *Il Politico*, 2, (1971) 349–77.
- [15](#) J.W.N. Watkins, ‘(Hayek's) Philosophy’, in A. Seldon (ed.) *Agenda for A Free Society*, (London: Hutchinson, 1961) pp. 31–49.
- [16](#) Hayek, *The Constitution of Liberty*, p. 142.
- [17](#) For a defence of this view of Fuller's, see Rolf Sartorius, *Individual Conduct and Social Norms*, (Encino, Calif.: Dickenson Publishing Co., 1975).
- [18](#) Hamowy, ‘Freedom and the rule of law in F.A. Hayek’, p. 362, envisages a circumstance in which the overwhelming majority of a society which is equally divided racially supports the institution of a legal prohibition of miscegenation.
- [19](#) Bruno Leoni, *Freedom and the Law*, (Los Angeles: Nash Publishing Co., 1961) pp. 63–71 and p. 153.
- [20](#) See *ibid.*, pp. 64–6, and Joseph Raz, ‘The rule of law and its virtue’, *Law Quarterly Review*, 93, (1977) 195–215.
- [21](#) See Hayek, *Law, Legislation and Liberty*, pp. 59–60., where he distances his own theory of law both from legal positivism and from natural law. Here his discussion on pp. 26–7 of the same volume is relevant in that while he emphasizes that true laws are found and not made, he insists with regard to ‘the much discussed question of “moral relativity”’, that ‘there can, therefore, be no absolute system of morals independent of the kind of social order in which a person lives’, p. 27.
- [22](#) David Hume, *A Treatise of Human Nature*, Book 3, Part 2 (London: Pelican, 1969) Sections 1, 2, 6 and 7.
- [23](#) See Hayek, *The Constitution of Liberty*, p. 162, for a quotation from Locke in which the contrast between liberty and licence is clearly stated.
- [24](#) Hayek makes explicit the connection he mistakenly believes exists between freedom and welfare, when (on p. 136 of *The Constitution of Liberty*) he allows that a man's freedom may be curtailed by withdrawal of services crucial to his existence or to the preservation of what he most values.
- [25](#) *ibid.*, p. 433, n. 2, ‘No institution will continue to survive unless it performs some useful function.’
- [26](#) Especially in *Law, Legislation and Liberty*, vol. 7, *Rules and Order*, [Chapters 5](#) and [6](#).
- [27](#) Michael Oakeshott, *On Human Conduct*, (Oxford: Clarendon Press, 1975) [Chapter 3](#).
- [28](#) R. Rhees, *Without Answers*, (London: Routledge & Kegan Paul, 1969), p. 84.

## Chapter seven

# **Spencer on the ethics of liberty and the limits of State interference**

It is by now almost a commonplace to recognize that Moore misrepresented Mill; it is a measure of the extent to which contemporary philosophers read Mill, but do not read Spencer, that it goes unrecognized that Moore also misrepresented Spencer — the real Herbert Spencer is as far from being Moore's straw man as is the real J.S. Mill.<sup>1</sup>

Reasons for twentieth-century neglect of Spencer's thought are many and complex. To give any remotely adequate account of the sudden eclipse of his once enormous influence would involve writing (or, perhaps, rewriting) the intellectual history of the English-speaking world over the last century or more. Among the causes of Spencer's decline as a formative influence on thought, however, the prejudiced and ignorant treatment given his writings by moral philosophers of the late nineteenth and early twentieth centuries cannot be the least important. Like J.S. Mill, Spencer has been credited with a number of fallacies in moral theory so elementary as to render his writings on moral philosophy unworthy of serious study. In contrast with Mill,<sup>2</sup> no wave of revisionary scholarship has yet arisen powerful enough to rescue him from the misunderstandings of his successors and his near contemporaries. Despite a handful of recent careful studies,<sup>3</sup> these errors continue to infect scholarly references to his works. In

truth, Spencer's work in ethics continues to be dismissed primarily because it goes largely unread.

When we turn to Spencer's writings in moral and political theory and consider them with minds unburdened with the usual preconceptions, we find a coherent and systematic doctrine of liberty, of its moral foundations and its implications for the limitation of State interference, from which we still have something to learn. Spencer committed few of the crude fallacies it is an academic convention to ascribed to him. His writings in moral philosophy retain considerable interest inasmuch as they show that moral theories may have a structure more complex than any that can be captured in terms of well-worn distinctions between teleological or maximizing and rights-based or side-constraint theories. His hedonistic conception of intrinsic value involves him in no sort of ethical naturalism. There is nothing incoherent in Spencer's thesis that, when taken in conjunction with a consequentialist principle regarding the Tightness of actions, hedonist value-theory yields a species of rational utilitarianism the moral content of which is contained in classical liberal principles about justice and individual rights. Spencer's claim is, indeed, that the adoption of side-constraint principles may have and cannot avoid having a utilitarian justification.

In Spencer's own view, his moral and political theory was but one part of a larger synthetic philosophy wherein human life as a whole was set in an evolutionary perspective. Spencer's speculations on social evolution are often less objectionably naïve than many of his critics have allowed. It remains true that his evolutionism implicated him in serious confusions which have a distorting influence on much of his work in normative theory. Spencer's limited withdrawal from some of the most radical implications of his liberal principles may be better accounted for by the influence on him of misplaced evolutionist categories of thought than by the utilitarian character of his derivation of liberal principles. The utilitarian defence of liberal principles has drawbacks and dangers. Yet it was not Spencer's rational utilitarianism — the cause-and-consequence principle to which he so often refers — which motivated his retreat from his early radicalism, but rather the view he came to adopt of moral notions and principles as themselves products of social and cultural evolution. Though I shall not attempt to pass over their difficulties, Spencer's arguments on the subject of the limits of State interference with individual freedom will be found to command our

interest and respect once they have been separated from the misconceived claims of his larger philosophy.

### **Spencer's ethical theory**

In his famous *Principia Ethica*, whose damaging impact on contemporary thought is by no means confined to its debilitating influence on Spencer studies, G.E. Moore quotes Spencer as asserting that: conduct gains ethical sanction in proportion as the activities, becoming less and less militant and more and more industrial, are such as do not necessitate mutual injury or hindrance, but consist with, and are furthered by, cooperation and mutual aid. These implications of the Evolution-Hypothesis, we shall now see, harmonise with the leading moral ideas men have otherwise reached.

Moore comments on this passage that:

if we are to take the last sentence strictly — if the propositions which precede it are really thought by Mr Spencer to be implications of the Evolution-Hypothesis — there can be no doubt that Mr Spencer has committed the naturalistic fallacy.<sup>4</sup>

Moore goes on to observe that ‘Mr Spencer's language is extremely loose’ and to admit that ‘he [Spencer] seems to regard the view it implies as false’. Moore concludes with the observation that:

We cannot ... take it as Mr Spencer's definite view that ‘better’ means nothing but ‘more evolved’; or even that what is ‘more evolved’ is therefore ‘better’. But we are entitled to urge that he is influenced by these views, and therefore by the naturalistic fallacy. It is only by the assumption of such influence that we can explain his confusion as to what he has really proved, and the absence of any attempt to prove, what he says he has proved, that conduct which is more evolved is better.<sup>5</sup>

I do not think I exaggerate when I say that nothing in the passage from Spencer which Moore quotes, and nothing else that I am acquainted with in Spencer's writings, supports Moore's construal of Spencer's position. It is, in any case, an academic commonplace that Moore never clearly explained what he meant by the naturalistic fallacy. W.K. Frankena, in his well known paper on the subject,<sup>6</sup> distinguishes three claims, denial of any one of which might be and has been identified with the naturalistic fallacy. Frankena states these related but distinct claims as follows: (1) Ethical propositions

are not *deducible* from non-ethical ones; (2) Ethical characteristics are not *definable* in terms of non-ethical ones; (3) Ethical characteristics are different in kind from non-ethical ones. (These are distinguishable claims, since (3) entails (2) and (2) entails (1) but the reverse implications do not hold.) Now, however Moore's naturalistic fallacy is interpreted, it is pretty clear that Spencer advances none of these claims. Spencer nowhere *defines* 'good' or 'better' as 'more evolved', and he never qualifies 'good' as *meaning* pleasure or happiness. There is thus no evidence for Moore's claim that 'It is plain that Mr Spencer ... rejects the naturalistic identification of "better" with "more evolved"; but it is possible that he is influenced by another naturalistic identification — that of "good" with "pleasant"'.<sup>7</sup> Spencer does not, then, commit the *definist fallacy* of treating good as equivalent in meaning with some non-ethical concept. Like his moral epistemology generally, Spencer's account of how the goodness of pleasure is known is obscure and unsatisfactory; but it would be hard to find any statement in his writings suggesting that the goodness of pleasure is a necessary truth.

Nor does Spencer ever assert the deducibility of ethical from non-ethical statements, or deny that ethical characteristics are different in kind from non-ethical ones. When he speaks of the implications for conduct of the evolutionary hypothesis, the implications to which Spencer refers are not strict implications of any hard, deductive sort. It is true that Spencer asserts the reality of sociological laws which constrain the successful pursuit of intrinsic value but here his claim is that these laws specify definite limits on the methods we may reasonably adopt to promote happiness or pleasure, not that we may deduce the goodness of happiness or pleasure from any statement of these laws. Spencer's view is that industrial or co-operative activities tend inevitably to prevail over militant and aggressive activities in the course of the evolution of society. While there is no doubt that as a moralist Spencer was inclined to regard this development favourably, he does not suppose that the moral superiority of industrial over militant social orders is reducible to its place in social evolution or its productivity in regard to pleasure. Still less does he take moral judgments about the relations of militancy with industrialism to be deducible from any statement of the evolutionary theory.

That Spencer's account of the relations between the evolutionary hypothesis and normative (moral and political) theory is problematic and

unsatisfactory is undeniable; in particular, as I shall later contend, Spencer's moral theory takes a pragmatic turn in which justificatory questions are not so much answered as rendered otiose. At the same time, Spencer's view is entirely different from any that can be gleaned from the account that Moore gives of it. Spencer affirmed that human society evolves just as the human species has evolved. The mechanism which Spencer identified as promoting social evolution was the pressure of population on resources and so on social life. In sharp disagreement with Malthusian pessimism, Spencer asserted that population growth stimulated the division of labour, fostered the extension of social co-operation and generated a whole range of progressive cultural developments. Confronted with the imbalance between natural resources and human needs brought about by population growth, men displayed their ingenuity in technological innovation and in the creation of new forms of social organization. In this response the human imperative was that of self-preservation, but, Spencer believed, the preservation of ever larger numbers of people could not fail to yield an ever greater surplus of pleasure over pain in the lives of those involved. Thus it was Spencer's thesis that the industrial order was best suited to sustain growing numbers of people in circumstances of comfort and pleasure and that for this reason it was bound progressively to be adopted by mankind. A number of hard questions can be asked about this claim, but none of them are addressed to the question of Spencer's alleged naturalistic fallacy.

That Spencer embraced a hedonist view of intrinsic value is easily shown. Consider the following assertion in *The Principles of Ethics*: Hence, recognising in due degrees all the various ethical theories, conduct in its highest form will take as guides, innate perceptions of right duly enlightened and made precise by an analytic intelligence; while conscious that these guides are proximately supreme only because they lead to the ultimately supreme end, happiness special and general.<sup>8</sup>

It may be thought that Spencer's endorsement of value-hedonism creates a major difficulty for his defence of liberal principles regarding justice and individual rights. After all, if happiness or pleasure and that alone has value for its own sake, is it not axiomatic that more happiness or pleasure is always better than less? Spencer's difficulty, it might be contended, is still worse than this. For, not only did he subscribe to a hedonistvalue theory, but he placed it at the terminal level of justification in his moral and political thought. All principles for the regulation of conduct were to be ratified by

reference to their consequences for the promotion of happiness. Hedonism is, then, at the very foundation of Spencer's doctrine of liberty. If this is so, however, what reason can Spencer give for respecting individual rights when this involves a net loss of pleasure? Is not Spencer radically confused here? Or is it a thesis about individual rights that is the undefended cornerstone of his doctrine, after all?

This range of objections is inconclusive, and indeed unpersuasive, because it depends on a number of erroneous assumptions. First of all, nothing follows for action from Spencer's commitment to a hedonist value-theory. A man may think that happiness and happiness alone has intrinsic value without acknowledging the promotion of happiness as a sufficient reason for action and yet be implicated in no inconsistency. To begin with, the statement that happiness alone has value for its own sake and the statement that the right action is the one which maximizes happiness are not at all equivalent; indeed, they belong to different categories of discourse. The former entails the latter, if (and only if) there is inserted as a bridge between them a statement of the consequentialist principle that right action is what brings about best consequences. Otherwise, it is open to anyone to accept hedonist value-theory while believing that there are weighty side-constraints on the promotion of happiness having to do (say) with the inviolability of the person. Taken by itself, the thesis that happiness alone has intrinsic value cannot be action-guiding: one man might accept it and think it a sufficient reason for maximizing happiness while another might think it gave him a reason merely to refrain from reducing the happiness already in the world (or which would otherwise come about in the world). It is in virtue of an awareness of these distinctions that J.S. Mill<sup>9</sup> (with whose thought Spencer's moral theory has much in common) tended to distinguish between the Principle of Utility, which merely specified what was of intrinsic value, and a Principle of Expediency, dictating that what was of intrinsic value ought always to be promoted.

Now there is little doubt that Spencer, like J.S. Mill, endorsed *both* a hedonist theory of value *and* a consequentialist principle about right action. It might be urged, accordingly, that Spencer is committed to overriding individual rights, when this promotes happiness, even granting the distinction made earlier between principles (such as the hedonist or utility principle) about value and principles (like the consequentialist principle) about right action. A maximizing approach to happiness would seem to be



entailed by Spencer's moral theory, if (as I have suggested) the latter comprehends consequentialism. This objection too, however, rests on an erroneous assumption. For a utilitarian (such as I am claiming Spencer to have been) who believes that happiness ought always to be maximized is not therefore committed to the view that such maximization should be treated as a matter of moral or (still less) of legal obligations. A utilitarian of this sort may very reasonably fear (as did both Spencer and J.S. Mill) that the direct pursuit of utility may for a variety of reasons have a self-defeating effect. As has long been recognized in a utilitarian tradition of thought about justice going back at least as far as David Hume and extending into our time in the writings of R.M. Hare,<sup>10</sup> human deficiencies in information and in motivation may mean that we can never rely on our ability to detect the utility-promoting action. If we try to act directly to maximize utility, we will find the utility thereby yielded is far less than that which would have been secured if we had followed the far more specific maxims of ordinary moral practice. The limitations of our knowledge and sympathy are so radical that we must seek criteria of right action for the conduct of life which are wholly distinct from the consequentialist principle and far more determinate than it. These maxims will have the character of Hume's principles of justice in that they will impose strict restraints on the pursuit of general and individual welfare. Thus we find in Spencer, as in Mill and Hume, a recognition<sup>11</sup> that the sum of utility-maximizing acts need not be a utility-maximizing sum. The two will not in general be equivalent because of the contingent but unalterable limitations of human sympathy and knowledge to which I have already referred. Principles of justice imposing side-constraints on the pursuit of utility are accordingly indispensable *on utilitarian grounds*. This is advanced by the utilitarian writers I have mentioned not as a conceptual but as an empirical thesis. They are not engaged in a reductionist argument about justice: they are not claiming that the concept of justice is analysable into the requirements of utility-promotion. Rather, the claim is that the rules of justice are defensible or justifiable in utilitarian terms.

What evidence is there that Spencer adhered to the moral theory I have imputed to him? By far the most direct avowal of his utilitarian commitment occurs in the second volume of his *Autobiography*. There Spencer recalls discovering to his surprise that he had been classed as an anti-utilitarian by J.S. Mill in his *Utilitarianism*. Spencer wrote at length on

the subject in a letter to Mill which (since it is not readily accessible) is worth quoting fully:

I have never regarded myself as an Anti-utilitarian. My dissent from the doctrine of Utility as commonly understood concerns not the object to be reached by men, but the method of reaching it. While I admit that happiness is the ultimate end to be contemplated, I do not think it should be the proximate end. The Expediency-Philosophy having concluded that happiness is the thing to be achieved, assumes that morality has no other business than empirically to generalise the results of conduct, and to supply for the guidance of conduct nothing more than its empirical generalisations.

But the view for which I contend is, that Morality so-called — the science of right conduct — has for its object to determine *how* and *why* certain modes of conduct are detrimental, and certain others beneficial. The good and bad results cannot be accidental, but must be necessary consequences of the constitution of things; and I conceive it to be the business of moral science to deduce, from the laws of life and the conditions of existence, what kinds of action necessarily tend to produce happiness, and what kinds to produce unhappiness. Having done this, its deductions are to be recognised as laws of conduct: and are to be conformed to irrespective of a direct estimation of happiness and misery.... Corresponding to the fundamental propositions of a developed Moral Science, there have been, and still are, developing in the race, certain fundamental moral intuitions; and ... though these moral intuitions are the results of accumulated experiences of utility, gradually organised and inherited, they have come to be quite independent of conscious experience ... just as space-intuition responds to the exact demonstrations of Geometry, and has its rough conclusions interpreted and unified by them; so will moral intuitions respond to the demonstrations of Moral Science, and will have their rough conclusions interpreted and unified by them.<sup>12</sup>

Spencer concludes this part of his autobiography by opposing ‘the contented resting in empirical utilitarianism’, and observing, ‘that the connections between conduct and consequence are in every case causal, and that ethical theory remains but rudimentary until the causal relations are generalised, was a truth not recognised by them [i.e. the early, “empirical” utilitarians]’.<sup>13</sup>

It should be noted that the moral theory which Spencer expounds here under the name ‘rational utilitarianism’, and which he contrasts so sharply

with the merely ‘empirical’ ethics of the early utilitarians, is in fact little different from the doctrine espoused by J.S. Mill, against whose misinterpretation of his doctrine Spencer protested. For it was Mill's view that the principles of morality and of justice, such as his own famous principle of liberty, were secondary maxims derivable from the principle of utility itself and based on the utility-promoting and utility-diminishing tendencies of the classes of acts they variously prescribed and prohibited. That these principles are not ‘empirical’ in the weak, objectionable sense which Spencer criticizes is shown clearly enough in a passage from Mill's ‘Dr Whewell on moral philosophy’:

If the effect of a ‘solitary act upon the whole scheme of human action and habit’ is small, the addition which the accompanying pleasure makes to the general mass of human happiness is small likewise. So small, in the great majority of cases, are both, that we have no scales to weigh them against each other, taken singly. We must look at them multiplied, and in large masses. The portion of the tendencies of an action which belong to it not individually, but as a violation of a general rule, are as certain and as calculable as any other consequences; only they must be examined not in the individual case, but in classes of cases.<sup>14</sup>

Again, in one of his later letters, Mill observes that:

the right way of testing actions by their consequences, is to test them by the natural consequences of the particular action, and not by those which would follow if everyone did the same. But, for the most part, the consideration of what would happen if everyone did the same, is the only means we have of discovering the tendency of the act in the particular case.<sup>15</sup>

As D.G. Brown has put it in an article in which these statements of Mill's are cited, they show Mill arguing that ‘the tendency of a particular act literally is a causal tendency, statable in an empirical law’.<sup>16</sup> Further, we find Mill working with a conception of the place of rules in moral and political life which is neither the ‘practice’ conception adumbrated by Rawls,<sup>17</sup> nor yet the rule-of-thumb view defended by Smart.<sup>18</sup> For Mill, as for Spencer, moral rules such as those defining the juridical framework of a liberal order are injunctions to act or to abstain which supersede in the guidance of conduct any appeal to utility but the content of which is derivable wholly in utilitarian terms. It seems that neither Mill nor Spencer noticed the striking family resemblance between their respective theories.

It was left to the penetrating intelligence of Henry Sidgwick, whose *Lectures on Mr Spencer's Ethics*<sup>19</sup> remain by far the most acute criticism of Spencer, to note the affinity between Spencer's own doctrine and those of the Utilitarians whom Spencer largely misunderstood. Sidgwick observes of Bentham that he argues 'in a manner not unlike Mr. Spencer's, against the absurd supposition that each could make the happiness of others his *primary aim*'.<sup>20</sup> Spencer's advocacy of egoism, like Bentham's, is, as Sidgwick sees, strategic and not ethical. Sidgwick goes on further to remark that,<sup>21</sup> whereas the influence of Comte upon J.S. Mill renders Spencer's misunderstandings of J.S. Mill somewhat more intelligible than the mistakes he commits in his exposition of Benthamism, yet Spencer could not have represented Mill in the way he does had he read Mill's criticism of Comte's altruistic universalism in his *Auguste Comte and Positivism*.<sup>22</sup>

Despite their mutual misunderstandings, then, it is true that for Spencer and for Mill the tendencies of actions were captured in storable empirical laws. Both Spencer and Mill adhere to what Spencer calls 'rational utilitarianism'. There were, of course, important differences between Spencer and Mill as to their positions in moral epistemology, in theory of knowledge in general, and in metaphysics. Spencer was less opposed than Mill to apriorism in moral theory, and his theory of empirical knowledge was pragmatist rather than inductivist. Whereas moral theory as Spencer and Mill conceived of it relied on empirical (sociological) laws, it is worth reiterating that there is nothing naturalistically fallacious in their doctrines. The connection between sociological laws and moral judgments, though invariant, remains contingent: it becomes necessary only when specific normative judgments are added to the statements of sociological law. Though these writers supposed that the moral maxims they defended were always supportable by reference to empirical law, they did not attempt to deduce moral principles directly from these laws, but derived them as theorems from these laws with the indispensable assistance of their utilitarian commitments. When they sought to modify the stringency of the moral and political principle they had defended, it was because they had come to doubt the universality of the laws they had invoked in support of them. It was primarily the influence of Comte's historicism on Mill and of evolutionist thought on Spencer and not their rational utilitarianism which motivated the most serious abridgements they were inclined to make of liberal principles.

Spencer's most important doctrine in political ethics — which he defended early in *Social Statics* and continued to espouse in all his writings, but which is most systematically elaborated in *Principles of Ethics* — is that the formula of justice most consonant with the demands of utility is the Law of Equal Freedom: 'Every man is free to do that which he wills, provided he infringes not the equal freedom of any other man.'<sup>23</sup> It is unambiguously clear that Spencer understands this principle as dictating the *greatest* equal freedom among men. Like Kant, Rawls and most<sup>24</sup> political philosophers, Spencer takes it for granted that social freedom is a variable magnitude. His aim is to justify its maximization subject only to the constraint that it be equally distributed, and his claim is that this policy is defensible on utilitarian grounds. It is important to stress the point that, as far as Spencer was concerned, the Law of Equal Freedom was not obeyed by any of the indefinitely large set of juridical frameworks in which all subjects suffer the same restraints on their freedom of action, but only by that framework in which men enjoyed the *maximum* equal liberty. Spencer's equal-freedom principle, then, is the principle that each and every man should possess the greatest right to freedom consistent with every other man possessing that same right. His research programme in ethics was to disaggregate or decompose this equal right to maximum freedom into distinct and discrete liberties and rights and to exemplify the utilitarian justification of the Law of Equal Freedom once these instances of it had been identified. There is much textual evidence in support of this interpretation, but the following is an especially explicit statement:

If we bear in mind that though not the immediate end, the greatest sum of happiness is the remote end, we see clearly that the sphere within which each may pursue his happiness has a limit, on the other side of which lie similarly limited spheres of action of his neighbours; and that he may not intrude on his neighbour's spheres on condition that they may not intrude on his. Instead of justifying aggression and counter-aggression, the intention of the formula is to fix a bound which may not be exceeded on either side.<sup>25</sup>

Spencer's procedure in [Chapters 8–29](#) of Part Four of *Principles of Ethics* is to elaborate systematically the implications of the formula of justice for the limitation of state interference within the juridical framework of a liberal order. I do not want to comment here on the detail of Spencer's argument (though there is much in it that has interest and value) but rather to confront directly the fundamental question about the limits of State



authority. I have in mind, in the first place, Spencer's well-known deletion of the chapter on 'The right to ignore the State' from the later editions of *Social Statics*, but Spencer's more conservative later views on conscription and land nationalization are also relevant here. At this stage in my inquiry I am concerned with justificatory questions about the logic of Spencer's position, and not with explanatory questions in Spencer's intellectual history (about which I will offer speculation in the next section of this chapter).

What are the implications for the nature and extent of State activity of Spencer's Law of Equal Freedom? A range of views exists, among which several important distinctions need to be made. One view, which ought to be taken more seriously than it usually is and which is most ably defended in Murray Rothbard's writings,<sup>26</sup> is that recognition that each and every man possesses the same right to maximum freedom at once disqualifies any institution resembling the State from moral legitimacy and entails individualist anarchism. In its ethical aspect, this is the thesis that the system of rights is a structure of infinitely weighty side-constraints on action; so that the existence of any institution which depends on rights-invasion is unjustifiable. In this view, though the demands of justice do not exhaust the requirements of morality, they always have priority over other moral claims: a conflict of justice with morality in which non-justice obligations override those of justice is not a moral possibility. Now, whatever may be said in favour of this view, it cannot plausibly be defended in the terms of Spencer's moral theory. A consequentialist argument cannot support a principle licensing the discounting of all consequences, and it would, I think, be mistaken to regard Spencer's equal-freedom principle as a principle consigning infinitely weighty side-constraints on rights-violation to those who fall under it. The requirement that freedom be maximized imports a teleological element or aspect into what is otherwise a side-constraint principle and would seem to disqualify a policy of rights-protection whose consequences include a drastic general collapse in the enjoyment of protected rights.

A weaker position than Rothbard's, and one which turns out finally to be unviable, is that which Robert Nozick identifies<sup>27</sup> in his description of the moral attributes of the ultra-minimal State. Here there is supposed a single institution with a monopoly in the business of rights-protection but from which independents are at liberty to opt out. I do not want here to digress into an extended criticism of Nozick's argument that a dominant protection

agency having all the properties of an ultra-minimal State might be expected to emerge from a Lockean state of nature by an invisible-hand process involving no morally impermissible step. Notwithstanding Nozick's murky discussion of 'compensation', it seems clear that nothing can legitimate his *minimal* state if he holds fast to the postulate that side-constraints against rights-violation are infinitely weighty.

Two points are worth making about the ultra-minimal State which precedes the establishment of Nozick's version of the standard minimum State of *laissez-faire* theory. First, nothing about the ultra-minimal State *confines* it to the business of rights-protection: its moral status remains unchanged whatever other services it provides, so long as independents remain at liberty to opt out. (Spencer went so far in his search for a practical mechanism facilitating such opting-out or voluntary outlawry as to commend direct over indirect taxation.<sup>28</sup>) Second, and crucially, the ultra-minimal State cannot supply even rights-protection, consistently with Nozick's specifications regarding side-constraints, if its monopoly in that area is maintained by force, that is to say, by the violation of rights. Unless the ultra-minimal State abjures such rights-violation, unless (in other words) its moral circumstance is that of one protection agency among potentially many others, it stands condemned by Nozick's conception of the weightiness of side-constraints. Indeed, if the ultra-minimal State of Nozick's imagination were to satisfy the requirements of justice which Nozick himself seeks to impose upon it, we would have a good reason to expect<sup>29</sup> an invisible-hand process to occur, in which the ultraminimal State would disappear into a peaceful anarchy. Apart from the moral ambiguities and empirical implausibilities of Nozick's conception of the ultra-minimal State, our inquiry suggests that his derivation of the State is foredoomed from the start by the stringent requirements Nozick imposes regarding the weightiness of side-constraints.

What can we say now of the logic of Spencer's position? Spencer's version of the Law of Equal Freedom seems clearly to commit him to some variant of what Nozick calls a utilitarianism of rights.<sup>30</sup> In this doctrine, the assumption of the infinite weight of side-constraints on rights-violation is relaxed and that policy is justified in which the weighted sum of protected rights is maximized (or, in another version, of violated rights is minimized). Some such view seems to be entailed by what I have described as the teleological aspect of Spencer's side-constraint principle — namely, its



reference to *greatest* equal freedom. It should be noted, however, that Spencer's utilitarian derivation of the Law of Equal Freedom does not commit him to endorsement of a policy in which side-constraints are violated whenever it is believed that a net benefit in terms of rights-protection may result. For, just as Spencer supposes the direct pursuit of general happiness to have a self-defeating effect, so he might in consistency support a utilitarian policy prescription making a general prohibition of trade-offs among rights. Though general, the prohibition need not on that account be absolute, and, in Spencer's case, as his sanctioning of conscription shows, it is not.

Spencer's moral theory appears now as a complex, hierarchical and indirect utilitarianism, in which the Law of Equal Freedom is derived as a side-constraint principle having a quasi-absolutist force. The teleological dimension of the formula of justice, however, licenses some rights-violations when this is indispensable to promote the greatest attainable equal freedom. As a matter of practical policy, Spencer might well wish to restrict such rights-promoting rights-violations to instances where a catastrophic collapse in the whole system of rights would otherwise occur. It is the avoidance of such a collapse, presumably, which motivates his support *in extremis* of conscription. In this area, we may feel Spencer to have been mistaken: it is, at least, not obvious that twentieth-century experience of the results of military conscription shows it to have been, on balance, freedom-preserving. There seems to be no *inconsistency* in the development of Spencer's views on this question, however, or in the area of the permissibility in terms of the Law of Equal Freedom of taxation and of the private ownership of natural resources ('land'). Libertarians who deplore Spencer's retreat from his early opinions must recognize his later views as always a legitimate possibility in the development of his moral and political theory. If they wish to cut off such a development a priori, they must seek a theory of the foundations of ethics, foreign to Spencer's, in which rights are primary and sufficient.

### **Spencer's evolutionism**

Though the changes in Spencer's opinions to which I have alluded were never excluded by his underlying and life-long moral theory, they were mainly motivated by empirical beliefs Spencer derived from his evolutionary theory. It can fairly be said that Spencer's evolutionism distorts

the pattern of his moral theory and that it is his confused doctrine of the absolute and the relative standpoints of morality more than his utilitarianism which accounts for the increasingly conservative complexion of his outlook. Indeed, though Spencer's evolutionary beliefs are distinct and separable from his moral theory, they display in an extreme form some of the dangers to which any *purely* consequentialist defence of liberal principles is exposed.

What connects Spencer's moral theory with his larger synthetic philosophy? In value-theory, Spencer's hedonism committed him to the view that life is worthless in the absence of pleasure or happiness. His evolutionist beliefs, however, encouraged him to suppose that a balance of pleasure over pain, happiness over misery would ultimately come to prevail in human life. A number of insuperable difficulties beset this view. First, there are overwhelming obstacles in the way of giving anything like quantitative exactitude to comparative judgments about pleasure and pain. These are ancient and well-worn problems, but it remains true that the lack of any proposal in Spencer's writings for a workable *measure* of utility undermines his confident affirmation of the progressively increasing balance of pleasure over pain in human life. It may well be doubted, of course, that Spencer's belief that the course of social evolution promoted happiness was based on empirical observation. More likely, it had its source in Spencer's unyielding metaphysical and moral optimism, his faith in the evanescence of imperfection, a doctrine to which empirical beliefs are not obviously salient, but which Spencer sought scientific support for in his evolutionary speculations. Here Sigwick's comment on Spencer seems irresistibly persuasive:

In criticising this [Spencer's] 'evolutionary optimism', as we may call it, I ought to explain that I am not opposing optimism as a philosophical doctrine. I am not myself an optimist; but I have a great respect for the belief that, in spite of appearances to the contrary, the world now in process of evolution is ultimately destined to reveal itself as perfectly free from evil and the best possible world. What I would urge is that, in the present stage of our knowledge, this belief should be kept as a theological doctrine, or, if you like, a philosophical postulate, and that it should not be allowed to mix itself with the process of scientific inference to the future from the past.<sup>31</sup>

Spencer's mistaken belief that evolutionary theory might give support to moral optimism by demonstrating the necessity of moral progress has its

source in a central defect of the evolutionary theory itself, namely, that it specified no plausible *mechanism* for the evolution of societies. Indeed, unless we accept Spencer's Lamarckian belief in the inheritability of acquired characteristics, we have no reason for supposing that the evolution of species and the evolution of societies occurs on a single scale. While we have in Darwinian theory an intelligible mechanism of biological evolution in the natural selection of genetic accidents, there is no analogous mechanism in society whereby from the competition of customs and practices those prevail which are on some independent (and, typically, unspecified) criterion 'the fittest'. Certainly, Spencer's references to the pressure of population of growth on resources and on existing forms of social life are wholly inadequate in this context. Different societies react in different ways to the pressure imposed on them by growth of population — some by technological and social innovation, others (historically the vast majority) by curbing the growth in their numbers. There is, in any case, no automatic and invariant connection between either a society's productivity or its populousness and its chance of survival in a competition with other societies. While these are complex and disputed matters, everything suggests that Malthus and Darwin are better guides in these areas than Lamarck and Spencer.

Neglect of the crucial disanalogy between biological change and social change — that we have in biology what we lack in the theory of society, namely a criterion of fitness and an intelligible mechanism for the elimination of unfitness — has allowed social theory to be led astray. Thus we find in Parsons, in Hayek and, according to one recent interpreter,<sup>32</sup> in Marx, a species of evolutionary functionalism according to which existing social practices are the precipitate of a long process of natural selection and may be presumed to be (at least provisionally, and according to some criterion) socially optimal. There is, however, nothing in Spencer's synthetic philosophy or anywhere else to support this doctrine. It appears, in Spencer and in Hayek, as a pseudo-scientific licence for a form of moral optimism which, in each case, turns easily into moral conservatism. Though Spencer never himself drew such conclusions from it, the theory that forms of social life are in competition with one another and that there is a presumption in favour of any which survives that competition becomes in the end hard to distinguish from a doctrine according to which might is right. It may not be too fanciful, in this context, to speculate that it was in part the influence of a

vulgarized form of Spencer's evolutionism on the Webbs which (in conjunction with their temperamental authoritarianism) motivated their eulogy of Soviet society. Though Spencer himself reacted with helpless melancholy to the apparent failure of social evolution in his time to preserve industrial orders from the threat posed to them by militant orders, other less timid souls were not lacking who interpreted the triumph of tyranny as an evidence of its evolutionary fitness. Since Spencer's own doctrine secretes a sort of moral pragmatism in which moral principles are themselves regarded as perishable products of social evolution, it contains no antidote to the dangers to which the Webbs and a whole generation of western intellectuals succumbed.

I have identified as the chief failure of Spencer's thought the conjunction it attempts of ethical with evolutionary theory. Though it involves no naturalistic fallacy, it exemplifies a kind of pragmatism in moral theory which has done great damage to liberal civilization. It may be that the meliorist outlook which animates Spencer's entire work must itself be regarded as a source of danger to the liberal tradition. Perhaps, in neglecting the character of liberal civilization as an historical achievement, meliorism ignores the permanent fragility of liberty and the fact that, ever since the emergence of traditions of liberty and civility, they have existed in conflict with traditions of servility and tyranny.<sup>33</sup> Certainly, Spencer's thought displays that vice of thinking of history and society in monistic terms which is one of the chief supports of contemporary illiberalism. His talk of social betterment and of the increasing surplus of pleasure over pain in human life ignores the diversity and the conflicts which go to make up our society: he invokes the dangerous moral fiction of a social entity to which pleasure and pain, progress and retardation may be attributed, whereas what we find in the world is a diversity of conflicting ways of life.<sup>34</sup> This ineradicable plurality of ways of life undermines the claims of any way of life to compel the assent of all men. It suggests, also, that any defence of the liberal tradition as one among many rival traditions must comprehend an ineliminable element of sheer moral commitment.

I have characterized Spencer's political thought as resting on a sort of indirect utilitarianism, and I have claimed that Spencer's rational utilitarianism (as he himself called it) opens up a neglected and powerful, if not wholly adequate, path of justification of the liberal order. It may be that, once purified of its various inadvertences, the moral and political theory

that emerges will seem to have little in common with Spencer's. Theorists of liberal society will have reason for gratitude to Spencer none the less. For, as I have tried to show, his works contain a valuable development of the utilitarian tradition which cannot be ignored by any subsequent theorist of the moral foundations of liberalism.

## Notes

- [1](#) Alasdair MacIntyre, *A Short History of Ethics*, (London: Routledge & Kegan Paul, 1968) p. 251.
- [2](#) I have discussed revisionary Mill scholarship in 'John Stuart Mill: traditional and revisionist interpretations', *Literature of Liberty*, II, (2), April-June, 1979.
- [3](#) Among recent studies of Spencer, the best are: J. D. Y. Peel, *Herbert Spencer: the Evolution of a Sociologist*, (London: Heinemann, 1971); and David Wiltshire, *The Social and Political Thought of Herbert Spencer*, (Oxford: Oxford University Press, 1978).
- [4](#) G.E. Moore, *Principia Ethica*, (Cambridge: Cambridge University Press, 1965) p. 48.
- [5](#) *ibid.*, p. 49.
- [6](#) W.K. Frankena, 'The naturalistic fallacy', *Mind*, 48, (1939) 464–72, reprinted in Phillipa Foot (ed.) *Theories of Ethics*, (Oxford: Oxford University Press, 1974) pp. 50–63.
- [7](#) Moore, *Principia Ethica*, p. 50.
- [8](#) Herbert Spencer, *The Principles of Ethics*, vol. 1 (Indianapolis: Liberty Press, 1978) p. 204.
- [9](#) On Mill's distinctions between utility, expedience, and morality, see my book, *Mill on Liberty: A Defence*, (London: Routledge & Kegan Paul, 1983) [Chapter 2](#).
- [10](#) For Hare's version of utilitarianism, see his paper 'Utilitarianism and ethical theory', in H.D. Lewis, *Contemporary British Philosophy*, Series 4, (London: George Allen & Unwin, 1976).
- [11](#) The arguments that most, perhaps all, forms of utilitarianism have a self-defeating effect in their applications to conduct, is worked out most systematically in D.H. Hodgson, *Consequences of Utilitarianism*, (Oxford: Oxford University Press, 1967).
- [12](#) Herbert Spencer, *An Autobiography*, vol. II (London: Syme & Co., 1904) pp. 88–9.
- [13](#) *ibid.*, p. 90.
- [14](#) 'Dr Whewell on moral philosophy', in Mill's *Essays on Ethics, Religion and Society*, J.M. Robson (ed.) *Collected Works of J.S. Mill*, vol. X (Toronto: Toronto University Press, 1969) p. 181.
- [15](#) *John Stuart Mill, Later Letters 1849–1873*, F.E. Mineka and D.N. Lindley (eds), vol. IV, *Collected Works*, vol. XVII (Toronto: University of Toronto Press, 1972) p. 1881.
- [16](#) D.G. Brown, 'Mill's act-utilitarianism', *Philosophical Quarterly*, 24, (1974) 67.
- [17](#) J. Rawls, 'Two concepts of rules', *Philosophical Review*, 64, (1955) 2–32.
- [18](#) J.J.C. Smart, 'Outline of a system of utilitarian ethics', in *Utilitarianism: For and Against*, (Cambridge: Cambridge University Press, 1973) Section 2, pp. 9–12.
- [19](#) Henry Sidgwick, *The Ethics of T.H. Green, Herbert Spencer and J. Martineau*, (London: Macmillan, 1902) pp. 135–312.
- [20](#) *ibid.*, p. 183.
- [21](#) *ibid.*, p. 185.
- [22](#) See the Everyman edition of *Utilitarianism, Liberty and Representative Government*, (London, 1972) pp. 397–413, for some valuable selections from J.S. Mill's 'Auguste Comte and positivism' in which his criticisms of Comte are particularly clear.
- [23](#) Spencer, *Principles of Ethics*, vol. II, p. 62.
- [24](#) More recently, Hillel Steiner has contested the common view that social freedom is a variable magnitude in his 'Individual Liberty', *Proceedings of the Aristotelian Society*, (1974–5) 33–50.

It should be noted that the proposition that social freedom cannot be augmented or diminished, but only redistributed, does not by itself yield any distributive rule for freedom. Steiner's argument for the equal-freedom principle is independent of his conceptual analysis of liberty.

[25](#) Spencer, *Principles of Ethics*, vol. II, p. 62.

[26](#) See, especially, M. Rothbard, *Power and Market*, (Menlo Park: Institute for Humane Studies, 1970) [Chapter 1](#).

[27](#) Robert Nozick, *Anarchy, State and Utopia*, (Oxford: Basil Blackwell, 1974) pp. 26–30.

[28](#) Spencer, *Social Statics*, (New York: Robert Falkenbach Foundation, 1970) p. 187.

[29](#) See Roy Childs, 'The invisible hand hits back', *Journal of Libertarian Studies*, 1 (1), (Winter 1977).

[30](#) Nozick, *Anarchy, State and Utopia*, pp. 28–30.

[31](#) H. Sidgwick, 'The relation of ethics with sociology', *Miscellaneous Essays and Addresses*, (London: Macmillan, 1904) p. 264. Sidgwick also has an extremely interesting paper on 'The theory of evolution in its application to practice' in *Mind*, 1(1).

[32](#) G.A. Cohen, *Marx's Theory of History: A Defence*, (Oxford: Clarendon Press, 1978).

[33](#) As Michael Oakeshott puts it: 'In a modern European state they [civil association and enterprise association] are not friends, but they are not exactly foes; perhaps, as was said of England and France in the sixteenth century, their relationship is that of 'sweet enemies', *Human Conduct*, (Oxford: Clarendon Press, 1975) p. 326.

[34](#) R. Rhees puts the point forcefully: 'If there are conflicting ways of living, then no sort of work is working for society', *Without Answers*, (London: Routledge & Kegan Paul, 1969) p. 66.

## Chapter eight

# Indirect utility and fundamental rights

### A traditional view of utility and rights

According to a conventional view, no project could be more hopelessly misconceived than the enterprise of attempting a utilitarian derivation of fundamental rights. We are all familiar — too familiar, perhaps — with the arguments that support this conventional view, but let us review them anyway. We may begin by recalling that, whereas the defining value of utilitarianism — pleasure, happiness, or welfare — contains no mention of the dignity or autonomy of human beings, it is this value which utilitarianism in all its standard forms invokes as the criterion of right action. Worse, in so far as utilitarian policy must have as its goal the maximization of welfare conceived as an aggregate summed over the utilities of everyone affected, legal and political utilitarianism seems bound to have a collectivist bias, trading on the dangerous fiction of a social entity and ignoring the distinctness of separate selves with their several incommensurable claims.

It seems that, if individuals can appear in the utilitarian calculus at all, it will only be as ciphers, abstract place-holders for units of welfare. For, as an aggregative value, utility must be indifferent to distribution, and insensitive to the pre-eminently distributive considerations marked by claims about rights. So, if whatever has utility can be broken down into units or elements which are subject to measurement or at least comparison



by a common standard, then it will always be possible that a very great loss of welfare for one man or a few men can be justified if it produces a great many small increments of welfare for a vast multitude of men. It seems impossible, then, that utilitarian policy should be able to protect the interests of individuals or minorities, when these obstruct the general welfare or the welfare of large numbers. If there were such things as utility monsters — individuals capable of inordinately greater happiness than the ordinary run of human beings — it might even be utilitarianly allowable to sacrifice the welfare of the great majority to that of a favoured few.

The conventional arguments rehearsed so far all express the difficulty utilitarian ethics faces in accommodating fundamental rights. Admittedly, utilitarianism in its applications in jurisprudence may (as it did in Austin) allow for the institution of legal rights of various sorts — civil rights as entrenched in a constitution, or rights governing the practice of contractual exchange, say — but these will be seen as institutional devices for the purpose of maximizing general welfare, and not as embodying the irreducible moral claims of individuals. Even if we do not go so far as Dworkin in *defining* fundamental rights as constraints on the pursuit of general welfare,<sup>1</sup> it seems plain that if they are to be worth anything such rights must be more than merely shadows cast by calculations of utility. For, if individuals have fundamental rights, they must be able to stand upon them or invoke them to resist the claims of general welfare. On any viable conception, in other words, fundamental rights must do more for their bearers than secure a place in the calculus of utilities. Bentham's maxim, 'Everybody to count for one, nobody for more than one', may disqualify some moral conceptions of an elitist or a particularist sort, but it will not confer immunity against enslavement or summary execution (say) if such policies prove to be beneficial in utilitarian terms. Basic rights cannot be reduced to utilitarian devices or stratagems without being emptied of their distinctive moral content as expressions of individuals' claims in justice.

As they are commonly rehearsed, these arguments hold no matter how utility is conceived. It does not matter if welfare is given a hedonistic content as in Bentham, an ideal construal as in G.E. Moore, or a eudemonistic interpretation as in J.S. Mill, and it does not matter whether the utilitarian principle enjoins us to maximize whatever has utility or else to minimize whatever has disutility. In any case, intuition and commonsense are unequivocal that maximizing welfare may demand the

infliction of losses on individuals which cannot be sanctioned by considerations of justice. This is, after all, only a consequence of the disparity between utility as an aggregative principle and the distributive character of principles about rights and justice. At its deepest, this disparity expresses a most fundamental divergence in the force of moral principles; a divergence between those goal-based or teleological principles which enjoin us to promote some value, and those rights-based or duty-based principles which impose deontological constraints on the promotion of values. The impossibility of a utilitarian derivation of fundamental rights is only a consequence of this fundamental distinction.

### **Indirect utilitarianism: a neglected species of utilitarian theory**

Against the view which I have sketched in the preceding section, I wish to explore the possibilities of a neglected form of utilitarianism which may not be vulnerable to the standard objections. The form of utilitarianism theory I have in mind is *indirect utilitarianism*, a species often and rightly ascribed to Henry Sidgwick, a proto-version of which may be found in Hume, and a very explicit and systematic version of which is expounded by J.S. Mill. As it is found in these writings, and in the work of our contemporary, Richard Hare,<sup>2</sup> indirect utilitarianism has several features. First, and most fundamentally, the principle of utility figures here not as a prescriptive principle, but as a general standard of evaluation. Indirect utilitarianism may be defined as that species of utilitarian theory in which a strong distinction is marked between the critical and the practical levels of moral thought, and in which the principle of utility is invoked, solely or primarily, at the critical level. Utilitarian appraisals apply, not directly to conduct, but to all the considerations which govern conduct — not only social rules, but the whole body of sentiments, attitudes and dispositions which lead us to do one thing rather than another. In its most general applications, indeed, utility may serve as a standard for the assessment of any state of affairs, whether or not it can be affected by any human action. But in its application to the human realm, it will apply especially to the codes of conduct to which we subscribe.

Next, given that its role in the indirect view is not that of a decision procedure for resolving specific practical dilemmas, utilitarian assessment bears especially on the codes and conventions which inform practical

deliberation, and it issues, typically, in proposals for the revision and reform of these codes. Third and last, indirect utilitarian policy is commended on the ground that direct utilitarianism has a self-defeating effect. Direct utilitarianism, which means here any view in which the decisive reasons cited for or against any act or policy are reasons having to do only with its utilitarian consequences, such utilitarianism is viewed as being generally and sometimes necessarily counterproductive. Indirect utilitarianism embodies and exploits the apparent paradox that utility maximization will not be achieved by adopting the strategy of maximizing utility. Indeed, its central contention is that utility is best promoted if we adopt practical precepts which impose constraints on the policies which we adopt in pursuit of utility.

Each of the writers I have mentioned accords his own degree of emphasis to each of the features of indirect utilitarianism I have listed, and each has a somewhat different account of the source of direct utilitarianism's self-defeating effect. Let us, in order to exhibit more clearly some variations on the theme of indirect utility, consider each of these writers briefly. We may begin with David Hume, in whose *Treatise of Human Nature* may be discerned an indirect utilitarian analysis of the emergence and functions of rules of justice. For Hume, an indirect strategy in respect to the promotion of welfare is forced upon us by certain general facts of the human circumstance. These facts — which could conceivably have been otherwise, but which are for us so little alterable as to be among the natural necessities of social life — are, above all, the limited sympathies and partial views of human beings and the natural scarcity of most human goods. As Hume observes,

Here, then, is a proposition which, I think, may be regarded as certain, that it is only from the selfishness and confined generosity of men, along with the scanty provision nature has made for his wants, that justice derives its origin.<sup>3</sup>

The precepts of justice which these features of men's natural predicament necessitate are three and are characterized by Hume as: 'the three fundamental laws of nature, that of the stability of possessions, of their transference by consent, and of the performance of promises'. Hume tells us: 'It is on the strict observance of those three laws that the peace and security of human society entirely depend; nor is there any possibility of establishing a good correspondence among men where these are

neglected.’<sup>4</sup> And, in the most explicit and crucial passage of his exposition, Hume asserts: ...

if men pursued the public interest naturally, and with a hearty affection, they would have never dreamed of restraining each other by these rules; and if they pursued their own interest without any precaution, they would run headlong into every kind of injustice and violence. These rules, therefore, are artificial and seek their end in an oblique and indirect manner; nor is the interest which gives rise to them of a kind that could be pursued by the natural and inartificial passions of men. To make this more evident, consider that, though the rules of justice are established merely by interest, their connection with interest is somewhat singular, and is different from what may be observed on other occasions. A single act of justice is frequently contrary to public interest; and were it to stand alone, without being followed by other acts, may in itself be very prejudicial to society ... Nor is every single act of justice, considered apart, more conducive to private interest than to public; and it is easily conceived how a man may impoverish himself by a single instance of integrity, and have reason to wish that, with regard to that single act, the laws of justice were for a moment suspended in the universe. But, however single acts of justice may be contrary either to public or private interest, it is certain that the whole plan or scheme is highly conducive, or indeed absolutely requisite, both to the support of society and the well-being of every individual.<sup>5</sup>

It is easy to quibble with particular moves in Hume's argument. It may be that he does not need an assumption of natural human selfishness or limited generosity, but only the natural fact of diverse and conflicting human purposes, to show the importance of the stability of property. It may be that his precepts of justice would be necessary, even if there were not a natural scarcity of the goods for which men strive; for time would remain scarce and instability of property no less crippling a defect of human arrangements. But, though he may not need them, these general facts of human life are as clear to us as they were to Hume, and they do the job he wanted of them. The unalterable facts of our confined generosity and limited rationality and of natural scarcity by themselves disqualify any strategy of promoting general welfare directly. Given our human limitations, we have no hope of promoting general welfare except against a background of well-established rules of justice. Even when its operations appear to result in significant welfare losses, justice is to be viewed as an

indispensable condition of welfare rather than as a competitor with welfare. We have no alternative to accepting justice as a system, if we aim to promote welfare, even if we suppose ourselves capable of identifying cases where its operations appear disutilitarian. As Hume observes in the third appendix to *An Enquiry Concerning the Principles of Morals*:

All the laws of nature, which regulate property, as well as all civil laws, are general, and regard alone some essential circumstances of the case, without taking into consideration the characters, situations and connections of the person concerned, or any particular consequences which may result from the determination of these laws, in any particular case which offers. They deprive, without scruple, a beneficent man of all his possessions, if acquired by mistake, without a good title; in order to bestow them on a selfish miser who has already heaped up immense stores of superfluous riches. Public utility requires that property should be regulated by general inflexible rules; and though such rules are adopted as best serve the same and public utility, it is impossible for them to prevent all particular hardships or make beneficial consequences result from every individual case.<sup>6</sup>

Hume's thesis is that whereas any single act of justice may be contrary to public or private interest, the usefulness of the whole system depends on it not being continuously threatened by utilitarian calculation. Hume exploits the indirect utilitarian paradox that we protect our interests and promote our welfare as best we can, not by treating the rules of justice as at any moment defeasible by reference to private or public welfare, but precisely by treating them as almost invulnerable to such overthrow or abridgement. The utility which acts of justice possess, they possess as instances of a system of rules or as aspects of a practice, and this utility is lost if the costs of a particular act are used to support a breach of the system of rules of which it is a part. Unless those who apply them are governed by a disposition to implement rules of justice regardless of their apparent disutilities, such rules will fail to yield the utility we want of them.

In large part, then, Hume commends a strategy in which rules of justice constrain utilitarian policy by virtue of the unalterable facts of our human limitations. In part also, to be sure, Hume's entire view of human nature inclined him to regard the rules of justice as spontaneously generated moral conventions, serving general welfare but never designed for that purpose. In Hume, indeed, a full understanding of the needs and circumstances which

give rise to a moral practice issues in an endorsement of it precisely on utilitarian grounds, so that his moral and political thought bears a decidedly conservative aspect. In Hume, perhaps, utility figures both as a principle for explaining human life and as the ultimate canon of justification in conduct, and these two uses of the principle are often hard to disentangle.

A much greater degree of self-consciousness as to the character and uses of the principle of utility is to be found in J.S. Mill. More clearly and explicitly than any other writer I know, Mill is at pains to emphasize that utility is a principle of general evaluation and not a principle which yields in any straightforward way judgments about what ought to be done. Further, in his doctrine of the Art of Life as set out in *A System of Logic*,<sup>7</sup> Mill develops a taxonomy or classification system for practical life which enables him to distinguish between the utilitarianly best thing to do (that which is, as Mill terms it, maximally expedient) and what it is that a man has an obligation (defensible in utilitarian terms) to do and which enables Mill to accord priority in the latter over the former.

Mill's argument — as expressed in *A System of Logic*, the last chapter of *Utilitarianism*, and the essay *On Liberty* — has three moves. To begin with, Mill distinguishes the principle of utility from precepts for the guidance of action and divides practical life into three areas, branches, or departments, which he calls Prudence, Nobility (or Aesthetics), and Morality. Mill's first claim is that, except where their maxims conflict and need arbitration, it is the principles of the various departments of the Art of Life, and not Utility itself, which ought to guide conduct. However, these secondary principles or axiomata media are, according to Mill, all derived from Utility. Second, Mill contends that only Morality should come into the sphere of social control and enforcement, the other two spheres coming into the self-regarding area. For Mill, morality is an instrument of collective self-defence and has as its purpose the protection of men's vital interests from invasion and injury. Neither Prudence nor Nobility can sensibly be made the subject of enforcement. Third, Mill argues that as a matter of utilitarian policy, Morality should be maximally permissive as to liberty. There is a standing presumption against limiting liberty, itself derived from Utility, and this should be defeated only when an important interest is threatened and the costs of enforcement are not prohibitive. This third argument yields Mill's famous Principle of Liberty, which states that liberty may rightfully be



restricted only when serious damage to the vital interests of others is at issue.

Mill's version of indirect utilitarianism is striking for a number of reasons. Inasmuch as the Principle of Utility applies as the supreme standard of evaluation in all branches of conduct and not just in ethics, it is not itself a moral principle and it does not of itself give us a criterion of right conduct. In Mill's own formulations, the Principle of Utility has primarily an axiological force specifying that pleasure or happiness, and that alone, has intrinsic value. Even if we add to Utility Mill's consequentialist Principle of Expediency, we still do not have a criterion of right action. For Mill, in fact, such a criterion falls out as a theorem from his whole theory of morality. The criterion of conduct fundamental in that theory is a criterion of wrongful conduct as that conduct, prejudicial to the interests of others, which it is maximally expedient should be made punishable. Conduct not other-regarding cannot be wrongful, however harmful it may be, though it may be grossly imprudent or otherwise lamentable.

Mill's proposal is that as a matter of utilitarian strategy concern for best consequences be displaced as a criterion of right action. What, though, justifies our adopting this strategy? Mill's view, as expressed in *On Liberty*, *Utilitarianism* and elsewhere in his writings, is that pursuing utility directly by making it the goal of our policies is likely to be self-defeating in two ways. First of all, Mill adduces in *Utilitarianism* the psychological paradox that in men happiness is best achieved by pursuing and achieving ends valued for their own sakes. Here Mill trades on the complex Aristotelian and Humboldtian conception of happiness argued for in several places in his writings; for men, at any rate, happiness is not a long series of many episodes of pleasure, but a whole life in which self-chosen activities are pursued with a decent measure of success; happiness is not a passive state, nor is it the same for all men; it is found in activities and pursuits which will for each man have some distinctive and peculiar features. For the individual, if Mill's post-Benthamite moral psychology has any credibility, 'happiness' is barely a coherent goal at all. Each of us finds happiness, when he does, in the successful pursuit of his own projects. But also, Mill avers, the direct pursuit of happiness is likely to be collectively self-defeating. There are problems in the co-ordination of human activities which make the Principle of Utility quite unfit to serve as framing the terms



of social co-operation. It is by reference to some of these that Mill commends adoption of his Principle of Liberty rather than Utility itself as the salient maxim for regulating the coercive aspects of social life. His defense in utilitarian terms of the adoption of a maxim other than the Principle of Utility for the regulation of social life, has always puzzled interpreters. We can see that Mill could coherently give a utilitarian defence of a maxim other than Utility, *and even support giving it a practical weight greater than Utility*, if direct application of the Principle of Utility proves, indeed, to be self-defeating.

In Sidgwick, as in Hume, indirect utilitarian analysis has largely conservative conclusions. Sidgwick holds that, though it is reasonable for a Utilitarian to wish to see a world in which all men have become Utilitarians, the attempt to bring about such a state of affairs may have serious costs and, in fact, may be indefensible in utilitarian terms. As Sidgwick puts it in a justly famous section of the *Methods*:

on Utilitarian principles, it may be right to do and privately recommend, under certain circumstances, what it would not be right to advocate openly; it may be right to teach openly to one set of persons what it would be wrong to teach to others; it may be conceivably right to do, if it can be done with comparative secrecy, what it would be wrong to do in the face of the world; and even, if perfect secrecy can be reasonably expected, what it would be wrong to recommend by private advice or example. These conclusions are all of a paradoxical character ... Thus the Utilitarian conclusion, carefully stated, would seem to be this: that the opinion that secrecy may render an action right which would not otherwise be so should itself be kept comparatively secret; and similarly it seems expedient that the doctrine that esoteric morality is expedient should itself be kept esoteric. Or, if this concealment be difficult to maintain, it may be desirable that Common Sense should repudiate the doctrines which it is expedient to confine to an enlightened few. And thus a Utilitarian may reasonably desire, on Utilitarian principles, that some of his conclusions should be rejected by mankind generally; or even that the vulgar should keep aloof from his system as a whole, insofar as the inevitable indefiniteness and complexity of its calculations rend it likely to lead to bad results in their hands.<sup>8</sup>

Sidgwick's argument, here, is important in that it illuminates a point of correspondence between indirect utilitarianism and the more sophisticated versions of act-utilitarianism. There is nothing in the passage which I have

quoted to which an intrepid act-utilitarian such as J.J.C. Smart would be bound to take exception: for in the writings of Smart and others, a distinction is explicitly made between that which it is utilitarianly rational to do, and that which it is reasonable in utilitarian terms to approve, praise, or commend. One of the points which will occupy me in the next section of this chapter is how indirect utilitarianism is to be distinguished from sophisticated act-utilitarianism and from ruleutilitarianism, so I will not now pursue this question further, save to make one comment. After the passage I have quoted, Sidgwick goes on at once to assert that

Of course ... in an ideal community of enlightened Utilitarians this swarm of perplexities and paradoxes would vanish; as in such a society no one can have any ground for believing that other persons will act on moral principles different from whose which he adopts.<sup>9</sup>

We see, here, Sidgwick resisting a major insight of indirect utilitarianism, grasped by J.S. Mill, the insight that maxims other than (and more specific than) Utility would be indispensable even in a world of enlightened utilitarians. Sidgwick is an important expositor of elements of indirect utilitarian theory, none the less, in that he acknowledges (what an act-utilitarian must presumably contest) that efficacious pursuit of the utilitarian goal entails according to aspects of our ordinary moral life a measure of immunity to utilitarian appraisal and criticism. At any rate in our present phase of development, according to Sidgwick, our moral code will achieve its maximum usefulness only if it is largely protected from utilitarian erosion. The limitations Sidgwick places on the teachability and public avowal of utilitarian ethics, and his candid description of utilitarian ethics as an esoteric morality, all derive from his insight that utility will be lost if men make its pursuit their dominant motive.

### **Some questions and clarifications**

In the preceding two sections I have given the merest sketch of indirect utilitarian theory, supported by historical references to writers in whom elements of indirect utilitarian analysis can be discerned. It may be worth trying here, before I go on to develop the bearing of the indirect view on questions of fundamental rights, to confront some obvious questions about the character and claims of indirect utilitarian thought. In the first place, there are some difficult questions about the thesis that direct utilitarian

policy has a self-defeating effect. Is this thesis advanced as embodying a generalization of some sort, to which there might be important exceptions? Is the claim that there is a range of cases, not covering the whole of practical life, in which direct utilitarian policy is *necessarily* self-defeating? Or is it rather that there is such an over-whelming likelihood that direct utilitarian policy will be counterproductive that we have good reason to adopt a more oblique strategy? The question is a hard one for the indirect view because if there is only a likelihood that a direct policy will be self-defeating, and if we can identify those cases where the probability of such a result is small, then the power of the indirect view to support constraints on utility-promotion that are defensible in utilitarian terms will plainly be weakened.

Here a related question must also be asked, which poses a serious objection to the indirect view. It might be objected that there is a contradiction in the claim that direct utilitarian policy has a self-defeating effect. According to this objection, the only reason that an ideally well-informed and properly motivated act-utilitarian agent could fail to achieve maximum utility would be that he miscalculated. If he does not miscalculate, and acts instead on the best information available to him, then surely it is a necessary truth that his act produces the best possible consequences. In short, either he produces best consequences, or he fails to do so: what is unintelligible and incoherent is the indirect utilitarian claim that in achieving best consequences, there was some achievable utility foregone, such that the net utility produced by his action was less than it could have been. Plausibly, however, this common-sensical objection ignores a very simple distinction. The distinction is between the utility achievable by an ideal utilitarian agent in an act-utilitarian world denuded of moral practices of the ordinary sort and the utility that can be achieved by a utilitarian agent who is constrained by a moral code. The indirect utilitarian argument is that, whereas a perfect utilitarian agent may act so as to achieve best consequences in any circumstances and so always maximizes utility, he will achieve a different and higher maximum of utility if his actions (and in some measure his deliberations) are constrained by weighty principles of morality and justice that are more specific than Utility itself and bar any direct appeal to it. In other words, the sum of an agent's utility-maximizing acts will not be a utilitymaximizing sum, if indirect

utilitarianism is right that the utilitarian agent will be able to do better in a partially non-utilitarian world.

Why is it, though, that even a perfectly rational utilitarian will not do particularly well in a wholly utilitarian world? Without going into the extremely complex arguments which others have developed in this area,<sup>10</sup> I think one very general sort of reason stands out as explaining the self-defeating effect of direct utilitarianism. I refer to the fact that, among the necessary conditions of social co-operation, are moral practices which direct or simple utilitarianism is bound to corrode or supplant. These are, above all, the practices of truth-telling and promise-keeping, without general participation in which social co-operation is simply an impossibility. This strand of argument has been expressed, simply and concisely, by G.J. Warnock:

Paradoxical though it may at first seem to say so, this end ('the betterness, or non-deterioration of the human predicament') is *not* most effectively to be pursued by general adoption of the sole overriding object of pursuing it.

Can one say that what simple Utilitarianism essentially defeats is the possibility of *cooperation*? It seems that, if two or more persons are effectively to cooperate ... there must be such a thing as being prepared to be, and recognized as being *bound* to specific requirements of the cooperative 'ethics', or to specific undertakings. It is not, one may thankfully observe, essential that such bonds should absolutely never, with or without excuse, be broken; but it is essential that they should not in general make absolutely no difference, count simply for nothing one way or the other. But, if general beneficence is to be our sole criterion, they would inevitably count for nothing; they would be accepted with reservations, hence not relied upon, hence most readily disregarded and less relied upon, and so on to the point of wholly vanishing significance. And thus, towards the betterment of the human predicament, the simple recipe of general beneficence must be, while admirably intentioned, very minimally efficacious.<sup>11</sup>

The argument advanced by Warnock parallels that of Hodgson,<sup>12</sup> but Warnock's conclusions are rather different from Hodgson's. In *Consequences of Utilitarianism*, we recall, Hodgson had used the corrosive effects of direct utilitarian policy on indispensably useful social practices as reason for abandoning utilitarianism *tout court*. In Warnock, on the other hand, there is the recognition that, if Hodgson-type arguments are sound,

there is no reason why utilitarianism should not be able to accommodate them by adopting what I have called the indirect strategy. We come now, I think, to the nub of the indirect view, and to the claim which distinguishes it from standard varieties of act- and rule-utilitarianism. If, as Hodgson and the indirect view both maintain, direct utilitarian policy erodes the practices necessary to social co-operation, then these practices must be supported on utilitarian grounds as *imposing constraints on utilitarian policy*. They cannot be merely the rules of thumb of which Smart speaks: rather, in so far as they do constrain utilitarian action and deliberation, they possess what might be called a 'second-order' utility of their own, which they must lose if they are to be regarded as always vulnerable to utilitarian overriding. Indirect utilitarianism is distinct from even a sophisticated act-utilitarian view, then, because it requires that certain practices and conventions be accorded enough weight for their claims to be able to resist erosion by utilitarian appraisal. And, in so far as we can identify and weigh at the critical level those practices which do have second-order utility, we will not be irrational rule-worshippers if we subscribe to them even where a direct utilitarian policy would dictate that we breach them.

The indirect view has a no less important feature which distinguishes it from rule-utilitarianism. As we find it most clearly developed in J.S. Mill, the indirect strategy applies not only to social rules, but to entire codes of conduct, with all their attendant motives, dispositions, attitudes and sentiments. The indirect strategy demands not only that we institute or support social rules and practices having second-order utility, but also that dispositions and virtues be inculcated in respect to the proper application of social rules. These virtuous dispositions will not themselves have any utilitarian content, but will include such things as mercy, prudence, and so on. Because its compass is wider than social rules, the indirect view can cope with the central difficulty of rule-utilitarianism. Ought the rules which utility supports to be obeyed even when there is incontrovertible evidence of their producing a net utility loss? On the indirect view, social rules will not be liable to a rigoristic application, even though they will not on the other hand be subject to continuous utilitarian abridgement. For the virtuous dispositions which the indirect view also dictates that we inculcate in ourselves will lead us (without any necessity for utilitarian appraisal) to make abridgements of social rules in a wide range of cases where such breaches do in fact promote utility. The indirect view, inasmuch as its net is

cast much wider than the scope of social rules, can consistently treat social rules as more than rules of thumb and less than absolutist requirements.

It may be conceded that the indirect view is indeed distinct from the standard varieties of utilitarian theory, and yet it may be thought that it has difficulties of its own which make it less promising than the standard varieties. One obvious reason in support of this view, which I mention but cannot discuss, is that it may simply be denied (as it has been by J.L. Mackie and Peter Singer<sup>13</sup>) that direct utilitarianism has the self-defeating effect to which I have referred. Even if this objection can be countered, it seems difficult to accept the claim that the Principle of Utility can have no prescriptive or action-guiding role within a utilitarianly sanctioned code of conduct. Even J.S. Mill avowed that appeal to Utility was unavoidable where the precepts of the various departments of the Art of Life made incompatible demands. More fundamentally, it might be objected that the disavowance of the perspective of the moral agent from that of the observer or the legislator, which is fundamental to the indirect view, creates unnecessary difficulties for moral theory, and especially for consequentialist moralities. I do not aim to resolve any of these questions here, though I will address some of them in the last section of the chapter. At this stage I wish only to reiterate the point made earlier about the role of practical constraints on the pursuit of utility functioning as means to its maximization. The key aspect of the indirect view is in the claim that, in so far as they possess the 'second-order' utility to which I alluded earlier, certain moral practices serve as *maximizing constraints* in respect of the promotion of utility. It is to an expansion and clarification of this claim, and an examination of its bearing on questions of fundamental rights, that I now turn.

### **The indirect utilitarian derivation of fundamental rights**

If the argument thus far has any credibility, one common line of criticism of any utilitarian theory of rights will be shown to be misplaced. This is the objection that even if utilitarian theory can accommodate rights as part of the body of rules of thumb which it generates, it cannot allow that rights should constrain the pursuit of general welfare. On the indirect view, if rights have the property of second-order utility, they have a utilitarian justification, especially where they operate as constraints on simple maximizing policies. Even if we grant the distinction between distributive

and aggregative principles in which the standard objection to utilitarian rights theory is usually couched, we can see that it misfires. If direct utilitarian policy is counter-productive, we must accept practical constraints on it, and there is nothing to say that these will not include the distributive constraints imposed by principles conferring weighty moral rights on individuals.

It is one thing to argue, as I have done, that the indirect view allows for the institution of weighty moral rights as maximizing constraints on utilitarian policy; it is another thing altogether to show that the indirect view requires the adopting of rights principles. After all, the chief argument adduced in various forms by Hume, J.S. Mill, and Sidgwick for an indirect strategy is a fallibilistic one. It is argued that we have no reliable means of identifying the act that has best consequences. Accordingly, we do better if we stick to general principles, even where our calculations seem to suggest that we are sacrificing some available welfare thereby. This fallibilistic argument, however, while it establishes the need for maxims more specific than Utility, in no way supports the case for rights.

In Hume and Sidgwick, as I have already observed, such fallibilism has conservative implications. It is bound to do so if it is supposed that the received moral code of any society, having stood the test of time, is likely to be wiser than any man or any one generation of men. Not that the indirect view is bound to lead to inflexible moral conservatism. Both Hume and Sidgwick were moral reformers in limited areas, and it is obvious that as society changes new dilemmas will be thrown up to which the received moral code may have no ready answer. Still, even a moderate moral reformism is a different animal from advocacy of fundamental rights. How might a defence of such rights be conducted according to the indirect view? Asking this question exposes an acute difficulty for all variants of the indirect view — the *epistemological* difficulty of establishing which moral practices possess second-order utility, and in what measure. Unless we *know* which practices are to be preserved, which abolished, and which reformed so that social life contains an optimal mix of maximizing constraints, the promise of the indirect view will have proved to be in vain.

Consider J.S. Mill's argument for moral rights. In the last chapter of *Utilitarianism* — written as a separate essay before the earlier chapters and before *On Liberty* — Mill gives an account of justice as embodying the most fundamental of all classes of utility, security. Mill recognizes, of



course, that justice is a broader category than that of rights, but his object in this chapter is to give good reason in utilitarian terms for acknowledging a weighty moral right to security as being possessed by all men. It is not that this right may never be justifiably violated: like many non-utilitarian theorists of rights, Mill is clear that none of the fundamental rights is indefeasible. Rather, within the compass of the account of justice he gives in utilitarian terms, Mill argues that security is to be accorded the status of a weighty moral right, in ordinary circumstances indefeasible by considerations of general welfare.

The argument of *On Liberty*, once it is seen as completing the theory of justice sketched in the last chapter of *Utilitarianism*, gives us further insight into Mill's utilitarian rationale for moral rights. In his *Liberty*, Mill adduces the human interest in individuality and autonomy, along with the fact of human fallibility and the role of unfettered intellectual speculation and practical experiment in furthering the growth of knowledge, to limit the sphere of coercive social control. Only where harm to others' interests is at stake can limitation of liberty ever be justified. Note that the Principle of Liberty, in disqualifying all restriction on liberty save where there is a question of harm to others, entails that the fact that a restriction on liberty may yield large benefits in terms of welfare or utility, is *no reason at all* in favour of it, unless the limit on liberty *also* prevents harm to others. Mill's argument becomes intelligible and powerful once we see him as holding that utilitarian considerations themselves necessitate ranking the Principle of Liberty as a practical precept over any maximizing consequentialist principle.

Mill's argument, as I have so far expounded it, has a missing element crucial to his entire enterprise. That is his theory of the vital interests. Most of us are familiar with the large interpretative literature<sup>14</sup> spawned by analysis of the Principle of Liberty, and in particular by Mill's use of the concept of harm in it. It is, I think, generally accepted by now that Mill's conception of harm was one of harm to interests, so that the Principle of Liberty is to be stated as proscribing any limit on liberty except where harm to the interests of others may thereby be prevented. When *On Liberty* is taken in conjunction with the final chapter of *Utilitarianism*, however, there is more than we can say on Mill's conception of harm. The various restrictions Mill places on what is to count as harm for the purposes of the Principle of Liberty show him holding that, along with the vital interest in

security, men possess another interest, that in autonomy, which is to be ranked over their other interests. Mill's submission is that this pair of interests is to be weighted over men's other interests in such a way that only damage to those interests can justify putting a limit on their liberty. Note here that Mill is not, as some have argued, revising the content of utility or happiness, so that autonomy enters in as a particularly weighty ingredient of happiness. No doubt, as part of the more complex moral psychology he developed from the rudiments inherited from his father, Mill did believe that pleasures of activity are greater in human beings than is ordinarily realized. But his argument in *On Liberty* is not merely that autonomy figures as a matter of fact as a very weighty element in happiness, rather it is that autonomy ought as a matter of utilitarian strategy to be elevated along with security over the other human interests. This pair of vital interests functions in Mill's theory of the moral rights rather as the primary goods do in Rawls's theory of justice. We are to look to the vital interests and not to the utilities of the agents concerned when we are deliberating limits on their liberty. In Mill, however, this proposal is advanced as part of the indirect utilitarian strategy.

### **Some difficulties in Mill's utilitarian derivation of moral rights**

Taking Mill's as the most explicit and systematic indirect utilitarian defence of fundamental rights, we have the following argument. As I wish to interpret it (following most recent interpreters), Mill's utilitarianism is continuous with Bentham's inasmuch as Mill retains a thoroughly want-regarding view of human interests. He does not deviate into some kind of perfectionist morality<sup>15</sup> but rather differs from Bentham in his empirical assessment of human moral psychology, assigning a greater weight than Bentham did to the active pleasures. Within the whole range of human interests, Mill advocates on grounds of utilitarian strategy ranking the two interests of men in autonomy and in security above all the rest. If we see *On Liberty* as completing the argument for a moral right to security sketched in the last chapter of *Utilitarianism*, we may be justified in interpreting Mill as grounding two fundamental rights — the right to security of person and property, and the right to liberty — in the vital interests men have in security and in autonomy.

Now, quite aside from whether Mill's actual reading of human psychology is sound,<sup>16</sup> the structure of his derivation of fundamental rights poses a number of difficulties for him. First, even if we accept that there is good utilitarian reason to elevate the pair of vital interests over the rest, how does Mill propose that we trade off one vital interest with another when they compete? This is a problem of Mill's, obviously similar to that which Rawls has in respect to his primary goods, which cannot be circumvented by the expedient of linking the two vital interests in a conceptual way. For, even if the interests in autonomy and in security are not wholly distinct or separable, different institutions and different policies will promote them differentially. Granted the lexicographical priority of the pair of vital interests over all the others, Mill appears to need a decision procedure for resolving practical conflict within this pair.

Suppose, however, that we pass over this difficulty, and consider only the class of fundamental rights supposedly yielded by or grounded on the pair of vital interests. Are we allowed to maximize over fundamental rights, or to minimize over violation of such rights? Is it permissible, within Mill's structure of justification of fundamental rights, to follow a 'utilitarianism of rights' approach, negative or positive? It has been argued by Robert Nozick in his important discussion of this question,<sup>17</sup> that all of the morally objectionable features of the Benthamite calculus reappear within rights theory, unless we recognize some constraint on the violation of rights for the sake of greater rights-protection on balance. This is a special problem for Mill, since in my interpretation he needs weighting principles for the two vital interests, and it seems inevitable that these will result in assessments of the associated rights as having differing degrees of importance.

This is, to be sure, a general problem in all theories in which it is allowed that fundamental rights may make conflicting demands in practice, and in which as a consequence these rights are not treated as embodying infinitely weighty side constraints. It seems that the latent maximizing structure even of Mill's indirect view imposes a greater pressure towards a utilitarianism of rights, however, than need be the case in a theory in which there is no such underlying commitment to maximize whatever has value. Only by contending once again that, as a rule of utilitarian strategy, are we justified in prohibiting trade-offs of a few weighty rights against many less weighty ones, can Mill avoid this maximizing commitment seeping into

practical policy. The rationale would be fallibilistic, as before: plausibly, we have no reliable means of identifying cases where such a trade-off of some rights against other rights is optimum in terms of on-balance rights-protection. It seems implausible, all the same, to suppose that such fallibilistic reasons can grant support to the no-trade-off rule about rights and absolutist status.

How serious are those difficulties for Mill's view? It seems to me that the difficulties I have canvassed regarding trade-offs between fundamental rights are confronted by any plausible theory of rights, whether or not it is animated by a maximizing commitment. Unless we treat fundamental rights as framing a complete structure of compossible sideconstraints,<sup>18</sup> we cannot avoid having some principles of weighting among them, and, if I am right that the maximizing commitment in respect of the vital interests surfaces here, then at least the decision between the conflicting rights is governed by some principle, and is not merely *ad hoc* or intuitionistic. Again, the teleological structure of Mill's derivation may even be a strength. We may characterize his indirect utilitarian derivation of basic rights as *a rights-based political theory grounded in a goal-based moral theory*. Dilemmas within the sphere of rights-protection are informed and governed, in this view, by considerations about the promotion of utilitarian interests. Mill's theory has at least the advantage that rights considerations are not treated as ultimate or foundational within it, and the problem it faces about conflicts of rights it has in common with all rights theories, including highly formalistic ones, which do not make the stipulation that no such competition of rights with each other, or defeat of one right by another, can ever occur. Mill's account, then, has the advantage that it reconstructs moral deliberation in questions to do with conflicts of rights in a fashion which renders it intelligible and shows it to be governed by principle.

### **Concluding remarks**

I close this avowedly exploratory paper by mentioning three hard problems for the indirect utilitarian derivation of fundamental rights as I have reconstructed it out of Mill's account of justice. The first problem concerns the strong distinction between the critical and the practical level of moral thought which the indirect view especially marks. It might be objected that this distinction has no peculiar connection with utilitarianism, or at any rate

that the connection has yet to be exhibited in detail; there might be a large class of indirect moral theories, in some of which utility appraisals enter at the critical level, while in others it is judgments about rights which occupy that place.<sup>19</sup> I take it that Hare's Kantian derivation of utilitarian ethics is intended to answer this difficulty. A different but related point is that a wholly instrumental account of the value of rights, even of the sort given in the indirect view, does not seem to capture our sense of the moral importance of fundamental rights. Perhaps, if we cannot help but see in basic rights considerations which possess an irreducible or ultimate importance, such rights must enter our theory of them at the critical level and have a foundational role in the theory's applications. The most adequate view of rights may not be, and certainly need not be, one in which claims of welfare are always defeated by rights: we might try, as A.K. Sen has done in some recent important work,<sup>20</sup> to elaborate a more complex moral structure in which both rights and welfare enter into a consequentialist theory. However this may be, the objection is that it needs to be shown that rights enter moral and political theory always and only as derivations of some more fundamental principle. Against this objection, it may be worth observing that it is not an argument that is neutral in the area of moral epistemology. As Hare has pointed out, arguments of this sort appear to presuppose some sort of intuitionism in our moral knowledge, or at any rate they seem bound to rest content with the deliverances of our moral intuition as to the weight that rights principles are to have in our theory. It may be, however, that this translation of intuitive judgments into moral theory represents a mistake in method.

This last point brings me to what is probably the most fundamental question about the approach explored in this chapter. It may be objected that, in the indirect utilitarian approach, a claim for the primacy of theory over practice in moral life is made which we have no reason to accept. Especially in the indirect utilitarian view it is assumed that the role of theory is to reconstruct our primary moral judgments in a systematic and consistent fashion, and in so doing diminish the incoherences of actual moral life. In the indirect view, more than any other, however, it may be objected that this conception of the primacy of moral theory results in a kind of schizophrenia in which as moral theorists we are bound to submit our commitments and attachments to an impartial scrutiny, from which we are bound to exempt them in our role as moral agents. To argue this way<sup>21</sup>

is to hold that the distinction between the critical and the practical levels of moral thought is misplaced, or at any rate that it cannot have the place in moral theory which the indirect view gives it. If this objection can be sustained, then not only indirect utilitarianism but much else in moral philosophy founders. This objection would seem, in fact, to place a severe limit on the scope and authority of moral theory itself. Whether this fact is an argument for my view, or a further consideration against it, may perhaps best be explored on another occasion.

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## Notes

- [1](#) See Ronald Dworkin, *Taking Rights Seriously*, (London: Duckworth, 1977) [Chapter 12](#).
- [2](#) See R.M. Hare, 'Ethical theory and utilitarianism, in H.D. Lewis (ed.) *Contemporary British Philosophy*, 4, (London: Allen & Unwin, 1976) and, more recently, Hare's *Moral Thinking*, (Oxford: Clarendon Press, 1981).
- [3](#) David Hume, *A Treatise of Human Nature*, Book 3, Part 2 (London: Pelican, Liberalisms 1969) Section II, p. 547.
- [4](#) *A Treatise of Human Nature*, Book 3, Part 2, Section VI, p. 5.
- [5](#) *ibid.*, Book 3, Part 2, Section II, pp. 548–9.
- [6](#) David Hume, *An Enquiry Concerning the Principles of Morals*, Appendix HI. See R. Cohen (ed.) *Essential Works of David Hume*, (New York: Bantam Books, 1965) pp. 179–280.
- [7](#) *A System of Logic*, Book 6, [Chapter 12](#). I have examined Mill's indirect utilitarianism in much greater detail in my paper 'J.S. Mill on liberty, utility and rights', which appears in J. Roland Pennick and J.W. Chapman (eds), *Nomos Human Rights*, vol. XXXIII (New York: New York University Press, 1981). A complete statement of my interpretation of Mill on liberty appeared in February 1983 as *Mill on Liberty: A Defence*, (London: Routledge & Kegan Paul, International Library of Philosophy Series, 1983).
- [8](#) Henry Sidgwick, *The Methods of Ethics*, (London: Macmillan, 1983) pp. 487–9.
- [9](#) *ibid.*, p. 489.
- [10](#) I refer especially to D.H. Hodgson's pioneering *Consequences of Utilitarianism*, (Oxford: Clarendon Press, 1967). A good guide to this area is D.H. Regan's excellent *Utilitarianism and*



*Cooperation*, (Oxford: Clarendon Press, 1980).

[11](#) See G.J. Warnock, *The Object of Morality*, (London: Methuen, 1971) pp. 24 and 31.

[12](#) Hodgson, *Consequences of Utilitarianism*.

[13](#) On this, see several useful references in Mackie's *Ethics: Inventing Right and Wrong*, (Harmondsworth: Penguin, 1977) bibliographical notes.

[14](#) See, especially, J.C. Rees's contribution, 'A re-reading of Mill on liberty', *Political Studies*, 8 (1960), 113–129, reprinted with an important postscript (1965) in P. Radcliff (ed.) *Limits of Liberty*, (Belmont, Ca.: Wadsworth, 1966) pp. 88–107. See also D.G. Brown, 'Mill on liberality and morality', *Philosophical Review*, 81, (1972) 133–8; 'What is Mill's principle of unity?', *Canadian Journal of Philosophy*, 3, (1973) 1–12; 'Mill's act-utilitarianism', *Philosophical Quarterly*, 24, (1974) 67–8; 'John Rawls: John Mill', *Dialogue*, 12, (3), (1973); 'Mill on harm to others' interests', *Political Studies*, 26, (1978) 395–9. For David Lyons' contributions, see his 'Mill's theory of morality', *Nous*, 10, (1976) 101–20; 'Human rights and the general welfare', *Philosophy and Public Affairs*, 6, (1977) 113–29. His recent paper, 'Mill's theory of justice' which appears in A.I. Goldman and J. Kim (eds) *Values and Morals*, (Dordrecht: D. Reidel Publishing Co., 1978) pp. 1–20; and his 'Mill on liberty and harm to others', *Canadian Journal of Philosophy*, Supplementary vol. V, (1979) 1–19, are also important sources. Of particular importance in developing the interpretation of Mill as an indirect utilitarian is Richard Wollheim's 'John Stuart Mill and Isaiah Berlin: the ends of life and the preliminaries of morality', in Alan Ryan (ed.) *The Idea of Freedom*, (Oxford: Oxford University Press, 1979), pp. 253–69; and Wollheim's *The Sheep and the Ceremony: the Leslie Stephen Lecture*, (Cambridge University Press, 1979) pp. 28–33.

A valuable source of recent interpretations is W.E. Cooper, Kai Nelson, and S.C. Patten (eds) *New Essays on John Stuart Mill and Utilitarianism*, published as Supplementary vol. 5, (1979) *Canadian Journal of Philosophy*, in which the papers by David Lyons, J.P. Dryer, David Copp, L.W. Sumner, and Fred Bergen are particularly noteworthy.

[15](#) I employ the term 'perfectionist' here in Rawls's sense. For an argument that J.S. Mill espoused a perfectionist morality, see V. Haskar, *Equality, Liberty and Perfectionism*, (Oxford: Clarendon Press, 1979).

[16](#) Mill's argument was disputed on grounds of psychological realism by James Fitzjames Stephen in his *Liberty, Equality, Fraternity*, (Cambridge: Cambridge University Press, 1967).

[17](#) See Robert Nozick, *Anarchy, State and Utopia*, (Oxford: Basil Blackwell, 1974) p. 30 *et seq.*

[18](#) Leibnitz's notion of compossibility is used in the content of rights theory by Hillel Steiner in his 'The structure of a set of compossible rights', *Journal of Philosophy*, 74, (1979) 767–75.

[19](#) This latter point is made by A.K. Sen in his 'Utilitarianism and welfarism', *Journal of Philosophy*, 74, (1979) 463–88.

[20](#) See especially Sen's 'Plural utility', *Proceedings of the Aristotelian Society*, vol. 81, (1980–1).

[21](#) I have in mind here, especially, Bernard Williams as an important sceptic about the systematizing aspirations of moral theory. See Williams's *Problems of the Self*, (Cambridge: Cambridge University Press, 1973), and *Moral Luck*, (Cambridge, Cambridge University Press, 1981).



## Chapter nine

# **Liberalism and the choice of liberties**

I begin my investigation with a question: What must be true for liberalism to be a possibility? I do not mean to ask what are the necessary conditions of a liberal society. That question opens up some fascinating lines of inquiry — it suggests questions about the demands made on the intellectual and moral capacities of human beings by the institutions of a free society, about the degree of moral conflict and diversity a free society can tolerate and the character of the moral consensus on which it none the less depends — and it leads on in a natural way to the question whether, as most classical and modern liberals suppose, freedom can become the normal condition of mankind, or whether, as (following Spinoza) I think myself, it is bound always to remain an exception in human affairs. Such questions are certainly intriguing, taking us quickly into disciplines of conjectural history and speculative sociology, but I do not aim to address them here. My question instead is a more centrally philosophical one: What must be true for liberalism to be a coherent and meaningful political ideal?

In its most typical formulations, liberalism is represented as that political philosophy — or that extended family of political philosophies — in which liberty is accorded priority over other political goods or values. To be sure, liberals differ in their conceptions of liberty, they disagree as to how stringently the priority of liberty is to be interpreted and so about the range of circumstances in which the claims of liberty are defeated or qualified by

those of other considerations. Despite these differences among liberal thinkers, it is a presupposition common to all of them that a coherent conception of liberty is available to us. If we do not know what liberty is, if we cannot agree as to its central content, how can we know when it is in competition with other values? Again, if the priority of liberty means that the restraint of liberty must be reduced to a minimum, how are we to know that the minimum has been reached? Unless we can appeal to a coherent conception of liberty that commands rational acceptance, it seems that none of these questions can have determinate answers. We cannot hope to maximize (or optimize) a value whose scope and content are indefinite and whose very individuation is controversial. For this reason, the liberal ideal itself becomes indeterminate in the absence of criteria for identifying freedom and unfreedom. The problem I am approaching here arises most clearly, perhaps, in those cases where we try to come to an on-balance judgment about liberty. When some liberties wax and others wane, how do we assess the onbalance impact on liberty? The conceptual problem I indicate becomes a normative and practical one when liberties enter into conflict with each other. How do we arbitrate a clash of liberties — conflict of freedom of information with the freedom of privacy, for example? Does it even make sense to say that one set of liberties composes or generates the greatest liberty on balance? If not, how are we to resolve such conflicts of liberties?

My investigation will have four parts or phases. I will first set out, more systematically than I have done so far, the conceptual difficulty that I believe bedevils all conceptions and principles of liberty. In doing so, I will in passing aim to answer the objections of those who maintain that, even if there be an indeterminacy in the notion of the greatest liberty, it poses no fundamental challenge to the coherence of liberalism. In the next two sections I will consider two procedures for arbitrating apparent conflicts of one concept of liberty with another concept of liberty, that of natural rights theory and that of utilitarianism, concluding that neither allows for reasonably determinate and morally adequate solutions to problems in the choice of liberties. In the fourth and last section I will offer a sketch of a better method of arbitrating conflicts among liberties — a variant of contractarian method that owes something to Rawls, Buchanan, and Gauthier, and much to the thought of Spinoza and Hume. In offering this sketch of a decision procedure for the choice of liberties, I hope to

contribute something to the defeat of a fundamental challenge to the coherence of liberalism.

### **The problem**

That comparative judgment of on-balance liberty poses great difficulties, and that these difficulties have implications for the moral content of liberalism, are propositions acknowledged, implicitly or explicitly, by many recent writers. Joel Feinberg, having observed that “‘On-balance judgments’ of freedom are of necessity vague and impressionistic, and even the comparative judgments that they sometimes incorporate are usually incapable of precise confirmation’, goes on to assert that, if, in any case where two persons are free in different respects, a questioner:

persists in asking who is the more free ‘on balance’ and in the last analysis, he must want to know which of the two respects is more important. If we are to avoid vitiating circularity, our standard of importance’ must be something other than ‘conductibility to freedom’ ... A result of considerable interest seems to follow from this analysis. Since ‘maximal freedom’ (having as much freedom on balance as possible) is a notion that makes sense only through the application of independent standards for determining the relative worth or importance of different sorts of interests and areas of activity, it is by itself a merely formal ideal that cannot stand on its own feet without the help of other values. One person's freedom can conflict with another's, freedom in one dimension can contrast with freedom in another, and the conflicting dimensions cannot meaningfully be combined in one scale. These conflicts and recalcitrances require that we put types of subjects, possible desires, and areas of activity into some order of importance; this in turn requires supplementing the political ideal of freedom with moral standards of other kinds. The supplementary values, however, are not external to freedom in the manner of such independently conceived rival ideals as justice and welfare, but rather are ‘internally complementary’ — a necessary filling in of the otherwise partially empty idea of ‘on-balance freedom’ itself.<sup>1</sup>

The threat to liberalism posed by Feinberg's analysis should be clear enough. If there is in fact no substantive ideal for freedom, judgments about greater or lesser freedom will vary along with different valuations of the importance of different activities. If, as seems evident, some at least of such

judgments are subjective in character, disputes about what is the greatest freedom will then be in some cases rationally irresolvable. Indeed, whenever there is a conflict of liberties needing arbitration, and the assessment of the conflict proceeds by invoking standards of importance which are not shared and whose claim on reason is controversial, political philosophy will be incompetent to do more than clarify the formal structure of the rival views. But then whose judgment of importance or worthwhileness is to prevail? The analysis seems to go radically against the trend of recent liberal thought in a Kantian tradition which claims that substantive principles of freedom can be defended that in no way depend upon controversial ideals of the good life. In one of its most influential versions, the task of a liberal theory of justice is precisely to come up with principles of freedom which allow exponents and practitioners of opposed conceptions of a worthwhile life to coexist in peace. If Feinberg is right, the standpoint of impartiality or neutrality with respect to such rival conceptions is simply not available to the theorist, and one of the central aspirations of recent liberal political philosophy is shown to be bankrupt.

It is true that, among recent Kantian liberal writers, there are those who accept something akin to Feinberg's analysis and yet think liberalism need not thereby become indeterminate. Ronald Dworkin, for example, has argued<sup>2</sup> that, since quantitative assessments of liberty cannot be made and some liberties appear trivial or worthless, there can be no general right to liberty. Where liberty does have worth, it has it in virtue of its expressing or protecting the foundational value of equal concern and respect for persons. It is this latter value, and not any commitment to the priority of liberty, which defines the constitutive morality of liberalism in Dworkin's account of it. Dworkin's argument is, however, far from persuasive. Nothing in his description of what it means to have equal concern and respect for persons shows that ideal to be any more determinate than the ideal of liberty he seeks to supplant as the central morality of liberalism. People may be accorded equal concern and respect in many different ways, and judgments about which mode of treatment best exemplifies the underlying ideal of equality are no less intractably controversial than judgments about the greatest liberty. In many cases, disputes about what best exemplifies a policy of equal treatment seem to turn on just those considerations of relative importance of competitive interests that Feinberg thinks give

freedom its only substantive content. But then Dworkinian equality turns out to have as little substance as traditional liberal liberty.

Nevertheless, liberalism on Feinberg's analysis remains lamentably incomplete. It cannot be much help in guiding political practice, and it will have little to say when moral conflicts assume political importance. Feinberg's analysis has many features in common with that of Isaiah Berlin. Discussing the problem of comparative on-balance judgments, Berlin remarks:

The extent of my freedom seems to depend on a) how many possibilities are open to me (although the method of counting these can never be more than impressionistic). Possibilities of action are not discrete entities like apples, which can be exhaustively enumerated; b) how easy or difficult each of these possibilities is to actualize; c) how important in my plan of life, given my character and circumstances, these possibilities are when compared with each other; d) how far they are closed and opened by deliberate human acts; e) what value not merely the agent, but the general sentiment of the society in which he lives, puts on the various possibilities. All these magnitudes must be integrated', and a conclusion, necessarily never precise, or indisputable, drawn from this process.<sup>3</sup>

The difficulties disabling Berlin's account here seem similar to those that flow from Feinberg's. If comparative judgments about liberty must appeal to the valuations placed on the various possibilities by the agent and his society, what is to be done when these valuations collide? It would be incongruous, and certainly illiberal, to give precedence always or typically to the valuations of society: to do that would be to establish a presumption against non-conformist liberty. Allowing the agent himself to exercise a complete authority over the value or importance of the possibilities open or closed to him is no better, since it makes his freedom relative to his desires (or, at least, to his judgments of importance) and yields the paradox of the slave who is not unfree if his life contains all that is important to him. The undecidability of disputed judgments about liberty is in Berlin's account not just normative, but conceptual. It is not only that we have no means of reaching agreement as to when liberty ought to be restrained, but worse, we cannot arbitrate our disagreements about when it has been restrained, and in what measure. We cannot even agree on the description of the conflict of liberties, still less on its resolution. Recognizing, as Berlin does, that there may be conflicts among liberties and that no rational procedure exists for

resolving such conflicts so as to yield even a description of the greatest liberty, seems to empty liberalism of its distinctive content. If value conflict breaks out in the depths of the idea of liberty, and no solution of it can be shown to be the best in terms of liberty, how do liberals differ from non-liberals in their fundamental moral outlook?

It is questions such as these that have led some of John Rawls's critics to attack his first principle of justice — the Greatest Equal Liberty principle — as being indeterminate in its content. Both H.L.A. Hart<sup>4</sup> and Onora O'Neill<sup>5</sup> have contended against the Rawlsian priority of liberty that liberty never stands on its own feet, but always on a foundation of other values in whose absence comparative judgments cannot be made. I will look later, and in a little detail, at Rawls's responses to these criticism, which I find profound and, in part, persuasive. I want now to consider one of several views according to which the problem of disciplining judgments about greater liberty is less than fundamental in its threat to liberalism. In a series of remarkable papers, Hillel Steiner<sup>6</sup> has challenged received accounts of freedom. Steiner has argued that individual freedom can be neither increased nor diminished in society, but only redistributed. One man's freedom to act is always another's unfreedom, and the pursuit of greater freedom is a zero-sum game. Since freedom cannot be increased (still less maximized), liberal justice cannot be spelled out in terms of the priority of liberty. Rather, Steiner argues, liberal justice demands equality of liberty — where this means, in the end, equality of original property titles. How might Steiner's theory circumvent the problems I have been canvassing?

I cannot see that it does. To being with, Steiner, as much as any theorist of liberty, needs a method for arriving at comparative judgments: he needs to know when persons possess the same (or equal) liberty, even if the idea of maximal liberty has no sense in his theory. There are in Steiner's writings on these subjects two very different proposals about how these judgments might be made. In his 'Individual Liberty', where he argues that only force can restrict liberty, he works with a topological paradigm in which liberties are individuated by reference to spatio-temporal regions and material objects. A man is free to the extent that he, the space that he occupies, and the objects he possesses are not acted upon by others so as to prevent physically any action of his. The problem with the physicalist account of freedom and unfreedom is that the physical impact of others' actions on one

may occur with very diverse degrees of moral weight. As Fried says in regard to Epstein's use of an analogous topological model of tort:

Epstein sees heat, sound, concussion waves from explosions, odors and gases as instances of invading objects or transmitted energy. Here his physics is beyond reproach but misses the point that light may come in the form of a destructive laser beam or as a spotlight on an outdoor movie screen or as the dim but decipherable bearer of an offensive image. Sound may be shattering, or merely discordant, or the bearer of a disturbing message. Whether or not the intrusion is harmful will be a function of factors other than the physical magnitude of the force ... Indeed, it is not clear why only positive intrusions should be actionable. Corresponding to the light shone upon your movie screen would be the erection of a barrier blocking the sun from your bathing beach or greenhouse. Corresponding to the offensive images projected onto your property would be the erection of a barrier to a delightful view. Is it crucial whether you project a light, or a shadow — or a combination of light and shadow forming an image? It should be said that Epstein resolutely holds to his physicalist line, finding the light actionable but not the shadow.<sup>7</sup>

The problem with a physicalist model of unfreedom as the invasion of personal space is, then, that different forms of physical action on one's person or possessions may have very different effects on one's interests, with some being clearly injurious and others not clearly actionable. Here, again, it seems that standards independent of the notion of liberty — standards to do with the relative magnitude of distinct harms — are required to settle questions about whether liberty has been restricted (and in what degree). It is clear that the topological physicalist model of freedom of action comes to grief on these arguments.

In a later paper,<sup>8</sup> Steiner appears to change tack, and argues that, whereas freedom cannot be a matter of degree, anyone's freedom can be measured by finding out how many actions he is prevented from performing. He recognizes that the individuation of actions is in significant part conventional, so that a given piece of behaviour may be appropriately characterized by many different act descriptions, but contends that any new description that may be applied may simply be added to a list. One person is freer than another (at any time) if a longer list of actions can be said to be available, to him, where (by contrast to theories of freedom as the non-restriction of options<sup>9</sup>) this means that he is not prevented physically by



others from performing them. The main objection to this proposal is that we have no reason to suppose the range of potentially appropriate or felicitous act descriptions of any piece of behaviour to be less than infinite. It seems that, in any dispute as to comparative freedom, victory will go in Steiner's account to he who is most ingenious in contriving act descriptions from this inexhaustible set. It seems an unsatisfactory method of settling such disputes to allow the decision to turn on the conceptual or linguistic versatility of the parties to it rather than on features of the objective situation.

If Steiner's proposals fail, his redefinition of liberalism in terms of equal liberty, where this means equal property entitlements, fares no better. We have no argument for the highly counter-intuitive view that freedom is a constant sum in society save for the claim that one man's freedom to act always presupposes another's unfreedom. If freedoms or liberties are claim-rights rather than Hohfeldian liberties (as I think they are), then the correlativity of freedom with unfreedom follows, but not its equivalence or identity. For the fact that, when one person has a freedom another has an unfreedom, would establish the constancy of freedom, only if the correlative freedoms were the same — that is to say, if whenever one man lost a freedom, another gained that freedom. But this is patently false, as the situation of tyrants in a despotic regime confirms. Far from freedom being a zero-sum value, it is truer to say that no one in a tyrannous regime is as free as most are in a free society. Even if Steiner's thesis of the conservation of social freedom could be sustained against these objections, I do not see how his own central principle eludes the difficulties that beset more conventional liberal maxims. Property is as difficult a notion as liberty, and equal property is just as hard to specify. (Does equal property mean property of equal worth or value, and, if so, how is that to be assessed?) In associating liberty with property, however, Steiner makes his own important contribution to a distinguished line of liberal thinkers that starts with Locke. For many of these thinkers, conflicts among liberties of the sorts I have been excluding cannot occur within the system of liberal rights and my whole investigation is much ado about nothing. Let us see, though, if such theories can avoid confronting the difficulties that disable the others we have thus far considered.

## **Natural rights**

An advantage commonly claimed for theories of natural rights is that they are so structured as to avoid the kinds of conflict on which I have been focusing. They achieve this advantage by virtue for the property of a compossibility which belongs to such rights taken as comprising a system. Compossibility is a term taken from the metaphysics of Leibniz, but its first use in the context of moral and political theory, as far as I can tell, is in a book by Bertrand Russell, himself a distinguished Leibniz scholar, called *Human Society in Ethics and Politics*.<sup>10</sup> There it is employed as part of a quasi-utilitarian ethical theory to characterize desires that are compatible or harmonious with one another. The same term is used later by Steiner to name the attribute of non-conflictability which, like many other rights theorists, he believes to be an essential feature of any set of basic rights. The central idea of rights compossibility is that if the basic rights are so contoured as to dovetail, then no occasion need arise in which protecting one right entails violating another. Variants of this idea are often used in arguments aiming to show that only negative passive rights — rights whose protection does not make significant demands on the sort of scarce resources demanded by the provision and exercise of welfare rights — can be basic or natural rights. This latter argument may perhaps be sound, but I think the broader strategy of requiring compossibility among rights fails to stave off the conflicts among liberties to which this paper is addressed. We can begin to see why this is so by noting that imposing the formal requirement of compossibility on a system of rights is likely to be successful if, and only if, the system acknowledges only one primordial right of which all the others are derivatives or instantiations. Within a structure that contains several independent fundamental rights, conflict among rights will be precluded only on very demanding and implausible assumptions about the regularity of moral life in the world — assumptions sustainable, if at all, only in the theological context in which they are at home in Locke. This is true, even if the various independent rights are all negative passive rights. A right against invasion of privacy, for example, might well conflict with property rights. So long as there is an array of such rights that are not merely distinct, but independently derived and justified, the likelihood remains of conflicts among basic rights, including rights to liberties of various sorts.

The boldest among the rights theorists aim, for this reason, at a structure in which all rights are derivations from a single aboriginal right,

interlocking branches from a single tree, but there are serious obstacles facing any such project. Consider in this connection how obscure are the relations between a liberal right of initial self-ownership (as postulated by Nozick<sup>11</sup>) and the right of initial acquisition. There appears to be no relationship of derivability between the latter and the former: that is to say, no specific right of initial acquisition appears to follow from the right to self-ownership, but only a prohibition of violation of the self-ownership right itself. To be sure, since each of us owns his labour, he is entitled to its unfettered disposal, but that tells us nothing about the scope, content, or limits of the right to initial acquisition. Even in the Lockean and Nozickian frameworks, then, it appears that there may be two basic rights, not one, and insofar as they have independent justifications, a competition among their demands cannot be ruled out.

The difficulties of Locke's own labour-mixing theory of initial acquisition are notorious, and are powerfully developed by Nozick himself.<sup>12</sup> Here I do not want to spill more ink on the intricacies of the famous proviso, but rather to make a Humean point which bears on my general theme. The point is that we have no theory of acquisition which contains definite criteria for adjudicating the scope of apparently conflicting property rights. Consider the following example. A family of fisher folk has since time immemorial trawled a given strip of coast. Now, because of industrial activity further along the coast, the catch which it had always brought in falls substantially. What are the fisher folk entitled to demand according to Lockean theory? May they veto the industrial activity as a direct invasion of their property rights, demand compensation for the loss they have suffered, or are they without property rights of any sort in their customary catch? My purpose in bringing up this example is not to defend any of these alternatives, but to observe that they are all more or less equally arguable in Lockean terms. In other words, taken by itself, the Lockean theory has no definite answer to these questions. My point is the same point made by Hume, when he declares<sup>13</sup> that the failings of Locke's doctrine can be remedied only by an appeal to convention. It is not just that there are hard cases for Lockean principles, but rather that in their applications in the state of nature they contain vast indeterminacies. The guidance they appear to offer in civil society is, for this reason, delusive, and we rely in reality on convention to settle boundary problems of the sort I have mentioned.

The relevance of these indeterminacies in Lockean doctrine to my theme of the choice of liberties is that, even on the Lockean view, we will need to assess the bearing on liberty of different legal arrangements when none of them is uniquely selected by Lockean principles. When we have a choice — about the structure of taxation, the nature of patents, or the exact contours of a specific class of property rights, say — we are bound, if we have a liberal commitment to liberty, to consider how the various legal policies at our disposal (none of them forbidden by Lockean principles) affect liberty in its broader dimensions. As I shall later contend, this means looking at the import of different legal policies within the Lockean spectrum on a family of basic liberties, covering such areas as occupational choice, association, movement, conscience and so on. At this stage I want merely to make the small but vital point that, if I am right that the indeterminacies of Lockean doctrine need to be filled in by reference to the impact on liberty of different legal policies and frameworks, then the claims of liberty cannot be exhausted by the demands of Lockean property rights.

A choice of liberties may occur, even within a natural rights theory which contains only one primordial right, in circumstances where there is no uncertainty as to the contours of the system of rights. Of course, if the rights do indeed dovetail in a compossible set, and they are all negative passive rights, then conflict among rights can be avoided simply by agents — whether private citizens or public officials — refraining from rights violation. In that case, no conflict of rights is ever possible. But consider the situation in which, if some rights are not violated, a catastrophe will befall the entire system of rights. I am not here referring to the case in which the structure of rights as a whole may be defeated by considerations or values other than those of rights — a case where the welfare effects of the operation of a system of rights are deemed to be catastrophic, say — as I am unconvinced of the reality of such cases. This is not to suggest — as H.L.A. Hart absurdly says of Nozick's account of rights<sup>14</sup> — that rights protection exhausts the requirements of morality, a view Nozick clearly rejects.<sup>15</sup> The catastrophe to which I allude is rather that in which the exceptionless protection of rights allows the system of rights as a whole to be destroyed. Think here of Weimar Germany in 1932, where, according to some reports, military leaders contemplated a *coup d'état* to forestall Hitler's coming to power. Now it seems incontestable that such a military takeover would have entailed committing serious violation of rights and yet

would almost certainly have prevented far more extensive and severe rights violations. It is no less clear that an absolutist rights theory which prohibits some rights violations where a catastrophe to the entire system of rights can plausibly be prevented in no other way is morally unacceptable.

The results of allowing rights violations in such circumstances of potential catastrophe are, however, large and grave. Assessment of more or less extensive rights violations opens up the possibility of a utilitarianism of rights — in this instance, a negative utilitarianism of rights — of just the sort rights theorists seek to close. For assessment of the severity or magnitude of rights violations suggests a hierarchy of weightiness among rights such that lesser or weaker rights may on occasion be violated so as to prevent the violation of greater or stronger rights. If, as I think, these results flow inexorably from moral reflection on the example I have given, then the elegant simplicity of compossible rights theories — in which every fundamental right has an infinite weight against every other value, and no right ever competes with any other right — is ruined.

The consequences of a foundational level of the sort of example I have given are radical. They need not comprehend a utilitarianism of rights — though quasi-Aristotelian rights theories, in which rights are defended as conditions of human well-being or flourishing, easily collapse into a utilitarianism of rights when they are confronted with such examples. (Such Aristotelian-inspired theories face the general difficulty that, since the conditions of well-being are diverse and sometimes competitive, it seems unlikely that any single right or structure of derivative rights will always be sufficient to protect all the significant dimensions of flourishing.<sup>16</sup> Further, it is the burden of public goods arguments that there are vital conditions of human well-being that can sometimes be provided only by compromising the stringency of Lockean rights.<sup>17</sup>) The force of my example, most plausibly, is not to push rights doctrine into wholesale consequentialism, but to make it significantly consequence-sensitive. Indeed, from a value-pluralist perspective which I find compelling, the import of some such examples is that there are undecidable questions in the foundations of ethics. This is to say that, whereas I am convinced that no ethical theory is adequate which dictates that we respect rights where doing so permits the system of rights to be destroyed, I can see no way of giving this judgment demonstrative support. But, even if such dilemmas of radical or tragic choice — dilemmas in which doing right involves committing wrong —

cannot in their nature be subject to conclusive rational arbitration, moral and political theory cannot afford to neglect them. It is indeed a criticism of conventional ethical theory, utilitarian and deontic, that its terms inhibit serious reflection on moral and political tragedy. At this stage in my argument, I do not aim to comment on the sort of moral theory that emerges once the reality of conflicts among incommensurable values is openly acknowledged, save to observe that, whereas the reality of these radical conflicts of values is patent in both political and personal life, one of the central tasks of political philosophy in its *constitutional* dimensions is to specify the structure of legal rules and procedures with which conflicts of political goods can be arbitrated in normal circumstances.

### **Utilitarianism**

In my criticism of the natural rights perspective, I have not mentioned one of its most important advantages over other approaches. I refer to the conception of liberty it sponsors — as a moral notion whose content is given by a theory of justice. This idea of liberty as comprehending a domain of entitlements to act is in stark contrast with that found in most utilitarian writings. In Bentham, ‘liberty’ is taken to be virtually a descriptive term, so that the liberty of the rapist or the murderer comes into practical competition with that of the victim. In Benthamite utilitarianism, the choice of liberties in these cases is arbitrated, not by any concern for the greatest or most equitable liberty, but by appeal to the general welfare. I take it that Bentham's decision-procedure will be unacceptable to anyone whose political morality contains a weighty liberal component. Aside from anything else, a Benthamite utilitarian criterion for the resolution of conflicts of liberties may easily result in a grossly inequitable distribution of liberty among the parties. Most fundamentally, though, there is something morally repugnant in balancing the pleasure (or liberty) of the rapist against the pain (or constraint) of his (or her) victim. It is a virtue of entitlement conceptions of liberty that they prohibit such balancing, since no liberty is lost when the option of rape is closed, but, in their natural rights variants, entitlement conceptions of liberty fail because of the indeterminacies in their foundational principles. It is an obvious question whether J.S. Mill's utilitarian defence of liberty — which may be seen as an attempt to carve out a space for liberty that cannot be entered simply to produce benefits to

others — does any better than Benthamism and natural rights in arbitrating these conflicts.

Mill's utilitarianism has several features which make it superior to Bentham's from the standpoint of anyone who attaches importance to liberty. In it the Principle of Utility is not only or even primarily a practical principle, but first of all an axiological principle, specifying that only happiness has intrinsic or ultimate value. In the interpretation of Mill as an indirect utilitarian which I have myself offered,<sup>18</sup> no one is typically under any obligation to maximize happiness, and public officials are to be guided by precepts far more specific than the blanket directive to pursue general welfare. Indeed, because a strategy of pursuing general welfare directly is believed to be self-defeating, we are obliged for utilitarian reasons to adopt precepts which constrain us in the policies we may adopt in pursuit of welfare. The aim of *On Liberty* is to defend the proposition that chief among these constraining precepts is the principle of Liberty — the principle that restraint of liberty cannot be justified except when harm to others is prevented (or deterred). Mill's Principle has the paradoxical aspect, common in indirect utilitarian theories, of ruling out benefit to self or others as a sufficient reason for action. This is to say that it embodies the paradox of disqualifying the pursuit of welfare as a sufficient reason for action (where that action includes restraint of liberty) on the utilitarian ground that welfare will in fact be best promoted if we observe that disqualification. An indirect strategy in pursuit of the good is commended in Mill, and direct utilitarian policy disfavoured, by two distinct arguments. It is argued that the Principle of Utility is wholly unfitted to serve as a precept for the regulation of social co-operation and it is maintained that, in the case of the individual, happiness is most likely to be attained by the pursuit of ends valued in themselves. Acting with a direct view to the promotion of happiness or welfare is taken to be at once individually and collectively counter-productive or self-defeating. The aim of Mill's arguments is to yield a theory which, while remaining utilitarian at the foundational level, yet affords a special protection to liberty denied in Benthamism. For, whereas in Bentham a general presumption against restraint of liberty might be defensible, Mill wants and needs a liberty-protecting maxim that is not defeasible on welfare grounds alone.

Despite its great ingenuity, and the consistency with which Mill worked it out,<sup>19</sup> Mill's doctrine has crippling disabilities from the standpoint of



liberal justice. It seems more than doubtful if the disavowance between the standpoint of the utilitarian observer and that of the practical agent, which is essential to the indirect view, can be sustained in moral life. Because moral rules and practices often make conflicting demands, because the ends we value for themselves are sometimes uncombinable and because our moral sentiments may pull in antagonistic directions, we seem bound on occasion to recur to direct appeal to utility so as to resolve questions in practical life. It seems very unlikely that observing any utility-constraining precept will *always* maximize utility indirectly. Even within Mill's Aristotelian-Humboldtian conception of happiness, individuality is only one among several ingredients, with which others — such as security — may come into conflict. In short, the lexical priority of the interest in liberty over other interests seems plainly indefensible in Mill's terms.

The inadequacy of Mill's account may be approached from another angle — that of the Principle of Liberty. It has often been attacked for the vagueness of the idea of harm that it incorporates,<sup>20</sup> but my own criticism is rather more specific. It is that, if the idea of harm, like that of happiness, comprehends several distinct components or ingredients, the Principle of Liberty will fail as a guide to action. Let us allow that in Mill harm connotes harm to interests, with the pair of vital interests in security and autonomy being protected before all others. The Principle of Liberty cannot guide action because, given that harm to others is at issue, and restraint of liberty is allowable, different liberty-limiting policies will affect these two interests in very different ways. Again, so far as the Principle of Liberty goes, a very minor harm might sanction a major restraint of liberty. The damage to the vital interests of the agent whose liberty is restrained might, in other words, be grossly disproportionate to that prevented. Nor does reference to the Principle of Liberty remove the danger of inequity in the distribution of liberty, and of injury to the vital interests, which the Principle of Liberty creates. For the most cost-efficient policy of harm prevention may still be very inequitable in its resultant impact on liberty and the vital interests. I see no way out of this dilemma within Mill's doctrine.

In general terms, the trouble with Millian utilitarianism as a decision procedure for resolving conflicts among liberties is that it contains no resources for protecting equity in the distribution of liberty. Further, the set of basic liberties that would be protected by Mill's doctrine would be

contoured by reference to a concern for general welfare that might well yield restraints abhorrent to Mill himself and unacceptable to latter-day liberals. Invoking an unstated Principle of Equity in Mill (as I did myself<sup>21</sup>) does not help, since the adoption of a strong distributive constraint on policy cannot be justified in the aggregative terms even of indirect utilitarianism. When liberties conflict, then, as they do whenever the harm principle applies, nothing in Mill's theory can remove the possibility of justifying the imposition of very inequitable burdens and illiberal restraints on liberty. This is only to endorse the view — from which I myself long dissented — that liberal justice cannot be derived from within a wholly consequentialist morality.

### **The contractarian method**

In his response<sup>22</sup> to Hart's criticism that the notion of the most extensive liberty is indeterminate in its applications, John Rawls has developed further the scheme of the basic liberties sketched first in *A Theory of Justice*. In so doing, he has made the most important contribution so far to providing a rational decision procedure for the choice of liberties. His method hinges on drawing out the implications for the theory of justice of a conception of the person as possessing the two moral powers of a capacity for a sense of right and justice, which he qualifies as the capacity to honour fair terms of co-operation (and thus to be reasonable) and the capacity for a conception of the good (and thus to be rational). Rawls' argument is that the contents of a list of basic liberties, and the most adequate scheme of basic liberties taken as forming a system or family, can be given a contractarian derivation with the assistance of the idea of the moral person I have just mentioned. In other words, the basic liberties are those liberties that free and equal persons with the relevant moral capacities would choose in the original position. The most adequate scheme of basic liberties — liberties that are protected from trade-off with other values — is that which best expresses the character of persons in the original position. According to Rawls, these basic liberties consist in freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law. As Rawls glosses this list: 'No priority is assigned to liberty as such, as if the exercise of something

called “liberty” has pre-eminent value and is the main if not the sole end of political and social justice.’<sup>23</sup> In thus moving from global liberty to specific liberties, Rawls follows in a path to which John Stuart Mill gestured when in the introductory chapter of *On Liberty* he specified ‘the appropriate region of human liberty’ as comprising ‘first, the inward domain of consciousness, demanding liberty of conscience in the most comprehensive sense’, second, ‘liberty of tastes and pursuits, of framing the plan of our life to suit our character’, and, third, freedom of association — ‘freedom to unite for any purpose not involving harm to others’. ‘No society in which these liberties are not, on the whole, respected is free, whatever may be its form of government’, Mill tells us, ‘and none is completely free in which they do not exist absolute and unqualified.’<sup>24</sup> Rawls's achievement is to specify the scheme of basic liberties in a way that is far more adequate than anything Mill proposes and to do so in a framework that is not disabled by any sort of maximizing consequentialism.

Might not the basic liberties thus specified by Rawls nevertheless conflict? He acknowledges that they will:

Since the various basic liberties are bound to conflict with one another, the institutional rules which define these liberties must be adjusted so that they fit into a coherent scheme of liberties. The priority of liberty implies in practice that a basic liberty can be limited or denied solely for the sake of one or more other basic liberties and never ... for reasons of public good or of perfectionist values. This restriction holds even when those who benefit from the greater efficiency, or together share the greater sum of advantages, are the same persons whose liberties are limited or denied. Since the basic liberties may be limited when they clash with one another, none of these liberties is absolute; not is it a requirement that, in the finally adjusted scheme, all the basic liberties are to be equally provided for (whatever that may mean). Rather, however these liberties are adjusted to give one coherent scheme; this scheme is secured equally for all citizens.<sup>25</sup>

Rawls recognizes that, where the demands of the basic liberties compete, they must be regulated. Given that what he calls ‘the central range of application’ of the basic liberties is provided for, however, none of them has been restricted or denied. It seems to me that this constructivist approach to the basic liberties is eminently reasonable and, indeed, unavoidable for anyone who acknowledges the indeterminacies in the Lockean scheme of compossible rights to which I have pointed in an earlier section. It is

manifest, all the same, that the content of the most adequate scheme of basic liberties will turn very largely on what are thought to be the demands of moral persons in the original position, and it is here that I confess to some difficulties. It is, in the first place, not altogether clear whether the conception of the person which Rawls invokes is intended to be culture-specific in its entirety. Is it, as he seems to suggest in his latest writings, a distillation of the ideas entertained about themselves by representative citizens of democratic political cultures? In this interpretation, which is consistent with an increasingly powerful Deweyan strand in his later work, the scheme of basic liberties would avowedly have no universal authority, but would be one of the results of a contract among Western persons having the self-image attributed to representative citizens of a democratic culture. In its methodological ramifications, this relativization of the conception of the person to our own circumstances would yield a detachment of political philosophy from metaphysical preoccupations — preoccupations about what is the true or most correct conception of the person, for example — and would rank political philosophy along with other contributions to reflective dialogue in our culture.

There is much that is appealing in this approach. It acknowledges with Hume, and against Locke, that the natural necessities of human society — what Hart calls the minimum content of natural law<sup>26</sup> — cannot by themselves yield liberal principles of justice. However, the circumstance of justice, taken on its own, imposes certain broad constraints on what is to count as an adequate conception of justice. Nor is this result avoided if Aristotelian considerations of human flourishing are invoked. For it seems most reasonable to suppose that human beings may flourish in a variety of types of society, liberal and non-liberal. Just as in Goodman's theory of knowledge,<sup>27</sup> the world is not only one way, but cannot for that reason be represented in any old way, so there are definite limits on the types of society in which persons may flourish, even though no single type of society uniquely or peculiarly promotes flourishing, or does so better than all others. There is no straight path, then, from the conditions of human flourishing to the liberal priority of liberty. Instead, considerations of flourishing and of the natural necessities of human society set a limit to the range of acceptable social arrangements. As for the rest, we must invoke what Hume calls conventions, or what Rawls might wish to term the particularities of our own historical circumstance and distinctive cultural

traditions. Also, Rawls' appeal to the deliverances of our own moral culture recognizes that the original position cannot be an amoral state of nature. As against the Hobbesian contract, including that of Gauthier,<sup>28</sup> who introduces a moral element into the original position only in the form of initial bargaining rights, Rawls is surely on the right track in holding that some conception of the moral powers of the person is necessary to the contractarian derivation of basic liberties.

My difficulties with this Rawlsian approach are threefold. First, I doubt that a vantage point of complete neutrality as to the metaphysics of the person of the sort presupposed by Rawls's recent pragmatic turn is available to us. It may be, as Parfit has argued,<sup>29</sup> that the conception of the person intimated by our commonsensical morality is defective and in need of philosophical revision. If this is the case, then we cannot simply read off our culture's moral self-image into the description of the covenanters in the original position. This criticism does not of itself show that there is anything wrong with Rawls' conception of the person, which is admittedly a distillate from conceptions of a looser sort found widely among us, and it is possible that the defects (if such there be) of our self-conception do not bear on Rawls' construct. It seems unlikely, though, that the construction of the person in the original position can be as distanced from the metaphysical reflection as Rawls' latest work suggests.

My second concern has to do with the degree of cultural specificity of the idea of the person which Rawls invokes. As it is set out in terms of the two moral capacities, it would command very general assent as expressing a view long-standing and deeply embedded in our cultural tradition. In its uses by Rawls, however, it becomes clear that the practices and norms of a democratic society are presupposed as the context in which this conception of the person generates practical principles. As Rawls puts it:

A crucial assumption of liberalism is that equal citizens have different and indeed incommensurable and irreconcilable conceptions of the good. In a modern democratic society the existence of such diverse ways of life is seen as a normal condition which can be removed only by the use of autocratic state power.<sup>30</sup>

It seems to me that Rawls here conflates two distinct phenomena — the individualist and pluralist character of modern moral life and the demand for democratic participation in government. Whereas the former goes back to the fifteenth and sixteenth centuries in Europe, the latter is a feature of

liberal thought and practice only since the mid-nineteenth century. My point here is that I see no reason for restricting the cultural context of contractarian reasoning to the moral conceptions of the last century. That we are bound to invoke a conception of the person and of moral life that is given us by our distinctive tradition is, I think, plausible; but the individualist tradition which Rawls draws upon is older and more resilient than the democratic tradition to which he assimilates it, and a result of wider scope and authority will follow if we extend the moral compass of the conception of the person beyond the concerns which typify us as citizens of democratic states.

My third and most substantive criticism of Rawls' construction applies to the content of the basic liberties themselves. As is well known, Rawls wished to include the political liberties among the basic liberties and exclude property rights in the means of production. If we adopt as our working conception of the person a conception distilled or refined from the longer stretch of western individualist tradition to which I have alluded, these two provisions will appear unwarranted. I can find no strong argument for the inclusion of the political or democratic (as distinct from the civil and personal) liberties in the basic set. The classic negative liberties of the person as theorized by Benjamin Constant in his *Liberty Ancient and Modern* (1819) — which Rawls himself characterizes as 'the liberty and integrity of the person (violated, for example, by slavery and serfdom, and by the denial of freedom of movement and occupation) and the rights and liberties conveyed by the rule of law'<sup>31</sup> — have historically flourished in a variety of political regimes aside from representative democracy. The connection between the basic civil and personal liberties and the political liberties is, I think, best characterized as causal or instrumental rather than constitutive: the latter are means to the protection and exercise of the former. Even within the terms of Rawls' own specification of the original positions, there is nothing that compellingly supports the arrogation to the status of basic liberties of democratic practices and institutions. That is, I think, tacitly acknowledged by Rawls when he allows that 'the role of the political liberties is perhaps largely instrumental in preserving the other liberties', but defends their inclusion among the basic liberties on the ground that they are 'important enough as essential institutional means to secure the other basic liberties under the circumstances of the modern state'.<sup>32</sup> My own preference, however, is still to disqualify them as basic



liberties on the ground that, unlike the civil and personal liberties, they cannot be shown to be strictly entailed by adoption of the preferred conception of the person.

The exclusion of property rights from the set of basic liberties is just as hard to sustain. In Kant's philosophy, the possession and exercise of strong private property rights is seen as an attribute of moral personality. Without the assured space of personal independence conferred on us by rights of possession, we cannot act as fully autonomous individuals. If our use of material resources must be mediated by co-operation or collective decision procedures, we cannot stamp our own personal signature on the world, as we can if we possess our holdings in full liberal ownership. This is, of course, only the merest sketch of an argument, but I think it worth exploring for the reasons it suggests for according liberties of private property the status of basic liberties. In addition to this, there will be strong reasons for including them in this category if we follow Rawls' example of incorporating as basic liberties those that are necessary conditions for the exercise of other basic liberties. Historically, whereas the personal and civil liberties have on occasion flourished in the absence of democratic institutions, there is no case where they have existed without extensive rights of private property. Though they are only a part of what liberty demands, Lockean property rights, suitably contoured and filled in by convention and agreement, are at once among the basic liberties and one of the conditions for their effective exercise.

The contract method I have espoused has major advantages — from the standpoint of settling a conflict of liberties — over the other two approaches I have canvassed. It is not saddled with a commitment to the maximization of aggregate welfare which, in Mill's case as in Bentham's, entails that resolving a conflict of liberties must be achieved by selecting the set that contributes most to general welfare. In all of its forms, utilitarianism fails to protect equity in the distribution of liberty and it will not protect basic liberties where (as in dilemmas of paternalism) they are likely to be used in ways injurious to the agent's interests. This result need not trouble an illiberal utilitarian — James Fitzjames Stephen, say — but it ought to worry all those utilitarians who stand in the liberal Millian tradition. The natural rights doctrine has the virtue of conceiving liberty as a moral entitlement demanded by justice that is not exposed to overriding by welfare considerations. Its failing is in the underdetermination of the basic



entitlements and their liability to conflict in cases where the system of rights as a whole is endangered. The contractarian view is superior to the natural rights approach in its candid acknowledgement of the necessity of constructivist and conventionalist stratagems in setting limits to the just restraint of liberty.

### **Concluding observations**

My investigation has been radically incomplete in several ways. I have not confronted fundamental objections (advanced by Jeffrey Paul and others<sup>33</sup>) to the cogency of the contract method in political philosophy. Nor have I even begun to spell out the conception of the person that is most appropriate to the contract method as being at once faithful to western individualist traditions and resistant to metaphysical criticism. I suspect that a Spinozistic view of persons as individuals impelled to assert their power and freedom in the world<sup>34</sup> will be found to be less fragile than the Kantian idea of persons as members of a kingdom of ends — but I cannot argue for that proposition here. Finally, I have not addressed, except with great brevity and in passing, the question of how far a contractarian method which invokes a philosophically defensible idea of the person must nevertheless have recourse to the moral postulates of a particular civilization for the results of contractarian deliberation to be sufficiently determinate to guide policy.

My argument has been the programmatic one that, first, conflict and choice among liberties is a problem unavoidable for liberalism. Second, I have submitted that the great difficulties of the other approaches warrant a careful exploration of a contractarian approach in which the adequacy of a system of liberties is assessed by reference to a definite conception of the person. It is an implication of my argument that, unless a conception of the person of the sort which Rawls has invoked can be fleshed out and defended against criticism, the problem of the choice of liberties is insoluble in liberal terms and liberalism itself defeated.

### **Acknowledgements**

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## Notes

- [1](#) Joel Feinberg, *Social Philosophy*, (Englewood Cliffs, NJ: Prentice Hall, 1973) pp. 18–19.
- [2](#) Ronald Dworkin, *Taking Rights Seriously*, (London: Duckworth, 1977).
- [3](#) Isaiah Berlin, *Four Essays on Liberty*, (Oxford: Oxford University Press, 1968) p. 130.
- [4](#) H.L.A. Hart, 'Rawls on liberty and its priority', in Norman Daniels (ed.) *Reading Rawls*, (Oxford: Basil Blackwell, 1975).
- [5](#) Onora O'Neill, 'The most extensive liberty', *Proceedings of the Aristotelian Society*, vol. 80, 1979.
- [6](#) Hillel Steiner, 'Individual liberty', *Proceedings of the Aristotelian Society*, vol. 75, 1975–5; 'How free: computing personal liberty', in A.P. Griffiths (ed.), *Of Liberty*, Royal Institute of Philosophy Lectures, vol. 15, 1983.
- [7](#) Charles Fried, 'Is liberty possible?', *Tanner Lectures on Human Values*, (Salt Lake City: University of Utah Press, 1981) p. 123.
- [8](#) Steiner, 'How free: computing personal liberty'.
- [9](#) Freedom as the non-restriction of options is defended by W.L. Weinstein and S.I. Benn in a number of well-known papers.
- [10](#) Bertrand Russell, *Human Society in Ethics and Politics*, (London: George Allen & Unwin, 1959).
- [11](#) Robert Nozick, *Anarchy, State and Utopia*, (Oxford: Basil Blackwell, 1974), (*passim*).
- [12](#) *ibid.*
- [13](#) David Hume, 'Enquiry Concerning the Principles of Morals', in R. Coles (ed.), *Essential Work of David Hume*, (New York and London: Bantam Books, 1965).
- [14](#) H.L.A. Hart, 'Between utility and rights', in Alan Ryan (ed.) *The Idea of Freedom*, (Oxford: Oxford University Press, 1979).
- [15](#) Nozick, *Anarchy, State and Utopia*, footnote on p. 30.
- [16](#) On this, see Bernard Williams, *Ethics and the Limits of Philosophy*, (London: Fontana Press, 1985) pp. 52–3.
- [17](#) See Christopher Morris's paper 'Natural rights and public goods', in John Gray, T. Attig, and D. Callen (eds) *Restraint of Liberty*, (Bowling Green, Ohio: Department of Philosophy, Studies in Applied Philosophy).
- [18](#) John Gray, *Mill on Liberty; A Defence*, (London: Routledge & Kegan Paul, 1983).
- [19](#) See Fred Berger's excellent study, *Happiness, Justice and Freedom: The Moral and Political Philosophy of John Stuart Mill*, (Berkeley: University of California Press, 1984).
- [20](#) See J.R. Lucas, *The Principles of Politics*, (Oxford: Oxford University Press, 1966).
- [21](#) Gray, *Mill on Liberty*, (*passim*)
- [22](#) John Rawls, 'The basic liberties and their priority', *Tanner Lecture on Human Values*, 1981.
- [23](#) *ibid.*, p. 5.
- [24](#) J.S. Mill, *On Liberty*, (Penguin edn) p. 71.
- [25](#) Rawls, 'The basic liberties and their priority', p. 9.
- [26](#) H.L.A. Hart, *The Concept of Law*, (London: Clarendon Press, 1961).
- [27](#) I owe the analogy between my own pluralistic conception of flourishing and Nelson Goodman's *Ways of World-Making* (Indianapolis: Hackett Publishing Co., 1975) to Tom Attig. It may be observed that a similar failure to derive uniquely determinate principles from supposedly incontestable postulates disables other species of liberal philosophy. The same failure disables the attempts of Hayek, Gewirth, and, perhaps, Oakeshott to derive substantive maxims from formal truths about practical (moral and legal) reasoning.
- [28](#) David Gauthier, *Morals by Agreement*, (Oxford: Oxford University Press, 1985). See also James Buchanan's *Limits of Liberty: Between Anarchy and Leviathan*, (Chicago: University of Chicago Press, 1975) in which the importance of individualist moral postulates is acknowledged within a post-Hobbesian perspective.

- [29](#) Derek Parfit, *Reasons and Persons*, (Oxford: Oxford University Press, 1984).
- [30](#) Rawls, 'The basic liberties and their priority', pp. 17–18.
- [31](#) *ibid.*, p. 50.
- [32](#) *ibid.*, p. 13.
- [33](#) Jeffrey Paul, 'Substantive social contracts and the legitimate basis of political authority', *The Monist*, 66 (4), Oct. 1983, 157–228.
- [34](#) For the best interpretation of Spinoza on freedom, see Stuart Hampshire's *Spinoza*, (Harmondsworth: Penguin, 1961) and D. Den Uyl's *Power, State and Freedom*, (Assen, The Netherlands: Van Gorssum, 1983).

## Chapter ten

# **Contractarian method, private property and the market economy**

How does contractarian political philosophy stand as to the justice of private property and the market economy? In the work of John Rawls, the contractarian method avowedly tells us nothing about the justice of these institutions. Rawls says:

It is necessary ... to recognise that market institutions are common to both private-property and socialist regimes, and to distinguish between the allocative and distributive function of prices. Since under socialism the means of production and natural resources are publicly owned, the distributive function is greatly restricted, whereas a private-property system uses prices in varying degrees for both purposes. Which of these systems and the many intermediate forms most fully answers to the requirements of justice cannot, I think, be determined in advance. There is presumably no general answer to this question, since it depends in large part upon the traditions, institutions and social forces of each country, and its particular historical circumstances. The theory of justice does include these matters.<sup>1</sup>

Here Rawls makes two major claims. First, that private-property and socialist regimes are both bound to adopt market pricing as a centrally important allocative institution. For this reason, it cannot be the presence or absence of markets that decides whether an economic system be classified

as capitalist or socialist. Nor, again, can it be the case that it is an assessment of the market in terms of efficiency and justice that settles the normative issue between capitalism and socialism. Here Rawls departs radically from a traditional understanding of the debate between exponents of capitalist and socialist economic systems. Marxism condemns market institutions as inherently exploitative and chaotic. In Austrian traditions the Marxian project of suppressing or transcending market institutions is condemned as leading to calculational chaos and to a system in which labour and capital alike are subject to political exploitation.<sup>2</sup> Rawls's first claim, then, is that, since market institutions figure prominently in both socialist and private property regimes, the issue between them cannot be resolved by a judgment on the merits of market institutions.

Rawls's second claim is that justice is neutral as to the choice between capitalist and socialist regimes. Whereas elements of the theory of justice may, indeed, inform our assessment of rival economic systems, it cannot dictate which is to be adopted. The subject matter of justice, for Rawls, is not the choice of economic system, but rather the social distribution of primary goods.

I aim to challenge both of these claims. As against Rawls, I wish to reassert the traditional understanding of the issue between capitalist and socialist regimes. I will submit that an assessment of the merits of market institutions — an assessment as much in terms of their justice as of their efficiency — is central to the appraisal of alternative economic systems. I will do this, in part, by criticizing the type of market socialism that I take to be implicit in Rawls's claim that market allocational mechanisms are present in both capitalist and socialist systems, arguing that market socialism is a hybrid that is morally indefensible and practically unstable. My principal argument is that, because market socialism lacks a market for capital, it is vulnerable to most of the moral and practical criticisms that have been levelled against command economies. In the real world, market socialist institutions have an inherent propensity to mutate into market capitalism or else to degenerate into a socialist command economy. It is, for this reason, an illusion to conceive of market socialism as a viable *tertium quid* between capitalism and socialism.

My second argument against Rawls is more fundamental. I shall argue that justice cannot be silent or neutral as to the choice of economic system. For us, the contractarian method yields a definite result, namely that justice

enjoins an economic system encompassing both private property and market freedoms. I argue this, despite the fact that contractarian method cannot, in general, yield results with the sort of determinacy that Rawls expects.

Besides defending these substantive claims, I hope to advance understanding of the scope and limits of the contractarian method itself. As we know, Rawls's own conception of that appears to have shifted in his recent work. I will try to specify which of the conceptions of contractarian method adumbrated in his writings is most consistent with the spirit of his latest work. Further, I will compare and contrast the various conceptions of the contract method to be found in Rawls's work with others, such as those of David Gauthier and James Buchanan. Most radically, however, my larger goal in the sections of the chapter concerned with the methodological content of the various contractarian approaches is to say something about the scope and limits of political philosophy itself. Here I aim to counterpoint Rawls's view, in which political philosophy may have a constructive role while yet distancing itself from foundational questions, with two other views — the view, found in Wittgenstein, Oakeshott and Rorty, that philosophy may illuminate but cannot otherwise change practice, and the view, which I hold myself, that philosophy may be critical or subversive of practice without thereby founding one set of practices or grounding any single form of life. Though I cannot here give anything like a satisfactory defence of this last position in philosophical method, a number of arguments in its support are suggested by the criticism I shall develop of the later work of Rawls. My argument has, on the whole, the form of an immanent criticism of Rawls's later work. At the same time, I shall suggest that results closely converging with those issuing from an immanent criticism of the later Rawls may be derived from an external perspective on it that treats the propositions of a Hobbesian contractarian moral and political theory as being substantially true. The result of my inquiry, accordingly, is the claim that an immanent criticism of Rawls's later theorizing supports conclusions that we have other reasons to accept.

### **The character of contractarian method**

It is common knowledge that, in the period since the publication of *A Theory of Justice*, Rawls's conception of philosophical method has changed. At the same time, there is very little agreement as to how radical this shift

has been. In my own view, the claim that there is a radical methodological rupture in Rawls's thought is exaggerated and misleading. For example, his constructivism in moral theory, strongly emphasized in the later writings, is present in the moral epistemology of reflective equilibrium in *A Theory of Justice*. Here, as elsewhere in this thought, we have development rather than discontinuity. There is not much basis in Rawls's work for a 'two Rawlses' thesis on the lines advanced in respect of Marx or Mill.<sup>3</sup> Neither can important discontinuities in Rawls's work be denied. A striking feature of *A Theory of Justice* is the Kantian universality of application attributed by him to the theory and, thereby, to the principles that the theory of justice yields. On any natural interpretation, Rawls in *A Theory of Justice* is concerned to defend and justify principles whose range of application extends to all mankind. The basis from which the principles of justice are derived in Rawls's book is a conception of rational choice by autonomous agents in a hypothetical circumstance of fair equality. It is clear that this conception is not intended by Rawls there to express the requirements of human moral personality and that it is not conceived by him merely as a distillate of a particular cultural tradition. The later shift in Rawls's philosophical method occurs at several levels. It is apparent, in the first case, in his account of the *goals* of the theory of justice. Rawls tells us that: since justice as a fairness is intended as a political conception of justice for a democratic society, it tries to draw solely on intuitive ideas that are embedded in the political institutions of a constitutional democratic regime and the public traditions of their interpretation. Justice as fairness is a political conception in part because it starts from within a certain political tradition.<sup>4</sup>

Later Rawls refers to justice as fairness as 'a reasonably systematic and practicable concept of justice for a constitutional democracy.'<sup>5</sup> The goal of the theory of justice, then, is restricted to that of providing a systematic set of practicable principles of justice for societies whose historical traditions are those of a constitutional democracy. Further, the basis of the theory of justice is in the political tradition of those societies. This is to say that the essential elements of justice as fairness are now understood as distillations of those specific traditions. Thus the primary goods, for example, are not specified primarily by any set of anthropological or sociological conjectures: they are normative constructions, derivations from a



conception of the person that is itself a practical notion. Rawls goes on to say:

the account of what I have called 'primary goods' is revised so that it clearly depends on a particular conception of persons and their higher-order interests; hence this account is not a purely psychological, sociological or historical thesis ... There is throughout... a more explicit emphasis on the role of a conception of the person as well as the idea that the justification of a conception of justice is a practical social task rather than an epistemological or metaphysical problem.<sup>6</sup>

Two fundamentally important theses are advanced here. First, the thesis that the task of a theory of justice, as presumably of political philosophy as a whole, is a practical task — that of constructing principles of social co-operation. Second, the key notions of justice and fairness are themselves understood as practical constructions from elements of the historical traditions of constitutional democracies. It must be evident that the Kantian ideal of universality has been relinquished and, likewise and as a consequence, the conception of political philosophy as a form of inquiry whose *telos* is the discovery or formulation of principles or conceptions applicable to all human societies has likewise been abandoned. This is not to say that Rawls's methodological shift is a turn to relativism or, still less, that it expresses the thesis that philosophical questions are unanswerable or misconceived. For, despite his avowed debts to Dewey, Rawls is not advancing any sort of relativism or pragmatism in philosophy, so that the practical interpretation of justice as fairness that Rawls advances in no way associates his view of philosophy with that of Rorty, for example. Rawls's methodological shift is, at bottom, a shift to a position in which political philosophy is separated from other areas of philosophy in such a way that its progress does not wait on progress on central questions, in, say, epistemology, metaphysics, or the philosophy of mind. It is this project of disavowal, and not any doctrine of relativism, that animates Rawls's most recent work. Political philosophy is, if not metaphysically neutral, than at least metaphysically uncommitted. As Rawls puts it:

As a device of representation the original position is likely to seem somewhat abstract and hence open to misunderstanding. The description of the parties may seem to presuppose some metaphysical conception of the person, for example, that the essential nature of persons is independent of and prior to their contingent attributes, including their final ends and

attachments and, indeed, their character as a whole. But this is an illusion caused by not seeing the original position as a device of representation. The veil of ignorance ... has no metaphysical implications concerning the nature of the self; it does not imply that the self is ontologically prior to the facts about persons that the parties are excluded from knowing. We can, as it were, enter this position any time by reasoning for principles of justice in accordance with the enumerated restrictions. When, in this way, we simulate being in this position, our reasoning no more commits us to a metaphysical doctrine about the nature of the self than our playing a game like Monopoly commits us to thinking that we are landlords engaged in a desperate rivalry, winner takes all.<sup>7</sup>

The contrast between Rawls's position and that of, say, Rorty, should now be clear. It is not that Rawls, in anti-philosophical spirit, is claiming that fundamental metaphysical questions are rationally undecidable: he is leaving open the possibility of their resolution. Nor is he claiming, in relativistic fashion, that philosophy cannot help operating within the postulates of a particular culture, epoch, or world-view. Instead, his argument is that, since the task of political philosophy is a practical task — that of securing agreement on basic principles of social cooperation — it can and ought to proceed independently of controversial commitments in other areas of philosophical inquiry. It does so, when its key conceptions — conceptions of the primary goods and of the person, for example — are conceived as being themselves practical notions, constructions of the understanding from elements in our moral and political tradition. Again: the aim of justice as fairness as a political conception is practical, and not metaphysical or epistemological. That is, it presents itself not as a conception of justice that is true, but one that can serve as a basis of informed and willing political agreement between citizens viewed as free and equal persons ... To secure this agreement we try, so far as we can, to avoid disputed philosophical, as well as disputed moral and religious, questions. We do this, not because these questions are unimportant or regarded with indifference, but because we think them too important and recognise that there is no way to resolve them politically. Thus, justice as fairness deliberately stays on the surface, philosophically speaking.<sup>8</sup>

The motivation for the method of avoidance of philosophical controversy in the theory of justice is, then, a practical motive, and not a philosophical one. It is a motive rooted in the history of western societies, at

least since the Reformation. 'Philosophy as the search for truth about an independent metaphysical and moral order cannot, I believe, provide a workable and shared basis for a political conception of justice in a democratic society.'<sup>9</sup> Rawls's methodological position, then, is not the anti-philosophical one, perhaps found in Rorty, which views philosophical questions as unanswerable or wrongly posed (and not as merely practically intractable and politically irresolvable). It is instead to be contrasted with the anti-philosophical view, because it comprehends no doctrine about philosophy. It is a thesis of the independence of political philosophy from the rest of philosophy. Political philosophy, at any rate, is an effort at finding a basis of agreement and not a search for truth. One may even say, not without a hint of paradox, that political philosophy encapsulates a contractarian view of truth.

Another way of framing the distinctively practical character of justice as fairness is by contrasting it with other liberal theories. That Rawls's is a liberal theory is evident in any manner of ways, but at the simplest it is liberal in that it is a response to *the liberal problem* — the problem of finding fair terms of peaceful coexistence among persons with different conceptions of the good. Rawls's liberalism differs from that of Kant or Mill, for example, precisely because of its insulation from metaphysical commitments and comprehensive moral doctrines. Unlike Kant's or Mill's, Rawls's liberalism does not rest upon (though it aims to encompass) moral ideals of individuality and autonomy, with their strong metaphysical presuppositions. The detachment of justice as fairness from such doctrines and presuppositions is, once again, motivated by practical considerations rooted in our history. Political philosophy must take as its point of departure the brute historical fact of rival moral outlooks and philosophical viewpoints in our society. This fact disqualifies from serious consideration any political position, including that adopted in many liberal theories, that tries to argue away these intractable differences and which postulates agreement or convergence where none exists.<sup>10</sup>

Rawls's variant of contractarian method has clear advantages over others. It seems superior to Gauthier's version, which (despite its many achievements in developing the contractarian project) is burdened by a conception of practical reasoning as maximization whose rationale is obscure, and which sets itself the heroic task of giving morality itself a contractarian reconstruction. Rawls's position in contractarian method is

preferable because it acknowledges explicitly the status of the key notions of his theory as practical and normative constructions. I will refer in the last section to the relations between such constructions and the empirical or anthropological propositions that they stand upon or presuppose. At this stage, I wish to argue only that the method of construction of the key terms in contract theory appears to have significant advantages over a method in which they are treated in quasi-naturalistic (but hardly realistic)<sup>11</sup> fashion. Further, Rawls's method has a real advantage over Gauthier's inasmuch as its goal is the contractarian reconstruction, not of morality, but of political justice. It seems inherently improbable that a contractarian analysis can be given of the whole of moral life, and the conception of philosophical inquiry as having a practical character — as consisting in a search for agreement — has its clearest application in political, not in moral, philosophy.

The question remains: notwithstanding its advantages over other contractarian methods, can the purely practical character of Rawls's version be sustained? Having distinguished Rawls's theory from a general anti-philosophical doctrine, and having pointed to its advantages over other variants of contractarianism, we may nevertheless suggest at least two ways in which the purely practical character of his theory may be compromised. In the first place, despite his intentions, Rawls's method of avoidance may itself invoke substantive philosophical doctrines and, for that reason, prove self-defeating. Consider, in this connection, his statement of 'the requirements of a workable conception of political justice': 'such a conception', he tells us, "must allow for a diversity of doctrines and the plurality of conflicting, and indeed incommensurable, conditions of the good affirmed by the members of existing democratic societies".<sup>12</sup> This statement goes beyond a sheer report of the brute historical fact of intractable evaluative disagreement to affirm the rational incommensurability of the values expressed in the various moral outlooks that the democratic societies comprehend. It affirms a thesis of value-pluralism akin to that defended by Sir Isaiah Berlin. It is a straightforwardly philosophical thesis, and the method of avoidance will have a self-defeating effect if it depends upon (or presupposes) it. Such an assertion of value-incommensurability appears to involve just the sort of definite position in moral epistemology that Rawls seeks to circumvent when he tells us that 'in what I have called "Kantian constructivism", we

try to avoid the problem of truth and the controversy between realism and subjectivism about the status of moral and political values'.<sup>13</sup>

Again, Rawls's conception of the person is a practical and political, that is to say, a normative conception. He contrasts it, in his lectures on Kantian constructivism, with a theory of human nature:

the conception of a well-ordered society. Like any other ideal, it must be possible for people to honour it sufficiently closely and hence the feasible ideals of the person are limited by the capacities of human nature and the requirements of social life. To this extent such an ideal presupposes a theory of human nature, and social theory generally, but the task of a moral doctrine is to specify an appropriate conception of the person that general facts about human nature allow.<sup>14</sup>

Here the relation between the conception of the person and the theory of human nature is one of compatibility. But it has not been shown that the theory of human nature is itself metaphysically uncommitted. Recent controversy in sociobiology, perhaps,<sup>15</sup> suggests that competition among theories of human nature is not merely a competition among rival empirical conjectures, but also among incompatible metaphysical and epistemological views. In so far, then, as the conception of the person must be compatible with a theory of human nature, which may itself incorporate substantive metaphysical elements and presuppose positions in other areas of philosophy, adopting the conception of the person will entail adopting or endorsing substantive positions in philosophical inquiry. If this is so, the method of avoidance will fail.

My aim here is not to settle decisively whether the method of avoidance is ultimately viable. I will in the last section consider how the Rawlsian method of avoidance compares with other recent positions in philosophical method. So far, I have tried only to characterize Rawls's method justly, and to voice a few suspicions as to its viability. I have done so as a prelude to the first main substantive part of my argument, in which I consider the bearing of Rawls's later methodological position on the content of his theory. Throughout I assume the substantial correctness of the historicist or contextualizing move in Rawls's later work. I am presupposing, but not arguing for, the view that the move away from a political philosophy with universalist pretensions is a desirable, or at any rate an inevitable move. To this extent my criticism of Rawls is an immanent one.<sup>16</sup> I will in the last section consider whether a method in political philosophy that explicitly

acknowledges the culture-specificity of its postulates may none the less make some universal claims. At this stage I wish to proceed by asking: How does Rawls's methodological shift to a strategy of avoidance affect the political substance of justice as fairness?

### **Post-Kantian methodology and the substance of justice**

Recall that the methodological shift in Rawls's later work is a shift from Kantian universality to Deweyan and perhaps Hegelian historicity. It is a shift to culture-specificity inasmuch as the subject matter of justice as fairness is a distillation of the civic cultures and political traditions of western constitutional democracies. The theory is contextualized in another sense, inasmuch as its application is restricted not only to a given cultural tradition, but also to a definite moment within it. The moment in which the theory applies to the western cultural tradition is specified by reference to such crucial events as the Reformation, and the consequent establishment of toleration in religion and personal morality, and by reference to the emergence of the institutions of constitutional democracy.<sup>17</sup> In general, the theory is contextualized in its application to western cultural traditions by reference to that moment in the history of our culture since when we have witnessed the proliferation of incommensurable value-perspectives and world-views. Indeed, one may even say that, abstracted from this moment in the development of our tradition, the central problem of the theory of justice — the liberal problem of establishing fair principles of social co-operation among persons having incompatible and incommensurable conceptions of the good — does not exist.

We can see how this contextualization affects the political substance of the theory of justice by considering two attributes of Rawls's conception of justice — that the principles it yields be fully determinate, and that they be fixed. As Rawls presents his project in his book, he demands of the problem of choice in the original position that it be solved by uniquely determinate principles that, once chosen, are fixed forever. Consider his account of the basic liberties. The theory of the basic liberties was developed by Rawls partly in response to questions about the determinacy of 'the greatest liberty' raised in criticism of his book by H.L.A. Hart.<sup>18</sup> Such questions, which I have considered earlier in the context of an assessment of the coherence of Rawlsian (and other) liberalism, focus on the fact that



comparative or on-balance judgments about liberty appear to presuppose rankings of the worth, value, or importance of the different liberties that are being aggregated. These rankings, however, themselves appear to encompass controversial judgments about the worthwhileness of different forms of life of precisely the sort that Rawls — like other ‘neutralist’ liberals, such as Ackerman and Dworkin<sup>19</sup> — seeks to extrude from the theory of justice. In other words, for Dworkin, as for other liberals in a Kantian neutralist tradition, principles of justice must not discriminate among different conceptions of the good, if they are to figure as candidates for the solution of the liberal problem. The difficulty for such neutralist liberalism is considerable, then, if comparative judgments about liberty — judgments of the sort needed for the coherence and applicability of a Greatest Equal Liberty Principle — turn out to hinge upon controversial evaluations of the contribution made by exercise of the various liberties to the promotion of specific conceptions of the good.

The problem has a reverse side. If, in order to avoid dependency on controversial judgments, we eliminate them from assessments of on-balance liberty, we face a problem of determinacy in a stark form. We will have no way, in many important cases, to make judgments about the greatest liberty. For liberties are not physical behaviours, and cannot be individuated except by reference to conventional, and in part normative standards. Without controversial standards of the choice-worthiness of different options and lives, we cannot even count liberties, still less weigh them. Principles like the Greatest Equal Liberty Principle fail, then, for the reason that they lack determinate content. They escape being dependent on controversial judgments about the good only at the cost of being empty.

It is as a solution to this difficulty that Rawls has developed the theory of the basic liberties, which aims to circumvent the necessity for on-balance assessments. I am less concerned at this point with the adequacy of Rawls's solution than I am with his view of the necessary condition of such a solution — that it yields a uniquely determinate set of basic liberties that, once specified, is fixed forever. This requirement makes sense, perhaps, in a theory committed — as *A Theory of Justice* was — to Kantian universality in respect of the principles of justice. If the theory of justice is culture-blind, founded on the requirements of generic human rationality and moral personality, it is natural to suppose that the principles of justice will be one and the same for all human beings.<sup>20</sup> When justice is contextualized and



restricted in its application to a particular moment in the development of a specific cultural tradition, the rationale for the requirements of fixity and determinacy disappears. Take now the requirement of fixity. This makes sense within the terms of a Kantian account of the powers of practical reasoning, in which it is supposed that autonomous reasoners can arrive at maxims for all rational agents. When this Kantian view is abandoned, or subjected to drastic qualification on Hegelian or Deweyan lines, there seems no basis for demanding, or expecting, fixity in regard to the basic liberties. How could a variant of the contractarian method that has as its subject matter the distilled deliverance of a changeable historical tradition yield principles that, once arrived at, are timeless? It would seem more natural to suppose that the set of basic liberties changes as the tradition that is its basis changes. In other words, it is hard to see how something as pre-eminently mutable as a political tradition could support fixity in the list of basic liberties.

I have earlier argued in criticism of Rawls's account of the basic liberties that it hypostatizes elements of the western individualist tradition — in particular, elements having to do with political equality and democratic participation — that are recent and, arguably, peripheral features of it. I argued that the political liberties are to be included in the set of basic liberties if, and only if, the account of the western individualist tradition is confined to the history of the past century, in which the classical liberal demand for constitutionalism and equal liberty before the law has been supplemented, and in some measure supplanted, by revisionary liberal demands for democratic equality.<sup>21</sup> I further argued for the inclusion of economic liberties (that is to say, liberties in the private ownership of the means of production) in the set of basic liberties. I do not want here to argue for a substantively different list of basic liberties, since I will address the question of the place of economic liberties in justice in the next section. My point is instead the methodological one that, given the historicist turn of Rawls's later thought, the class of basic liberties will vary at different moments in the development of the western political tradition, so that, as technology develops, social and economic conditions alter, and the moral and intellectual life of our culture changes, the contractarian method will yield a variable set of basic liberties. This will be so, even if we accept that within a contract theory such as Rawls's the choice of principles in the original position is bound always to have a certain *finality*. It will have a

character of finality whenever we enter the original position and deliberate therein. What is objectionable in Rawls's method is not the finality of its results, but rather his failure to recognize that different results will emerge from the method as it is applied at different movements in our historical tradition. Rawls fails, in short, to justify the move from finality to fixity in the outcomes of the method. There is a contrast here between Rawls's requirement of fixity in the basic liberties, for example, and the less conservative perspective of other contemporary liberal thinkers, such as Hayek, who argues explicitly that the basic liberties change as social and economic conditions change, and are, in fact, never exhaustively denumerable.

Consider, next, Rawls's other criterion of adequacy for a solution to the problem of choice in contractarian method, that it yield a highly, if not uniquely, determinate set of principles. If we have reason to think that the method should yield different results as it applies to different moments in our cultural and political tradition, why should we suppose that it should at any time yield a uniquely determinate set of results? There are several different reasons for supposing otherwise. It could do so, only if there prevailed in our culture a deep convergence on fundamental political ideals, from which a unique set of principles could be derived. It seems plain that, even if deep consensus on certain questions in our political tradition exists, it does not cover all questions that may become vital issues in public controversy. Some questions of this sort may well be rationally undecidable in Rawls's variant of the contract approach: the issue of abortion liberty may be one. In short, we have no strong reason to suppose a deep convergence of moral traditions within our civic culture on all important questions having to do with the basic liberties and the distribution of the primary goods.

The first reason for refraining from imposing a test of full determinacy on the results of the contractarian method is acknowledged by Rawls himself<sup>22</sup> in his recognition that Kantian constructivism differs from other standpoints in moral theory in that it does not suppose all moral questions to be answerable. My point is slightly different: it is that, once the subject matter of contractarian choice has been contextualized, we lack reason for supposing that the political tradition that is its basis will contain resources sufficient to settle all important questions relevant to the principles of justice. A second reason is that the requirement of unique determinacy

neglects the real possibility that several principles might tie as acceptable solutions to the problem of contractarian choice. One way of putting this is to say the principles of justice may be under-determined by the contractarian method once that has been historicized in the fashion of the later Rawls. Not one set, but several sets of principles, might present themselves as credible candidates for solutions to the problem of contractarian choice, and the method would then be itself neutral between them. Public choice within the range of credible principles would then proceed by reference to local circumstances, political bargaining and practical political reasoning.

Given the methodological shift in Rawls's later work, the Kantian requirements of determinacy and fixity in respect of the principles of justice are indefensible and indeed unreasonable. What remains, then, of the contract method? And what might it still have to say on central questions such as the justice of private property and market exchange? The contract method may yield definite results at a particular moment in the development of our political tradition, despite all that I have argued, inasmuch as it may serve as a filter for principles, by which some are decisively rejected. Here I would wish to endorse Scanlon's judgement,<sup>[23](#)</sup> that the contract method is best framed in terms of deriving principles no one could reasonably reject, rather than in the terms of principles all must reasonably accept. The natural tendency of Rawls's later work is in the direction of abandoning the agenda of determinacy and fixity for the results of the method that he inherits from his book. It is to adopt a humbler role for the contractarian method, in which it has a less radically constructive leverage on political practice. The contract method may eliminate certain solutions of problems of liberty and distribution, but it will not plausibly issue in a definitive solution for any of them.

It would be a disappointing upshot of the contract method if it had little to say on the fundamental questions of economic justice. As against this possibility, I want to argue that the contract method does yield a definite result in the area of economic justice in that it endorses the institutions of private property and market exchange. It does so, however, by disqualifying their socialist alternatives as credible answers to the problem of contractarian choice. The institutional framework thereby endorsed by the contract method will not be specified in all of its important features. It will

be a framework, nevertheless, in which the central institutions of capitalist economic organisation are clearly present.

### **The justice of private property and market exchange**

We may begin our exploration by noting the dependency of contractarian method upon the results of social theory. Central among the results accepted by Rawls for the purposes of his theory<sup>24</sup> is the indispensability of market mechanisms for the efficient allocation of resources in complex modern economies. It is important to be clear what is, and what is not being asserted here. It is not claimed that there cannot be economies in which market institutions play a small role in the allocation of resources. The economies of primitive or traditional cultures, where technology is static and preferences are slow to change, where a general medium of exchange is barely developed and prices are largely governed by convention, may be instanced at once. Again, even in modern complex economies, there are countless areas of social life that are not regulated by market mechanisms. Aside from communes, monasteries, charitable institutions, and bureaucracies, there is the example of the family or domestic household, within which market exchange is untypical.<sup>25</sup> Again, all modern governments are involved in the supply of more or less public goods, whose special attributes exclude their production on the market. Even where it is dominant, market allocation of resources is never, and perhaps can never be, all-pervasive.

Nevertheless, it is a well-established result of economic theory, amply supported by empirical evidence from socialist command economies, that in the absence of market pricing of most factors of production we may expect widespread waste, malinvestment, and discoordination of economic activity.

The logic of the argument for market institutions is, however, incompletely developed by Rawls, and has implications that undermine his thesis that market allocation and socialist property institutions may coexist in market socialism. It is worth recalling that the most intellectually powerful case against central economic planning, now widely accepted both in mainstream economics and in Marxist political economy,<sup>26</sup> is that developed by Mises and Hayek in their controversies with the socialist economists of the 1930s. In its most fundamental aspects,<sup>27</sup> the Mises-

Hayek argument against the possibility of rational economic calculation under socialism is an epistemological argument. It maintains that the knowledge that the public authority needs for successful economic planning simply is not, and cannot be available to it. In part, this is because much of that knowledge is local knowledge, knowledge of specific and often fleeting circumstances, which would be prohibitively costly to collect and in all likelihood dated once gathered. But more fundamentally, much of this knowledge is not only local knowledge but tacit knowledge — knowledge embodied in skills and dispositions, stored in customs and practices and expressed in use. If, as is likely,<sup>28</sup> part at least of this practical knowledge is inarticulable in theoretical or propositional form, there will be insuperable difficulties in the way of any central authority collecting or gathering it and using it for planning purposes.

The epistemological case against central economic planning invokes the fact of the dispersal of knowledge in society, its largely practical character and its consequent irretrievability by central authority. The epistemological case for market institutions is as discovery procedures for recovering and utilizing the dispersed knowledge scattered throughout society. Without attempting to centralize such dispersed knowledge, market institutions make it available to society in the medium of price information, which expresses and co-ordinates local practical knowledge of the structure of preferences and relative resource scarcities. Inasmuch as it allows for general social use of knowledge that would otherwise have remained local and dispersed, the market process generates information that would not otherwise have existed of the preferences and resources of unknown persons. The market not only makes best use of dispersed knowledge, it also generates new knowledge, which economic agents can then make use of for their own purposes. The idea of market institutions as epistemic devices, mechanisms for the generation and transmission of information that would otherwise be available only locally, or not at all, is the central theme of the Austrian economists, that until recently was lost in an Orwellian memory-hole because of its vicissitudes in the history of economic ideas.<sup>29</sup> It has now been recovered, partly because of the failings of dominant macroeconomic paradigms and partly because of a growing knowledge of the disastrous consequences of attempts at central economic planning in command economies. But, except among Marxists, who remain among the most historically literate among political economists, however,

the Austrian argument that suppression of market institutions inexorably produces calculational chaos remains unfamiliar to mainstream economists, especially in the United States.

How does the calculation argument (as the Austrian argument has come to be called) bear upon the prospect for market socialism of the sort envisaged by Rawls? As the Austrian argument is stated in Hayek's decisive papers of the 1930s,<sup>30</sup> it is successful against the Lange-Lerner model of socialism in which a central planning authority simulates market processes by shadow prices. Its relevance to the very different market socialism of worker-managed enterprises (which I take to be Rawls's conception of it) should be no less clear. In this model, most factors of production, including labour but excluding capital, are subject to market pricing. The wage relation is abolished in that all workers are owner-managers of socialist enterprises that compete with each other for markets, but workers may not alienate their share in their enterprise, and investment capital is obtained from a public investment bank. Whereas market socialism on this model achieves a considerable measure of decentralization of economic decision-making, it remains authentically socialist (but thoroughly un-Marxian)<sup>31</sup> in virtue of the communal ownership and consequent individual inalienability of the socialist enterprises and because productive capital is obtainable only from State investment banks. These aspects of market socialism merely illustrate its constitutive institutional features — that the hiring of labour by capital and the investment of capital in enterprises for the profit of others apart from those who work in them are forbidden. Capitalists and proletarians are, in this model, abolished and replaced by a single class of worker-managers of enterprises that remain themselves communally owned.

Modern socialism on this model (an imperfect variant of which has been attempted in Yugoslavia)<sup>32</sup> has many incidental disadvantages. The fusion of job-holding with access to profits from capital, which is central to the system, makes enterprises reluctant to take on new worker-co-operators, who tend to dilute the share of profit from capital available to each existing worker. Newcomers to the economy, such as immigrants or new generations, are likely to find it difficult to obtain employment in the worker-managed sector, and high levels of unemployment are likely to result. There will be a strong tendency for enterprises to be risk-averse in their research and development policies and a resultant low level of technological innovations in the economy. Ordinary economic assumptions,



when applied to the model, produce a picture of self-managed firms behaving very much like family partnerships in private-property regimes, tending to be conservative in admitting newcomers, and to function by slowly depleting the capital stock of the enterprise. These theoretical results are amply confirmed by the Yugoslav experience and should raise doubts about the desirability of market socialism from the perspectives of efficiency and equity.

It is not upon these incidental defects of market socialism that I wish to focus here. I wish rather to highlight fundamental problems in the operation of the mechanisms for allocating capital under market socialist institutions. I have noted already a constitutive feature of market socialism, that (private ownership of productive capital being prohibited) all investment capital other than that laid aside by existing enterprises will be allocated by state investment banks. The question arises, then: how, and by what criteria, is this investment of capital to be made? It is clear, in the first place, that enterprises can be established, and for that matter wound up, only by a decision of a state investment bank. The bank will for this reason have a decisive effect on the pattern of economic activity in the society. Its allocative decisions will need to be taken with the utmost care. The fundamental problems of the system appear to be two. There is the technical or theoretical problem of deciding upon a rule, or set of rules, for determining the rate of return on capital lent by the State bank, and there is the political or institutional problem of keeping to such rules, if they can be formulated. The first of these problems is commonly neglected by those non-economists and economists reared in a mathematical idiom of general equilibrium analysis, who suppose there to be a simple formula somewhere available whereby investment decisions can be made almost mechanically. I do not think I exaggerate when I say that this supposition is entirely delusive. It neglects the subjective character of economic costs, the conventional and variable forms of accounting systems and the purely entrepreneurial aspects of many investment decisions.<sup>33</sup> Though I cannot here show this to be so, I shall take it that the hope that a State investment bank could avoid arbitrariness in its decisions by reliance on a fixed rule is vain.

Against my argument, it may be objected that arbitrariness is not the only alternative to a fixed rule. The State investment bank could be guided in its decisions by political and normative principles — principles having to



do with the distribution of resources between regions and industries, with cross-generational justice and so forth. This rejoinder has the merit of acknowledging that investment policy in a market socialist economy would in practice be motivated chiefly by political considerations. It suggests that, even if a fixed rule for investment decisions is not forth-coming, this need not concern us overmuch, since such a rule is neither necessary nor appropriate. The institutional problem with reliance on normative standards for the allocation of investment capital is, however, a fundamental one. It is in the fact that we have no reason whatever to suppose that a political institution equipped with massive discretionary powers (which is what a state investment bank would have to be) would be able to keep to and implement the normative standards by which its decisions were supposedly guided. All our knowledge of bureaucracies suggests that the permanent officials of the State bank would be conservative and risk-adverse in the extreme and would shy away from investment strategies involving substantial speculative risks even if these were dictated by principles of justice. Again, the normative principles supposed to guide the decisions of the investment bank would sometimes conflict with each other, and would often be vague in their practical implications. Whenever room for discretion existed, we would confidently expect decisions to be taken by reference to the kind of interests identified in governmental institutions in the literature of the Virginia School of Public Choice.<sup>34</sup> For example, large existing enterprises with political clout would be favoured over small and struggling ones — and certainly over enterprises projected but not yet in a position to lobby for capital. In these circumstances, malinvestments would be unlikely to be eliminated, but instead would be concealed by further inputs of capital. The picture derivable from theoretical considerations of the sort developed by the Public Choice School is that of a vast auction for public capital, in which successful bids would be made primarily by entrenched enterprises having political skills and connections and (a crucial point) with the ability to control the flow of information to the central allocative institutions. (Nor is there any good reason to suppose that institutions providing for the democratic accountability of the State investment banks would improve the situations. Given the historical record of the ineptitude and corruption of economic policy in democratic regimes, market socialism might well be rendered less efficient and less equitable by the adoption of democratic procedures for the allocation of investment capital.) Market

socialist institutions would not in this central area of the allocation of investment capital differ materially from command economies, where all the evidence we have supports and corroborates the theoretical expectations of the Public Choice School.

Against this last point, it may be objected that market socialist institutions could be decentralized further than is suggested in my model of them. In particular, it might be urged, there could be a plurality of state investment banks, competing with each other in the supply of capital just as the worker-co-operatives do in the supply of products. What is to be said of such a proposal? On the positive side, it is at least possible that such a system of competing state investment banks would do for the allocation of capital what the system of shadow pricing is supposed to do in the Lange-Lerner model for the allocation of resources other than capital. It would effectively simulate the mechanism for the elimination of errors in capital-allocation that exists under a system of private ownership, and to this extent it would represent a marked improvement on other models of market socialism. Against this proposal, on the other hand, there is the claim (which I make against all species of market socialism) that it occupies an ultimately uninhabitable no man's land between full liberal ownership and the socialist command economy. Consider the system of competing State investment banks. Where would they acquire their initial lending capital, and how would they be wound up in the event of insolvency? It seems plain that central planning of resource allocation has not been avoided but simply pushed one stage further back. Like the worker-co-operatives themselves, the State investment banks will be dependent for their creation and liquidation on central political authority. It is clear that, given the similarities in incentive structure, all the problems in resource-allocation theorized by the Public Choice School in bureaucratic institutions would persist in a market socialist system characterized by competing investment banks.

It would be possible to circumvent these problems, perhaps, by conferring on the several investment banks substantial property rights in their initial capital endowment and then allowing them to invest it at will, at their own risk, in the various worker-co-operatives. To do this, however, would be to abandon normative criteria for investment and allow investment decisions to be made (as under capitalist institutions) by criteria of expected profitability. Allowing for market allocation of capital in this

way amounts to a reinvention of one of the central institutions of capitalist economic systems. It is hard to see how such a move could avoid bringing about an unravelling of the market socialist system itself. Once the incentive structure of the State banks is altered so as to be oriented towards maximum profits, Public Choice theory will predict (other things being equal) that profit-seeking lenders would attempt to uncover sources of profit in areas of the economy as yet subject to regulation and would act in many instances as agents of deregulation. Whatever the outcome of such developments, they introduce a profound instability into market socialism as a system and generate deep doubts as to its long term viability.<sup>35</sup>

The theoretical basis of the Public Choice School is in the proposition that human action in the political dimension is guided by much the same interests and motivations that govern economic behaviour. This assumption of constancy of motivation will be fiercely contested by normative theorists, despite the fact that it is amply confirmed by political experience. I will not attempt to defend it here, but will account it part of that social theory that the covenanters in Rawls's original position are allowed to know. Once this has been done, and the results of the 'calculation debate' are similarly included within the knowledge of the covenanters, it is clear that contractarian method cannot be neutral, or silent, in regard to the choice of an economic system. For the upshot of the Austrian calculation debate, reinforced by considerations from the Virginia Public Choice School, is that calculational chaos — waste, malinvestment and dis-coordination in the economy — can be avoided, or at any rate minimized, only if decision-making is decentralized to the level of the individual through the institution of private or several property. Then, and only then, in a regime in which individuals have the legal power to alienate their resources from any collective body to which they have been provisionally entrusted, can be local knowledge that is dispersed throughout society be put to use to secure a reasonable degree of economic coordination.<sup>36</sup> The policy upshot of the calculation argument, in so far as the institutional design of the economic system is concerned, is thus full liberal ownership of the means of production. It is not, indeed, that malinvestment, or waste, will not occur under a regime of full liberal ownership, since the imperfect co-ordination of economic life is an inevitable consequence of limitations in human knowledge, but rather that a decentralized system will promote co-ordination, and eliminate errors in decision-making, better than a

centralised system could. This last point is reinforced by the insights of the Public Choice School into the incentive structure of governmental institutions and the consequent lack of any error-elimination mechanism for mistaken allocations of resources. Knowing these results of social and economic theory, the deliberators in the original positions will opt for a regime of private property in the means of production and market allocation of all factors, including capital. They will do so because such a regime will make best use of available resources and is likely to yield greatest prosperity. Indeed, Rawls's covenanters will be compelled to adopt a private property regime if, as is suggested by my argument, the Difference Principle minimum achievable under capitalist institutions is higher than that achievable under market socialism.

My argument has been that the Austrian account of the epistemic role of market pricing, in conjunction with the Virginian insights into the mechanisms of government failure, constrain the operation of the contract method to the point of yielding an endorsement of a private property regime. My argument to this conclusion might be accepted, and it could nevertheless be denied that a private property regime emerges from contractarian choice as a matter of justice. After all, it might be objected, the principal burden of my argument has been only that opting for private property in the means of production is collectively prudent: I have said nothing, or little, to show that opting for socialist institutions is unjust. To this extent, I have not defeated Rawls's thesis of the neutrality of the theory of justice in respect of the choice of economic systems. So far as my argument has gone, a different reading of the results of social and economic theory could support an endorsement of socialist institutions. The argument for the non-neutrality of the contract method in respect of economic systems, if there is one, must then appeal to considerations other than those I have invoked so far.

### **The justice of private property and market exchange: a contractarian derivation**

The conception of the person deployed in the later version of Rawls's contractarian project is a political construction. It is not supposed to be the best conception of human nature, or even an empirical generalization of persons as we find them, but instead a device intended to model the circumstance of persons as political actors in the historical context with

which Rawls is concerned. This context is one in which society contains diverse and perhaps incommensurable value-perspectives and world-views. For this reason neither the theory of justice as a whole, nor the particular conception of the person that it encapsulates, expresses any comprehensive moral doctrine. But this much is only half the story. For, whereas our culture encompasses incommensurable outlooks and practices, it also exhibits overlapping consensus — a tacit convergence on basic values having to do with the moral claims and powers of individuals. This consensus, though it incorporates no specific conception of the good, informs the contract method so as to prevent its upshot being simply a Hobbesian *modus vivendi*?<sup>37</sup> Rawls's conception is deep and subtle. Undergirding our experience of moral diversity and conflict, our culture contains a subterranean layer of convergence on how persons are to be conceived as moral beings.

This conception is a remarkable achievement. It aims to capture, and in considerable measure does so, the modern western experience of moral conflict among individuals who share an underlying conception of themselves. Rawls's representation of our experience seems to me to be sound in many of its most fundamental aspects. It acknowledges that we are, none of us, radically situated subjects — that is to say, moral agents whose identity is constituted by membership of a single moral community. It is true of most of us that we belong to a complex diversity of moral communities, so that our sense of our identities is itself complex and even multiple, a microcosm of the conflicting traditions in the wider culture to which we belong. Rawls's conception is faithful to our moral life in its individualism — in its frank recognition and acceptance of the experience of individuality as a central and constitutive element in our culture. Because of its fidelity to the protracted historical experience that gave rise to our contemporary sense of self, Rawls's conception is resistant to the criticisms of it developed forcefully by Michael Sandel.<sup>38</sup> Because of its insight into the strength and depth of the experience of individuality, Rawls's conception refutes absurd claims about the demolition of modern moral life by triumphant individualism.<sup>39</sup> It captures the common experience that our society does harbour value-perspectives and views of the world that are incommensurable and, despite this, that we do appear to be animated by a shared sense of ourselves as individuals.

It is in the delicate balance between moral divergence and shared values that the chief difficulty of Rawls's conception lies. It is far from clear that an investigation of our cultural tradition in its contemporary manifestations would yield much in the way of a shared conception of self. It seems highly questionable to suppose that any overlapping consensus can be discerned in the welter of forms of life among which we move. Our culture contains born-again Christians as well as many for whom religious belief is barely intelligible, those who cleave to science and some who hold to magic. Indeed, it is not at all uncommon to find conflicting commitments of this sort in a single person, spread out over a lifetime. It is unclear that there is any common denominator among the rich variety of world-views our culture contains. For this reason, I cannot see that overlapping consensus has any definite content — unless it be only the minimal sense of self, or individuality, that is preserved across conflicting commitments and forms of life. Certainly, the moral content of the overlapping consensus will be minimal — and there is no reason to suppose that it will be liberal. This is to say that, precisely in virtue of a constitutive feature of the cultural tradition that Rawls is theorizing, he is disqualified from erecting on the basis of a supposed overlapping consensus any liberal civic ideal. Our culture contains forms of life that embody liberal self-conceptions of persons as free and equal agents, and forms of life that do not. Because even non-liberal forms of life are in our culture voluntarily assumed commitments from which exit is possible and commonplace, we cannot avoid trying to construct a conception of the person from which attributes derived from any specific form of life are excluded. This prevents us from giving the conception of the person the liberal content that it has in Rawls, and which it needs if it is to support his liberal political ideal.

How, then, is the conception of the person to be constructed? We are faced with the necessity of constructing a political conception of the person in a form appropriate to the circumstances of a culture where members share centrally the experience of conflict and coexistence among incommensurable values and forms of life. I suggest that the appropriate conception of the person for our historical circumstance is closer to that which Hobbes presented at a time of profound religious conflict. In Hobbes's model the person is equipped with desires and goals and with the disposition to prevail over others in contexts of material and moral scarcity. He is not a creature altogether devoid of moral attributes, since he has the

capacity to make and keep promises, but he is not defined by any ideal. In Hobbes's own account, the person's ruling motives are those of prudence. We need not follow Hobbes slavishly in this, since much recent work (above all that of Parfit) has succeeded in calling in question the claim of reason on prudence. Let us say, instead, that we think of the person as being autonomous — as having beliefs and desires, goals and projects. The person, possessing this autonomy of Humean rather than Kantian kind, will have reason to be prudent if, and only if, prudence is dictated by his goals. Nor need we, in adopting this modified version of Hobbes's conception of the person, accept his account of human psychology, which can be improved upon.<sup>40</sup>

If we want a formula for the conception of the person, we may turn from Hobbes to Spinoza, and equip our construction with the attribute of *conatus* — the disposition to assert one's power and freedom in the world.<sup>41</sup> If we do this in Rawlsian spirit, however, we will not suppose that we are capturing a metaphysical truth about persons. We will understand ourselves, instead, to be grasping our own condition.

I make no pretence at fleshing out in any persuasive detail the conception of the person that I believe should be adopted as an alternative to Rawls's. My aim is to mark a number of features that any such conception must possess if it is to be adequate as a political construction adapted to the circumstances of pluralism in forms of life that is our common experience. If the conception of the person we adopt has the Hobbesian (and Spinozistic) features I have indicated, we can discern three characteristics that will have direct bearing on our problem of the justice of private property and markets. The conception of the person will, in the first instance, be individualistic. It must be so, not because of any metaphysical doctrine about personhood, nor in virtue of any moral doctrine of the value of individuality, but because we need political principles that abstract from particular attachments to specific moral communities. We need these principles because our historical circumstance is not one of moral communities with fixed and impermeable boundaries, but one of constant migration across such boundaries. It is because we seek to mirror this historical reality that, in contractarian spirit, we deny to the hypothetical person knowledge of the moral community to which he belongs. We therefore conceive the person as an unsituated or unencumbered individual, defined not by communal attachments but by autonomous choices.



Proceeding in this contractarian spirit, we can see that this conception of the person embodies a form of minimal egalitarianism. Since they are denied knowledge of their place in specific moral communities, persons cannot apply particular conceptions of the good so as to rank different forms of life. From the perspective of contractarian choice, all forms of life are equally worth living. The hypothetical persons in the circumstance of contractarian choice will themselves have equal worth in the absence of any criteria that could establish otherwise. The construction of the person in the original position, as of the original position as a whole, then embodies a neutralism in respect of the claims of particular moral communities and their associated conceptions of the good. The principles of justice that emerge from the contract will have to be neutral in respect of the opposed forms of life that the society contains.<sup>42</sup> That is the rationale for denying the contractors knowledge of them.

How do these characteristics of individualism, equality and neutrality bear on the justice of private property and market exchange? Let us take neutrality first. In its application to the choice of economic systems, this requires that no ideal of productive enterprise be favoured over any other. Our society contains many such ideals, after all: the socialist ideal of co-operative productive activity directed to the direct satisfaction of human needs, religious ideals in which secular are subordinated to spiritual concerns, ideals of self-realization through individual entrepreneurship<sup>43</sup> and so on. Certainly no consensus exists. Any economic system that imposes on all a productive ideal that not all share must be condemned as unjust from the standpoint of contractarian method. Within a private-property regime, but not within a socialist, individuals may join workers' co-operatives or communes: they may achieve a partial or (as with the Amish) a near-total withdrawal from the surrounding capitalist economy.

The argument in favour of a private-property regime from the principle of neutrality is, in virtue of this permanent possibility of withdrawal from capitalist institutions, perhaps not best characterized as an argument for capitalism. For the virtue of a private property system is that it, unlike any socialist regime, permits a diversity of productive enterprises. Recall that even under market socialist institutions at least one form of productive enterprise — that involving wage-labour — is prohibited: workers are denied the legal power to alienate their shares in the co-operatives and to set up enterprises of their own, even if these embody an ideal of productive

association that they prize. In a private-property regime, by contrast, *no-one* may elect to live within capitalist institutions. What Robert Nozick says of his own meta-Utopian framework is true of every system of private property:

In *this* ... system it could turn out that though they are permitted, there are no actually functioning 'capitalist' institutions; or that some communities have them and others don't or some communities have some of them, or what you will.<sup>44</sup>

It is in virtue of its capacity to permit many different forms of enterprise that the private property regime is endorsed by the principle of neutrality and a socialist economic system condemned as unjust. It is worth noting here in parenthesis that the principle of neutrality, whereas it favours a private property system, does not enjoin a minimum State (*contra* Nozick) or presuppose a Lockean theory of property rights.

The same conclusions may be reached by way of the egalitarian component in the construction of the person. Any particular ideal of productive association could be enforced on others who do not share it, only if the latter are denied moral equality with the advocates of the favoured ideal. If the contractors have equal moral standing, any ideal of productive association is as good as any other from the standpoint of justice. The economic system that is favoured, then, from the standpoint of equality in the original position, is that which permits individuals to use their resources to express their own ideal, whatever this may be. It is evident that, because of the constitutive features of a private-property system — its decentralization of decision-making and the ability individuals have to deploy their resources without recourse to any procedure of collective choice — that system, and that alone, allows for such self-expression. A regime of private property, because it alone allows for diversity of productive ideals, is dictated by the principle of moral equality that the original position embodies in its Hobbesian (as, in a different form, in its Kantian and Rawlsian) constructions.

The three characteristics of the person in the original position I have identified are not altogether distinct and independent of one another. Consider neutrality and equality. It seems plain that the former is an implication of the latter, and not an independent principle. It is important that this be so, since otherwise a principle of neutrality might make unacceptable demands on the economic system. If neutrality were a

primordial principle, it might demand non-discrimination among ideals of productive enterprise, where this might be interpreted as meaning that each and every ideal has as good a chance of being realized as any other. That such a principle of neutrality as non-discrimination among productive ideals is impossible of realization is too obvious to require explication. By contrast, the neutrality that is demanded by moral equality requires only that the legal and institutional framework of society does not favour any one ideal over any other: it is a neutrality of intent, not of outcome. This has the important consequence that neutrality cannot be a fundamental principle in liberalism, even in its Rawlsian variety.<sup>45</sup> Further, in envisaging a single-status domain of persons, the individualist and the minimalist-egalitarian components of the Hobbesian contractarian construction are also clearly interdependent.

The advantage from the standpoint of justice of private-property over socialist institutions is that they permit individuals to opt out of market-exchange relations if their productive ideals so dictate. A question arises as to the endowments individuals possess with which they may so contract out of market exchange. Here two points are crucially relevant. First, because the person is in the Hobbesian construction conceived as autonomous and devoid of communal attachments, no policy of pure redistribution can emerge. But, second, because the Hobbesian construction does not contain proprietary rights, nothing is exempt from redistribution. From the standpoint of Hobbism, all assets pass from civil society back into a circumstance of no-ownership (*not* collective ownership)<sup>46</sup> when initial endowments are to be allocated. Because of its egalitarian element, again, it is not probable that the Hobbesian contract could yield an outcome in which some have no assets at all. Rather, it is reasonable to suppose that the Hobbesian contract would assign to each an initial capital endowment to dispose of.

My aim here is not to try to theorize the structure and outcome of a Hobbesian contract. I have described the persons in contractarian deliberation as autonomous agents, with desires and goals, but I have not aimed to determine whether the principles of practical reasoning they are equipped with are those of maximising *homo economicus* or other, less stringent (and more realistic) principles. I have not attempted to judge whether the veil of ignorance that conceals from the contractors knowledge of themselves is to be designed in the strong form that Rawls stipulates.

(For what it is worth, I believe the natural implication of the Hobbesian variant of the contract project to be that covenanters are denied knowledge of the final position they occupy in society, but not of their abilities, tastes, moral conceptions and so forth.)<sup>47</sup> Nor have I explored the difficult question of the 'baseline' of the contract. It seems to me that James Buchanan's variant of Hobbesian contractarianism, in which the method aims to specify Pareto-optimal departures from a baseline specified by the status-quo distribution of holdings, forms a neglected strand in political philosophy that is well worth developing. Buchanan's approach avoids the difficulties which abound in Gauthier's attempt to stipulate Lockean bargaining constraints so as to guarantee a Smithian system of natural liberty and it expresses the important insight that, contrary to common intuition, redistribution need not be a zero-sum game. But Buchanan's proposal regarding the baseline and criteria for Hobbesian redistribution is plainly not the only one worth exploring. The contract method consists in identifying the principles for distribution, filtering out some of those principles, and leaving the choice among the remainder to practical political deliberation. It seems clear that, on this view of contractarian method, the distributive principle adopted might vary from Buchanan's Paretian liberalism through principles specifying an equal level of initial holdings, and so forth. My own judgment favours the former option, but I do not claim that it can be derived as a demonstrative result of the application of contractarian method. At the same time, I would wish to claim that any fully worked out version of the Hobbesian contract will filter out some principles, among which the Rawlsian maximin principle may be singled out.<sup>48</sup>

My argument is that, whatever principle is adopted, Hobbesian contractarianism will regard property rights as conventional and the allocation of initial holdings as a fundamental dictate of justice. In its applications to economic life, I claim, justice demands the assignment of rights to holdings in private property. Further, I see no reason for supposing that this demand does not exhaust the content of economic justice. Indeed, once holdings are assigned as justice dictates, it is unjust to attempt to maintain any pattern in the distribution of income, or to thwart freedom of exchange. For the same reason, it is an injustice once holdings are assigned to impose upon their holders any ideal of productive enterprise. Justice is satisfied by the allocation of initial endowments, and is violated when

persons are denied freedom to exchange their endowments or to withdraw from market exchange in the service of an ideal of productive association that they prize.

How does this Hobbesian theory of contractarian justice differ from Rawls's? It shares with Rawls's account elements of a liberal political morality — its individualism, neutralism, and moral egalitarianism. Again, like Rawls's theory, but especially the later Rawls, it is a variant of contractarian method that is explicitly contextualised and historically situated in its application. In this it differs from most varieties of liberalism, including almost all forms of classical liberalism. The Hobbesian theory of justice differs also from liberal theories of all sorts in a respect I have not so far discussed, namely it contains nothing that guarantees the priority of liberty over other goods. This is not just the thesis that no determinate list of basic liberties may be expected to emerge from the contract. It is the more radical point that the basic liberties themselves will not in the Hobbesian account be immune from trade-off with other values such as peace and security. It is in this fact that, even when it issues (as it does in Buchanan's work) in endorsement of constitutional limited government, the Hobbesian contract differs most profoundly from liberalism, classical as well as revisionary, in denying to liberty an absolute priority among political goods and interests. This is a result that flows inexorably from the chief alteration that the Hobbesian view makes in Rawls's theory — its modification of his conception of the person so as to empty it of any distinctively liberal ideal. The motive for this evacuation of the person's liberal moral content is, in its turn, that very incommensurability in value-perspectives that generates the liberal problem. If this reasoning is sound, it has the consequence that, once the liberal problem is framed in this fashion, it becomes insoluble in liberal terms.

### **Concluding observations on contractarian theory and philosophical method**

In Rawls's later work, reflective equilibrium expresses intimations of our political tradition. This political tradition — the tradition of the western constitutional democracies — emerged from the Wars of Religion and the subsequent establishment of religious toleration. In the modern world, our political tradition harbours deep conflicts that mirror the diversity of incommensurable values that our culture displays. Rawls's project is to

diminish the incoherence of our political tradition and, by so doing, to solve the liberal problem by specifying principles of political justice that permit fair coexistence of the rival forms of life that our culture contains. He aims to uncover a convergence that undergirds the conflicts — between libertarians and egalitarians, for example — that our political culture exhibits. He seeks to achieve this by a strategy of avoidance that extends the principle of toleration to philosophy itself. The substance of the contract method is given, not by metaphysical commitments, or by comprehensive moral doctrines, but by an overlapping consensus that undergirds our culture. The result of the application of the method to this consensus is the various principles that are the prescriptive content of the theory of justice.

In accord with the strategy of avoiding fundamental controversies, Rawls holds the principles of justice are neutral on questions of economic organization. They are neutral between private property and collective ownership. I have criticized his argument, firstly, by arguing against Rawls's attempted divorce of private property institutions from market allocation of resources. The same criterion of efficiency that dictates market pricing of other factors of production dictates market allocation of capital — but this entails private ownership. My second argument against Rawls's thesis is the fundamental one. It is that, because it entails imposing a productive ideal, the choice of collective ownership is precluded by justice. My argument is contractarian, having important elements in common with Rawls's and differing principally in its construction of the person who is the subject of contractarian choice. Even where it differs from Rawls's, my argument thus has the form of an immanent criticism, since it contends that the very circumstance of value-pluralism that frames Rawls's problem disqualifies him from giving to the conception of the person a specific normative content, that of a liberal political ideal. When, as in our own case, a culture contains both liberal and non-liberal forms of life, we lack an overlapping consensus that might sustain such an ideal. For this reason, I have submitted that the person is better conceived in Hobbesian and Spinozistic fashion as being motivated by autonomous choices and lacking in communal attachments or social ideals. Such a construction preserves some elements of liberal political morality, but not all. It endorses what Oakeshott has illuminatingly called civil association,<sup>49</sup> but it does not always or necessarily support liberal ideals of the priority of liberty. The modified version of the contract method that I have defended sponsors a

juridical and political order that embodies no ideal of the person and so no ideal of productive enterprise. Such an order is best conceived as promoting no enterprise of any sort, but instead as simply securing the conditions in which persons may, however they conceive themselves, engage in their several and different projects and enterprises.

The contractarian method that I have developed differs from Rawls's, then, in giving a definite answer to a question on which he aspires to be neutral or silent. Nevertheless, it differs most radically from Rawls's in that it does not issue in definite propositions about liberty and distribution. It is an indeterminate contractarianism that leaves the choice of such principles largely to political practice. It filters out some principles as being ineligible because they are incongruent with the central elements of the contract — the conception of the person and the circumstance of uncertainty about his position in society — and it has something of substance to say about the procedures whereby principles to do with liberty and distribution may be chosen. A full version of the Hobbesian theory — which I have certainly not tried to give here — would address and answer questions about the circumstance of contractarian deliberation and it would thereby constrain the choice of principles; but it would not identify them. The choice of such principles would be a matter for political life itself— for bargaining, compromise, and ordinary political reasoning. Indeterminate contractarianism acknowledges that political life is always radically underdetermined by theory, and it abandons the idea that the adoption of political principles can ever be solely or primarily a matter of rational choice. It thereby abandons the central modern project, which is to confer a privileged status on liberalism.

Whereas it has been derived by means of an immanent criticism of Rawls's later work, the sort of Hobbesian contractarianism I have sketched exhibits many points of sharp contrast with the contract approach sponsored by Rawls. It does not seek to privilege liberty over other political goods, and it does not aim to issue in any specific principle of economic justice. Again, whereas it yields a definite result on the justice of economic systems, it is silent on the merits of constitutional democracy. The Hobbesian contract sketched here, unlike Rawls's Kantian variant and, for that matter, Gauthier's Hobbesian-Smithian variant, is not necessarily a liberal political doctrine, though it may in some circumstances have applications that are recognizably liberal. This divergence in political



substance between Rawls's contract approach and the Hobbesian approach supports a deeper methodological difference and identifies a point at which immanent criticism is followed by external critique. For, by contrast with the method practiced by Rawls and Gauthier, the Hobbesian approach does not seek (by a restrictive design of the original position or stipulations on bargaining rights) to derive specific principles by an application of the method. Rather, the method itself is applied to the salient contexts, and its results accepted as having a claim on reason. In the form in which it is here advanced, the contract method can represent itself as a genuine discovery procedure in political philosophy.

In the Hobbesian vision, then, the relations between method and results that hold in the theories of Rawls and Gauthier are virtually reversed. This reveals another point of divergence between Rawls's thinking and that which I defend here. In Rawls's work, the theory of justice depends above all on the conception of the person, which is a practical construction, and not any part of any empirical theory in anthropology or psychology. For the purpose of my project of immanent criticism, I have not dissented from this treatment of the idea of the person, nor to the contextualization of the rest of the theory of justice. I have claimed that my project of immanent criticism shows a Hobbesian conception of the person to be a more appropriate construction than Rawls's for the purposes of contractarian theory. At this stage, however, it is worth remarking that another strategy of argument is open to development that yields results closely akin to those emerging from the immanent criticism, but having radically divergent implications for the philosophical method. This is the strategy, powerfully defended by Kavka in his recent study of Hobbesian moral and political theory,<sup>[50](#)</sup> in which the central propositions of Hobbesian theory are taken as being substantially true. In this theory we have a rich account of human nature and the human circumstance that, because it is represented as being universally true, may be applied to any number of historical milieux and cultural traditions. The results of the theory will be variable, and in most cases only partly determinate, across the various cultures and historical contexts in which it is applied. The conception of persons as autonomous agents, with desires and goals that they pursue in contexts of material and moral scarcity, which in the immanent criticisms of Rawls's account was treated as a practical construction, will here be treated as a central element in an explanatory theory of human nature having universal scope. In its applications, however,

it will rarely yield universal practical principles, since the content of the principles yielded by applications of the method will depend on the relevant milieus and circumstances, with their distinctive self-conceptions. In our case, in which there is a diversity of incommensurable self-conceptions, the Hobbesian account of human nature may perhaps be applied most directly in a contract model in which the covenanters are allowed knowledge of their self-conceptions, but not of their positions in society. My claim is that, if we apply the Hobbesian apparatus to our circumstance in this direct fashion, we arrive at the result obtained from an immanent criticism of Rawls's theory — namely, an endorsement of the institutions of private property and market exchange.

The conception of political philosophy that emerges from these last considerations differs from Rawls's in several ways. Inasmuch as the Hobbesian account of human nature will enter into the contract apparatus at the level of the original position, the Hobbesian contractarian method as defended here will be less radically contextualized than Rawls's. In so far as the results are also much less determinate in most areas, it will also have far less constructive leverage on political practice than Rawls's method is intended to achieve. The Hobbesian approach will filter out some principles for the assignment of holdings and the allocation of liberties, and in the case of the choice of economic systems it will have a definite result. Otherwise, political philosophy in the contractarian idiom returns us to political practice, where the decisive choices are to be made. Because the Hobbesian approach generates a critical perspective on our current political life, it does not leave everything as it is, but nor does it pretend to be able to govern practice.

In generating a critical perspective on our current doings, the Hobbesian strategy distinguishes itself from the theory of philosophical method intimated in the writings of Wittgenstein and (perhaps) Oakeshott. To be sure, political philosophy in the Oakeshottian and Wittgensteinian idioms will not always be conservative in its effect, since in illuminating neglected aspects of our practices, it may open up possibilities — ways of thinking and valuing — that are genuinely novel.<sup>51</sup> Again, in showing up as elements of local practice, postulates such as those of liberalism, which have claimed for themselves a spurious universality, philosophy as Wittgenstein and Oakeshott conceive of it cannot avoid altering that practice. Even in their account of it, philosophical inquiry cannot be

insulated from practical life. Nor can it have the constructive leverage on practice that it seeks in Rawls's conception of it.

By contrast with both of these ways of thinking, the Hobbesian perspective intimates a position in philosophical method in which political philosophy may be genuinely critical and indeed subversive of practice. It achieves this critical, but not constructive, leverage on practice inasmuch as Hobbesian theory itself confutes or deflates central elements in our political tradition. In undermining the idea of a natural right to property, for example, Hobbesian theory opens up a space of criticism of existing holdings and, so to speak, it delegitimizes current distributions. Again by dissolving the idea that there might be a fixed set of basic liberties, immune to revision or trade-off, Hobbesian theory compels adoption of a critical perspective on current conceptions of liberty. The effect of philosophical inquiry on this Hobbesian conception of it is likely to be far from conservative, since it may set in motion a course of change — if not in practical life, then at least in our theorizing of it — whose outcome cannot be foretold. When this happens, however, it happens as an unpredictable by-product of philosophical inquiry, and not as its goal.

In the Hobbesian contractarian standpoint I have tried to open up by way of an immanent criticism of Rawls's later thought, political philosophy lacks the constructive leverage on political practice that it seeks in Rawls's work. It does not merely illuminate practice, since it suggests a critical perspective on the historic distribution of liberties and capital holdings. Yet, because of the indeterminacy of its results when applied to any specific circumstance, the Hobbesian project in contractarian philosophy may be thought to be wanting. For, except perhaps in so far as certain principles of distribution are disqualified by the filter mechanisms of the contract device, the Hobbesian approach may appear to be empty of prescriptive content. This thought may be amplified to frame a criticism of contractarian method in all its variants. Where the contract method envisages a hypothetical circumstance of deliberation and agreement, as it does in Rawls and Gauthier, it is unclear how its results (whatever their degree of determinacy) can have a bearing on practice. More specifically, it is unclear how conclusions in ideal theory about what it would be rational for imaginary agents in a hypothetical circumstance to adopt as principles of social co-operation can tell us about the reasons for action agents have in the non-ideal world in which we have to live. In its most radical and general form,

this criticism of contract method submits that hypothetical contract theories do not, and cannot, bridge the 'is-ought' gap.<sup>52</sup> Nor does recourse to a variant of contractarianism that postulates an actual, if tacit, agreement as the source of reasons for action, go any distance to answering the criticism. For, in that model (as developed by Harman,<sup>53</sup> among others), the tacit agreement is postulated as an element in an a priori descriptive moral sociology, conceived in empirical terms that have no action-guiding force. On both the hypothetical-consent and the actual-agreement models, then, it seems that the contract method in all of its varieties is destitute of prescriptive content. How powerful is this fundamental criticism of contractarian methodology in political philosophy?

The criticism is a powerful one that stands in need of a contractarian response, if only because nothing in it turns on taking literally the metaphor of contract itself. In its hypothetical-consent version, contract theory is a species of rational choice theory which, in the Hobbesian perspective I have elaborated, aims to achieve partial determinacy in its solutions of problems of choice. Even when the heuristic fiction of bargaining and agreement in a hypothetical initial position is dropped, the criticism still stands that the results of rational choice theory in an ideal circumstance have no clear implications for agents in the real world. Above all, such results fail utterly to establish the rationality of compliance in the real world with constraints on conduct whose rationality has been demonstrated in ideal theory. I see no way of answering this criticism, with all of its fatal consequences for the prospect of Gauthier's (if not Rawls's) project.

If the argument I have outlined is sound, then Hobbesian theory (as a species of state-of-nature, hypothetical-contract ideal theory) has no definite prescriptive content for action in the real world. It cannot enjoin action on real-world agents, still less motivate them to act in specific ways. It nevertheless has implications of a normative kind. In so far as it can show that some principles and institutions definitely would not be chosen in a hypothetical state of nature, Hobbesian theory condemns as unjust such institutions in the real world. If, as is plausibly the case, Hobbesian theory can show that the institutions of slavery, absolutism,<sup>54</sup> or of a socialist command economy could not be chosen by rational contractors in a state of nature, then these institutions are morally delegitimated in the real world. *Ceteris paribus*, their abolition is then licensed as permissible in terms of justice (though perhaps not mandated) by Hobbesian theory. In its ideal-

theoretical component, then, the Hobbesian approach has normative fall-out even if it is not straight-forwardly prescriptive in its content.

What of the contribution made to real-world political deliberation by the Hobbesian approach? That it cannot be directly prescriptive follows from our argument to the indeterminacy of its results. Contractarian method may nevertheless inform political deliberation in the real world by way of the insights it contains into distributional and constitutional changes which benefit all, or nearly all. It does so, most particularly, in the mode in which it has been developed in Buchanan's work, in which a thin veil of ignorance is combined with a status-quo baseline.<sup>55</sup> For Buchanan, we approach the problems of political practice, and we seek to raise ourselves from our current distributional conflicts by forging a new constitutional contract. Contractarian theory does not aim to set the terms of such a contract, which (aside from those which are filtered out by the normative elements in Hobbesian theory) must be forged in practice. Nor, again, does contractarian theory suppose that the negotiation of a new social contract is always possible. It recognizes the reality of the political state of nature in which recurrent prisoner's dilemmas throw up overwhelming disincentives to co-operation. Recurrent prisoner's dilemmas are found in many contemporary totalitarian states, and help to explain the massive stability of such states. It recognizes, in other words, that there are in the real world political dilemmas for which no rational solutions can be found. Where social co-operation for mutual benefit is feasible, however, contract theory may inform and illuminate our efforts to find and hold to principles that enhance the benefits and prolong the life-span of co-operative solutions to social conflicts. Whereas it is rarely, if ever, directly prescriptive in its content, contractarian theory may possess an indirect normativity in which it contributes to our practical struggles as it refines our understanding of the world in which we find ourselves. Its *telos* may, in the end, be explanatory rather than practical in character, but in assisting us to understand practical life it cannot help changing it.

The methodological shift in the thought of the later Rawls is from the hallucinatory perspective of Kantian universality to a conception of philosophy as the definition of the conditions of social co-operation. This is a welcome change. It brings with it recognition that the central elements of thought and practice in civil societies — such as the experience of individuality — are not eternal verities, but transitory historical

achievements, whose future cannot be underwritten by philosophy. My aim has been to take one further step on the path on which Rawls's thought has set us. I have argued that contractarian theory can no more give us a criterion of political choice for our contemporary dilemmas of liberty and distribution than it can deliver universal prescriptive principles of political justice. In its Hobbesian variant, contractarian theory is less radically contextualized than it is in the later Rawls, but it is also less determinate in most of its results. Indeed, the upshot of contractarian theory, as I have presented it, is to return us to practice, to seek in its vicissitudes the conditions of a precarious *modus vivendi*.<sup>56</sup> The substance of my argument has been that we are most likely to achieve such an accommodation if we accept the institutions of private property and market exchange. And I have claimed for the reasoning in support of this conclusion that it has a contractarian form and character.

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## Notes

- 1 John Rawls, *A Theory of Justice*, (Oxford: Oxford University Press, 1972) p. 273. In this book, on p. 271, Rawls also asserts: 'It is evident ... that there is no essential tie between the use of free markets and private ownership of the instruments of production.'
- 2 I have tried to summarize the Austrian argument to this conclusion in *Hayek on Liberty*, 2nd edn (Oxford and New York: Basil Blackwell, 1986) pp. 34–40; and in 'Marxian freedom, individual liberty and the end of alienation', *Social Philosophy and Policy: Marxism and Liberalism*, 3, (2), Spring 1986, 174–80.



[3](#) The “two Mills” theory is discussed and criticized by J.C. Rees in his ‘The thesis of the “two Mills”’, *Political Studies*, 25, 1977, 368–82. I have argued for a thesis of the unity of Mill's work in my *Mill on Liberty: a Defence*, (London: Routledge & Kegan Paul, 1983). I argue against a ‘two Marxes’ thesis in a forthcoming critique of Marx's system of ideas.

[4](#) John Rawls, ‘Justice as fairness: political not metaphysical’, *Philosophy and Public Affairs*, 14, (3), Summer 1985, 225. Rawls clarifies his view later (p. 228) as follows:

We collect such settled convictions as the belief in religious toleration and the rejection of slavery and try to organise the basic ideas and principles implicit in these convictions into a coherent conception of justice. We can regard these convictions as provisional fixed points which any conception of justice must account for if it is to be reasonable for us. *We look, then, to our public political culture itself, including its main institutions and the historical traditions of their interpretation, as the shared fund of implicitly recognised basic ideas and principles.* The hope is that these ideas and principles can be formulated clearly enough to be combined into a conception of political justice congenial to our most firmly held convictions. We express this by saying that a political conception of justice, to be acceptable, must be in accordance with our considered convictions, at all levels of generality, on due reflection (or in what I [Rawls] have called ‘reflective equilibrium’).

The italics are mine.

[5](#) Rawls, ‘Justice as fairness’, *Philosophy and Public Affairs*, 14, (3), Summer 1985, 226.

[6](#) *ibid.*, 224, footnote 2.

[7](#) *ibid.*, 238–39.

[8](#) *ibid.*, 230.

[9](#) *ibid.*, 230.

[10](#) Rawls's is not the only contemporary liberal theory to take as its departure-point a notion of value incommensurability. For Isaiah Berlin's statement of such a theory, see my ‘On negative and positive liberty’, *Political Studies*, XXVIII, (4) December 1980, 507–26, collected in John Gray and Z.A. Pelczynski (eds) *Conceptions of Liberty in Political Philosophy*, (London and New York: Athlone Press and St. Martin's Press, 1984).

[11](#) See D. Gauthier, *Morals by Agreement*, (Oxford: Oxford University Press, 1986), pp. 353–5, for a brief discussion of the moral and historical particularity of the conception of the individual that he employs somewhat naturalistically elsewhere in the book.

[12](#) Rawls, ‘Justice as fairness’, 225.

[13](#) *ibid.*, 230.

[14](#) Rawls, ‘Kantian constructivism in moral theory’, *Journal of Philosophy*, LXVII, (9), Sept. 1980, 534.

[15](#) I have especially in mind, of course, controversy surrounding the work of E.O. Wilson. Wilson gives an excellent statement of his views in his *On Human Nature*, (New York: Bantam Books, 1978).

[16](#) I argued for the culture-dependency of Rawls's earlier version of contract method in ‘Social contract, community and ideology’, [Chapter 3](#) of this book.

[17](#) Rawls, ‘Justice as fairness’, p. 225; where he notes:

The social and historical conditions of such a state (a modern democratic state) have their origins in the Wars of Religion following the Reformation and the subsequent development of the principle of toleration, and the growth of constitutional government and the institutions of large industrial market economies.

[18](#) Hart stated his criticism of Rawls in his ‘Rawls on liberty and its priority’, in N. Daniels (ed.) *Reading Rawls*, (Oxford: Basil Blackwell, 1975) pp. 230–52. Rawls replied to Hart's criticism in



his 'The basic liberties and their priority', *Tanner Lecture on Human Values*, (Salt Lake City: University of Utah Press, 1981).

[19](#) For an important criticism of neutralist liberalism, see Joseph Raz, *The Morality of Freedom*, (Oxford: Clarendon Press, 1986) [Chapter 5](#).

[20](#) For a subtle exploration of the themes of universality vs. localism in the theory of justice, see Sir Stuart Hampshire, *Morality and Conflict*, (Oxford: Basil Blackwell, 1983) [Chapter 6](#), especially pp. 154–5:

not only may a way of life fail to satisfy the purposes, and to permit the virtues, which it purports to satisfy and permit, and be internally incoherent; but it may also lead to the destruction of life and to a greater misery and degradation and to gross injustice, as Nazism did. These are always and everywhere considerations that count for evil in striking the balance between good and evil. There are obvious limits set by common human needs to be conditions under which human beings flourish and human societies flourish. History records many ways of life which have crossed these limits.

[21](#) I have argued against the revisionary liberal commitment to democratic equality as a fundamental principle of liberalism in my *Liberalism*, (Milton Keynes and Minneapolis: Open University Press and University of Minnesota Press, 1986), especially in [Chapters 4](#) and [8](#).

[22](#) See Rawls, 'Kantian constructivism', p. 563.

[23](#) See T.M. Scanlon, 'Contractualism and utilitarianism', in A. Sen and B. Williams (eds) *Utilitarianism and Beyond*, (Cambridge: Cambridge University Press, 1982) pp. 103–28.

[24](#) Rawls, *A Theory of Justice*, Section 42.

[25](#) I do not mean to imply that family life cannot be subject to an illuminating economic analysis. Such an analysis has been attempted, and in some measure achieved, in the work of Gary Becker.

[26](#) The indispensability of market allocation of most factors of production seems to be assumed by the ablest of contemporary analytical Marxists, Jon Elster, in his monumental *Making Sense of Marx*, (Cambridge: Cambridge University Press, 1985).

[27](#) For a careful history of the economic calculation debate, see D. Lavoie, *Rivalry and Central Planning: the Socialist Calculation Debate Reconsidered*, (Cambridge: Cambridge University Press, 1985).

[28](#) For an argument that much social knowledge is tacit knowledge only partly articulable, see my *Hayek on Liberty*, pp. 13–16, 21–26.

[29](#) For an account of the inadequacy of the standard version of this debate, see Lavoie, *Rivalry and Central Planning*, [Chapter 1](#).

[30](#) I refer to the papers collected in Hayek's *Individualism and Economic Order*, (London and Henley: Routledge & Kegan Paul, 1976), especially [Chapters II, IV, VII–IX](#).

[31](#) I suggest the un-Marxian character of market socialism in my 'Marxian freedom, individual liberty and the end of alienation', *Social Philosophy and Policy: Marxism and Liberalism*, 3, (2), Spring 1986, 177–80.

[32](#) On this, see James Dorn, 'Markets, true and false: the case of Yugoslavia', *Journal of Libertarian Studies*, 3, (Fall 1978) 243–68.

[33](#) I have discussed briefly the entrepreneurial aspects of economic decision-making in my *Hayek on Liberty*, pp. 37 *et seq.* For a useful discussion of investment that takes into full account the Austrian insight into dispersed social knowledge, see Brian J. Loasby, 'The economics of dispersed and incomplete information', in I. Kirzner (ed.) *Method, Process and Austrian Economics*, (Lexington and Toronto: D.C. Heath & Co., 1982) pp. 111–30.

[34](#) For an excellent general introduction to public choice theory, see James Buchanan and Gordon Tullock, *The Calculus of Consent*, (Ann Arbor: University of Michigan Press, 1962). See also

James Buchanan and Geoffrey Brennan, *The Reason of Rules: Constitutional Political Economy*, (Cambridge: Cambridge University Press, 1985) [Chapter 4](#).

- [35](#) For a brilliant theoretical investigation of the inherent instability and internal contradictions of market socialism in most, probably all, of its variants, by an intellectual leader of the Hungarian reform movement, see J. Kornai, 'The Hungarian reform process', *Journal of Economic Literature*, XXIV, (4), December, 1986, 1687. especially 1726–1727:

Lange's model is based on erroneous assumptions regarding the 'planners'. The people at his Central Planning Board are reincarnations of Plato's philosophers, embodiments of unity, unselfishness and wisdom. They are satisfied with doing nothing else but strictly enforcing the 'Rule' ... Such an unwordly bureaucracy never existed in the past and will never exist in the future. Political bureaucracies have inner conflicts reflecting the divisions of society and the diverse pressures of various social groups. They pursue their own individual and group interests, including the interests of the specialised agency to which they belong. Power creates an irresistible temptation to make use of it. A bureaucrat must be interventionist because that is his role in society; it is dictated by his situation. What is not happening in Hungary with respect to detailed microregulation is not an accident. It is rather the predictable, self-evident result of the mere existence of a huge and powerful bureaucracy. An inherent tendency to recentralisation prevails.

- [36](#) It is recognized in both the Austrian and the Virginian schools of political economy that macro-economic discoordination may occur endogenously in the market process. See Gordon Tullock, *The Economics of Wealth and Poverty*, (Brighton: Wheatsheaf Books, 1986) Chapter 15.
- [37](#) For his insistence that the outcome of the contract is not a Hobbesian *modus vivendi*, see Rawls, 'Justice as fairness: political not metaphysical', p. 247.
- [38](#) See Michael Sandel, *Liberalism and the Limits of Justice*, (Cambridge: Cambridge University Press, 1982).
- [39](#) I refer to Alasdair MacIntyre's *After Virtue*, (London: Duckworth, 1981).
- [40](#) On the strength and weakness of Hobbes's psychological theory, see Elias Canetti, *The Human Province*, (London: Picador, 1986), pp. 115–16:

He [Hobbes] explains everything through selfishness, and while knowing the crowd (he often mentions it), he really has nothing to say about it. My task, however, is to show how complex selfishness is; to show what it controls does not belong to it, but comes from other areas of human nature, the ones to which Hobbes is blind.

See also Canetti's fascinating study in Hobbesian political psychology, *Crowds and Power*, (New York: Viking Press, 1962).

- [41](#) For an illuminating account of Spinoza's political philosophy, see Douglas den Uyl, *Power, State and Freedom*, (Assen, The Netherlands: Van Gorcum, 1983).
- [42](#) I do not suppose that neutrality can be other than a matter of degree in these contexts.
- [43](#) The writings of the novelist-philosopher Ayn Rand contain a presentation of an ideal of self-realization through entrepreneurial work.
- [44](#) Robert Nozick, *Anarchy, State and Utopia*, (Oxford: Basil Blackwell, 1974) p. 321.
- [45](#) For an interesting argument that neutrality cannot be a fundamental principle of liberalism, but only an implication of a liberal ideal of autonomy, see Larry Alexander and Mamon Scharzschild, 'Liberalism, neutrality and equality of welfare vs. equality of resources', *Philosophy and Public Affairs*, 16, (1), Winter 1987, 85–110.
- [46](#) I mean to distinguish the Hobbesian conception of no-ownership from the idea of collective ownership. For a useful discussion of collective ownership, see G.A. Cohen, 'Self-ownership,

world-ownership and equality: Part IF, *Social Philosophy and Policy*, 3, (2), Spring 1986, 77–96.

- [47](#) Allowing the covenanters' knowledge of their abilities, histories and conceptions of the good, etc., though not their social position, goes far to answering Williams's objection that contract theory (in the Rawlsian variant most specifically) works with so attenuated a conception of the person as to be entirely indeterminate in its results. See Bernard Williams, *Ethics and the Limits of Philosophy*, (London: Fontana, 1985), p. 103: 'At the end, there is nothing to bring to that question [what the underlying ethical theory might contain] except, once more, the conceptions of what any rational agent as such must reject, and this conception is very indeterminate'. Williams's more general argument runs parallel to mine, in that he argues of ethical life (what I argue of political life) that it is only partially theorizable.
- [48](#) For the argument that maximin could not be chosen by Hobbesian contractors, see the important book by Gregory S. Kavka, *Hobbesian Moral and Political Theory*, (Princeton University Press, 1986), pp. 196–8.
- [49](#) On this, see Michael Oakeshott, *On Human Conduct*, (Oxford: Clarendon Press, 1975) [Chapter II](#).
- [50](#) Kavka, *Hobbesian Moral and Political Theory*.
- [51](#) On this point I owe much to conversations with Richard Flathman.
- [52](#) On this, see Jeffrey Paul's important paper, 'Substantive social contracts and the legitimate basis of political authority', *The Monist*, 66, (4), October 1983, 513–28.
- [53](#) See Gilbert Harman, 'Justice and moral bargaining', *Social Philosophy*, 1, (I), Autumn 1983, 114–31.
- [54](#) For the argument that Hobbesian theory (contrary to Hobbes's own theorizing) does not mandate political absolutism, see Kavka, *Hobbesian Moral and Political Theory*, [Chapter 5](#), section 5.
- [55](#) I owe my understanding of these aspects of Buchanan's work, most particularly, to his paper, 'The Gauthier enterprise', *Social Philosophy and Policy*, 5, (2), Spring 1988, 75–94.
- [56](#) Or, as Oakeshott puts it in *Rationalism in Politics*, (London and New York: Methuen, 1962) p. 127:

In political activity, then, men sail a boundless and bottomless sea; there is neither harbour for shelter nor floor for anchorage, neither starting-place nor appointed destination. The enterprise is to keep afloat on an even keel; the sea is both friend and enemy; and the seamanship consists in using the resources of a traditional manner of behaviour in order to make a friend of every hostile occasion.

## Chapter eleven

# **Oakeshott on law, liberty and civil association**

Always subtle in its substance and often oblique and almost hermetic in its expression, the thought of Michael Oakeshott constitutes one of the most profound and radical passages in the history of recent reflection on the character of law, liberty and government. Oakeshott has himself been careful to disavow anything akin to a settled doctrine, but he does not deny that his writings disclose ‘a consistent style or disposition of thought’<sup>1</sup> about the relations of law with liberty and their bearings on the engagements of government. If there is not a doctrine on these matters to be found in his writings, there is nevertheless a definite conception, maintained and developed throughout his works, of the form of political order that best protects both law and liberty, a conception whose separate elements are unified in Oakeshott's conception of civil association. This is a notion elaborated upon in Oakeshott's later writings, intimated perhaps in his earliest publications, which finds different idioms of expression as different styles of theorizing are absorbed (sometimes without leaving a trace) into the body of his thought. One of my aims in this exploration of Oakeshott's thought is to elucidate this conception of civil association, to link it up with the rest of Oakeshott's thought, and to see what might be said in criticism of it. My chief purpose, however, is to argue that in his conception of civil association Oakeshott has isolated and identified the very kernel of ‘liberalism’, which is a mode of associations constituted by adherence to

rules that are as non-instrumental — that is to say, as little substantive and as much procedural — as is attainable. It is this conception, in which the historic inheritance of civil society is illuminated by being theorized and given a partial relief from contingency, that captures what is most instructive (and most valuable) in ‘liberalism’. Oakeshott's account is mediated through the reflections of the greatest earlier theorists of civil society — Hobbes and Hegel — but it sketches the lineaments of its subject with the least distortion from the metaphysical context in which earlier accounts were framed. Further, it separates the most essential elements of the idea of civil association from irrelevant accretions which have become attached to it — such as doctrines of human rights, the minimum State, *laissez-faire*, social contract, or whatever. But my exploration of Oakeshott's thoughts has a larger purpose as well. For, in theorizing civil association without the doctrinal excess and universalizing illusion which pervades ‘liberalism’, Oakeshott at once shows us why that doctrine belongs to the past, and why doctrines of any sort are an inadvertence in political theorizing. It is in this last respect that his account of civil association (despite its own occasional inadvertences) has inestimable value.

### **Oakeshott's conception of philosophical method**

It is no easy matter to characterize Oakeshott's idea of philosophical inquiry. Even as his writings abound with attempts to clarify the *telos* of philosophy as an intellectual discipline, they suggest a variety of conceptions of the activity of being a philosopher, with the issue between them never definitely resolved. Partly, the indeterminacy of Oakeshott's view of philosophy springs from the restless vitality of his own theorizing, which has consistently taken into itself thoughts from the philosophers whose works he has most deeply studied. We find in his early work, accordingly, and particularly in *Experience and its Modes*, an account of philosophy that is plainly indebted to Bradley: it is that form of understanding of experience that is least encumbered by the conditions that define specific modes of experience and which, for that reason, is closest to a mode of experience that is presuppositionless. This Bradleian conception — with its echoes of Bradley's account of the internality of relations and of the partial and defective character of forms of understanding distinctive of or peculiar to definite modes of experience, and its elevation of

philosophical understanding to the apex of a hierarchy of modes of experience — is a recessive theme in Oakeshott's later writings. Aspects of the inheritance of British Idealism survive here and there — in the account he gives in *On Human Conduct*, for example, of the world of human practices as a system of thoughts or ideas whose relations with one another are (as Winch, by whose work he may well have been influenced, had maintained<sup>2</sup>) internal and conceptual rather than external and causal — but in general a heroic and synoptic conception of the tasks of philosophy has been amended by a deepening scepticism as to the place of philosophical inquiry in the life of the mind.

The scepticism about ‘philosophy’ that pervades Oakeshott's later writings may have many sources, none of them obvious or easily demonstrable. It may owe something to the work of Heidegger (whose lectures, in Marburg, Oakeshott attended in the 1920s) and whose post-Husserlian project of a rigorous phenomenology of human experience, dependent at no point on the dubious deliverances of ontology and metaphysics, has many evident affinities with the method practised in such later writings as *The voice of poetry in the conversations of mankind* and *On Human Conduct*. In these later writings, however, other influences may be at work — such as L. Wittgenstein's conception of philosophy (as exhibited in *Philosophical Investigations*) as an intellectual activity whose results are prophylactic and deflationary rather than constructive and systematic, or Ryle's account of philosophy as an exercise in logical geography or categorial taxonomy. It is in any case of undoubted significance that, certainly at least in his writings published since the Second World War, Oakeshott has been reluctant to use the term ‘philosophy’ as a characterization of his own activity and (in *On Human Conduct*) has come to prefer the term ‘theorizing’. I will later attempt, towards the end of my explorations of his thought, to say something definite about the account of theorizing which Oakeshott's later writings disclose. At this stage, I wish to illuminate some continuities in his account of human knowledge, and of its relations with moral and political life, which persist throughout his work, and which are germane to the understanding of his conception of civil association as a distillation of the historical achievement that is more crudely theorized by ‘liberalism’.

## **Rationalism, ideology and practice**

We may set out on the path to understanding Oakeshott's thought by considering his first major statement of it in his book *Experience and Its Modes*. The theme of the book, which has remained with Oakeshott over a long and productive intellectual life, is that human experience cannot be understood or theorized in the terms of any single category of thought. This is to say, first and foremost, that the project of the Positivists, and of their predecessors in the French Enlightenment, of grasping all human thought and practice in the terms of *science* is doomed to failure. For Oakeshott, science is only one idiom of understanding among many. It is in no sense at the apex of a hierarchy of modes of thought in which ethics, religion, and poetry, say, stand at lower levels. Experience discloses itself to us not as a hierarchy but as a miscellany, in which a plurality of distinct modes of thought and practice may be discerned. Accordingly, the idea of a single sort of discourse being 'true' or 'rational' discourse, which is also the idea that all human knowledge can be organized into a single system, is stigmatized by Oakeshott as a confusion of categories. That early argument of Oakeshott's goes against much in western philosophy, at least since Descartes, but it is also a polemic against the *scientism* which, during the 1930s, both in Oakeshott's own Cambridge (where he was elected a Fellow of Gonville and Caius College in 1923) and elsewhere, sought to refashion all thought and action on a model supposedly derived from the natural sciences. Thus attempts were made to construe the activity of a historian or a moralist (in scientistic terms, for example) and to dismiss as archaic and meaningless any activity (those of religion and poetry, for example) which could not be forced into a scientistic mould. For Oakeshott in *Experience and Its Modes*, however, the human world could never be a unified or hierarchical system of ideas, as perhaps it was for Plato and Aristotle. It is instead composed of a diversity of worlds, each separate and distinct, each with its own peculiar characteristics, which cannot be brought under the roof of any single concept or category.

The task of philosophy in Oakeshott's early work is to track the contours of the various modes or worlds of human experience and to specify their peculiar characters. Oakeshott's next major statement in his book of essays, *Rationalism in Politics* echoes his earlier rejection of monism in philosophy at many points, but its account of philosophy is different. In this later statement of his conception, philosophy is not assigned any privileged viewpoint among the diverse items of human understanding. Indeed, in the



seminal essay on 'The voice of poetry in the conversation of mankind', the very idea of a hierarchy among modes of experience is implicitly repudiated. There is, here and throughout Oakeshott's later writings, a shift away from the Idealist conception of unconditional (that is to say philosophical) thought as the highest human activity, but it is not therefore a shift to any pragmatist doctrine of 'the primacy of practice' in all spheres of life. As Oakeshott says in his most recent book about the demarcation of distinct spheres, categories or modes of activity or experience:

What we ordinarily perceive rarely, in fact, has this absence of ambiguity: it is a much more messy affair in which we come and go somewhat inconsequentially between a variety of universes of discourse. And, as for priority, some of our earliest experiences are not practical, governed by usefulness, but poetic and governed by delight.<sup>3</sup>

There is here a contrast between Oakeshott's pluralist account of experience and the account of the primordially of practical engagements developed by Heidegger (at least in *Sein und Zeit*, before the 'reversal' in his thought).

With respect to moral and political life, however, a thesis of the primacy of practice is developed in Oakeshott's later writings. There Oakeshott is concerned primarily to show how a mistaken conception of knowledge has had a corrupting effect on practice. The conception of knowledge Oakeshott criticizes, and which he calls *rationalist*, holds that all genuine knowledge is statable entirely in explicit, theoretical terms. All knowledge that is worthy of the name must, then, be expressible in a system of propositions or, if it is knowledge of practical things, in a set of rules or maxims. Further, and still more drastically, the rationalist conception is that practice is *irrational* if it is not governed comprehensively by a system of propositions and principles. For the rationalist, then, practical life is unregenerate unless it is guided at every point by explicit principles. Rational conduct is then action in accordance with some proposition or maxim which can be held before the mind, embodied in a rule and implemented in practice. This conception of rational conduct contains many traces of the Cartesian method of systematic doubt, in which only those beliefs are deemed authentic parts of human knowledge which embody incontestable truths, but (as Oakeshott acknowledges<sup>4</sup>) Descartes himself abandoned this method when it came to practical life, where he recommended adoption of a 'provisional morality'. By contrast with Descartes, whose humility in this connection they do not share, contemporary rationalists have focused their

attention most particularly on practical life. Their contention has been that any institution or practice which cannot be given a demonstrative justification — marriage, monarchy or religion, say — is irrational and should be abolished forthwith. Many manifestations of this rationalist view are merely ridiculous — the early twentieth-century manias for ‘rational dress’ and an artificial ‘rational language’ may be instances — but on the whole it has had an impact on practice that has proved substantial and profound. Accordingly, traditional methods in education have been anathematized as repressive of self-expression and the idea of education as an initiation into a cultural tradition repudiated as a relic of servility. Many other examples could be cited.

It is in political life, according to Oakeshott, that rationalism has had its most disastrous impact. For the rationalist, political life has to do not with the patient repair of inherited practices, nor with that reconciling and balancing of rival powers which has always been the craft of wise rulers, but with the construction of a new and ideal order in society and government. Rationalist politics, where it is not overtly a project of revolution — as it was in the most stupendous and catastrophic episode in the history of political rationalism, the Bolshevik Revolution — is always a project of radical reform. However tried and tested inherited institutions may be, and however much they may be embedded in the affections of the people, they are condemned by political rationalism because they were not constructed in accordance with a conscious plan, or modelled on the basis of an abstract principle. In its political expressions, for these reasons, rationalism is a powerful engine of delegitimation, a doctrine whose chief work is destruction.

What, in Oakeshott's view, lies at the root of the rationalist illusion? Oakeshott's answer is that rationalism rests upon a false, and indeed barely coherent account of human knowledge. For Oakeshott, human knowledge is not the mother of practice, but only its step-child. In all its branches, including the sciences, knowledge is an exfoliation from practice — from practices, moreover, which we have inherited and not ourselves invented. When we theorize our practices, we are discerning coherences within them, not imposing from without any set of abstract principles. Like footpaths, our practices are made not from the footprints of any one man, but of uncounted generations of men. A cardinal error of rationalism, then, is to regard practice as unreformed, as being almost a state of nescience, unless it

is governed by a theory. As I have already observed, Oakeshott is not here subscribing to a (pragmatic or early Heideggerian) view that practical engagements — the engagements of making or doing things with the world we find around us — are somehow ‘primordial’ in the constitution of our experience. Rather, he is asserting that theory is in every sphere of life — that of poetry as much as that of practical engagement — a distillation or elucidation of practice or activity. But what does this mean for practical life? The intrusion of rationalism into politics has been by way of that peculiarly modern heresy, *political ideology*. A political ideology purports to be a set of principles by the application of which ideal, or at any rate, good government may be realized. Such an ideology may have all the pseudo-scientific elaboration of Marxism-Leninism, or it may be a collection of inchoate slogans (like contemporary American liberalism), but it always has the aspiration of applying universally valid principles or techniques to the vicissitudes of circumstance. The offspring of political rationalizing in our times have been prodigious. As Oakeshott observes:

The notion of founding a society, whether of individuals or of States, upon a Declaration of the Rights of Man is a creature of the rationalist brain, so also are ‘rational’ or racial self-determination when elevated into universal principles. The project of the so-called Re-Union of the Christian Churches, of open diplomacy, or a single tax, of a civil service whose members ‘have no qualifications other than their personal abilities’, of a self-consciously planned society, the Beveridge Report, the Education Act of 1944, Federalism, Nationalism, Votes for Women, the Catering Wages Act, the destruction of the Austro-Hungarian Empire, the World State (of H.G. Wells or anyone else), and the revival of Gaelic as the official language of Eire, are alike the progeny of rationalism.<sup>5</sup>

The impact of rationalism on political life in the west has, then, in Oakeshott's view, been substantial and destructive. It has had its starkest and most terrible effects, however, in the totalitarian regimes of our time, in which the practical knowledge which is our cultural inheritance has been thrown away and vast and novel machineries of oppression built up in the service of delusive theories. Against these excesses of rationalism, Oakeshott asks us to conceive human knowledge correctly, as primarily practical in all of its spheres (including those outside the realm of practical engagements), embodied principally in our habits, skills, dispositions and traditions, and only secondarily in our theorizings. If we view knowledge in

this way, if we see theory as only a shadow cast by practice, we will be inclined to see politics as a practical art, whose successful practice requires skill and nous rather than mastery of any doctrine. We will also be likely to see politics as an inherently open-ended activity, in which men ceaselessly renew their identities and communities, but do not progress towards an ideal goal:

In political activity, then, men sail a boundless and bottomless sea; there is neither harbour for shelter nor floor for anchorage, neither starting place nor appointed destination. The enterprise is to keep afloat on an even keel; the sea is both friend and enemy; and the seamanship consists in using resources of a traditional manner of behaviour to make a friend of every hostile occasion.<sup>6</sup>

It is worth noting here that, whereas Oakeshott identifies as distinctively modern the species of rationalism he criticizes, he detects its roots in ancient times. Thus, moral life in Europe has almost from the beginning of our culture been distorted by a rationalist preoccupation with self-consciousness, and this informs (or occludes) both the Greco-Roman and the Judaeo-Christian elements in our cultural tradition. As Oakeshott puts it: The form of contemporary western European morality has come to us from the distant past. It was determined in the first four centuries of the Christian era ... In that Greco-Roman world the old habits of moral behaviour had lost their vitality ... It was ... an age of intense moral self-consciousness, an age of moral reformers who, unavoidably preached a morality of the pursuit of ideals and taught a variety of dogmatic moral ideologies. The intellectual energy of the time was directed toward the determination of an ideal, and the moral energy towards the translation of that ideal into practice. Moral self-consciousness itself become a virtue: genuine morality was identified with 'the practice of philosophy' ... In short, what the Greco-Roman world of this period had to offer was a morality in which the self-conscious pursuit of moral ideals was pre-eminent.<sup>7</sup>

The European legacy from the Greco-Roman world was, then, and perhaps unavoidably, not a stable tradition of moral life, but instead a variety of moral ideologies. For this reason, the European moral inheritance partakes of the decadence of the late Roman world, and all subsequent moral disorder, including our own, is in some measure infected by that of the ancient world. Importantly, Oakeshott sees our inheritance from early Christianity as no less deformed by rationalism:

our inheritance from that other great source of our moral inspiration, from early Christianity, was of a similar character ... The morality of these (early Christian) communities was a custom of behaviour appropriate to the character of faith ... It was a way of living distinguished in its place and time by the absence of a formulated moral ideal ... But over these earlier Christian communities, in the course of two centuries, came a great change. The habit of moral behaviour was converted into the self-conscious pursuit of formulated moral ideals ... A Christian morality in the form of a way of life did not, of course, perish, and it has never completely disappeared. But from this time in the history of Christendom a Christian habit of moral behaviour (which had sprung from the circumstances of Christian life) was swamped by a Christian moral ideology.<sup>8</sup>

Oakeshott concludes:

The fact ... remains that the moral inheritance of western Europe, both from the classical culture of the ancient world and from Christianity, was not the gift of a morality of habitual behaviour, but of a moral ideology.<sup>9</sup>

Unlike many, if not most, who seek to diagnose the disorder of our culture, Oakeshott does not explain contemporary decadence by pointing out to the modernist rejection of classical culture in its Greco-Roman and Judaeo-Christian forms. Nor does he harbour any project of rolling back the frontiers of modernity. The thinkers from whom he has learnt most — Hobbes and Hegel, for example — were themselves unequivocal modernists. The totalitarian theorists of the past few centuries, by contract, were all of them — and above all Rousseau and Marx — enemies of modernity.

We have seen that, whereas Oakeshott adheres to none of the cruder doctrines of pragmatism, he conceives theory to be an afterthought of activity. It is activity or energy that is primordial, in all of the different spheres of experience, and theory can hope only to seek coherence in the stream of activity. The rationalist inversion of the proper relations between activity and theorizing has been responsible for one of the chief delusions of our age — the delusion that the open-ended adventure of political life can be confined within the precepts of an ideology. With respect to morality, the contemporary tendency to represent moral life as life governed by a system of explicitly formable maxims in principles has the most ancient roots — perhaps in Socratic reflection, and certainly in the twin inheritances of the Greco-Roman world and early Judaeo-Christian life. It

would seem that the dominant western intellectual and moral traditions are throughout beset with the rationalistic distortions Oakeshott identifies and criticizes.

### **Moral life and civil association in the modern world**

What, then, does Oakeshott have to say about the character of moral and political life in the modern world? Oakeshott's third major statement, his book *On Human Conduct*, seeks to delineate positively the forms of moral and political practice which distinguishes the modern European state. Oakeshott begins by characterizing morality — at least in the terms in which we know it — as a non-instrumental practice. This is to say that moral life has no end, goal or *telos* outside itself, and it does not stand in need of any external justification. Further, Oakeshott avers, there is not a single or ideal form of ethical life of which the variety of forms of life that we find among us are approximations. Rather, moralities are akin to vernacular languages, in that it is the nature of them to be several and diverse. If moral life is in this way non-instrumental, and so in one sense purposeless, so also are law and the form of civil association which is created by the union of law with morality, independent of any specific purpose. We come here to one of the key concepts in Oakeshott's later work — the conception, which he finds pre-figured in the thought of Hobbes and Hegel, of society as a *civil association* — an association among persons who, having no ends or purposes held necessarily in common, nevertheless coexist in peace under the rule of law. On this account, the office of law is not typically to impose any particular duty or goal on men, but instead seeks principally to facilitate their dealings with one another. Oakeshott goes so far as to claim that law does not restrict freedom at all, since it merely stipulates conditions and actions but does not enjoin or prohibit them. We need not endorse this, probably exaggerated, claim (which I shall examine later), to find an important insight in Oakeshott's argument that the rule of law in a civil society is not that of promoting general welfare or any other similar abstraction (such as fundamental rights), but rather of securing the conditions in which persons may themselves contract into mutually chosen activities. Thus, law seeks not to impose on society any preferred pattern of ends, but simply to facilitate individuals in their pursuit of their own ends. Law has itself, for this reason, no purpose.

In modern societies, a powerful rival has emerged to this conception of civil association as association under purpose-independent general rules — that conception of society as an *enterprise association*. In this latter conception, which is perhaps coeval with that of civil association, the State is understood as an organization for the attainment of a definite end, or hierarchy of ends. It is so understood by Bacon (who saw the end of government in the exploitation of the Earth's resources), by the mercantilists (who affirmed it to be the increase of national wealth), and by sundry Positivists and their disciples, such as Sidney and Beatrice Webb. This collectivist conception of society and government, while it has never completely extirpated the inheritance of civil association, has been dominant in our times — most clearly and widely in Soviet Communism and National Socialism, but also in the New Deal, the mixed or managed economy, Corporatism, and ‘welfare capitalism’. The idea of the state as an enterprise association, whether it be the idea of the Fabians, of Mussolini, of Bacon, or of Auguste Comte, is an idea inimical to any notion of a civil association among persons linked only by their common subscription to a non-instrumental rule of law. The idea of the State as an enterprise association is therefore inimical to the European achievement of individuality, whose political embodiment is in civil association.

The idea of enterprise association has been given practical reinforcement, according to Oakeshott, by a widespread revulsion from the ordeal of individuality which has accompanied civil association almost from its inception. This revulsion is expressed in the character Oakeshott calls the ‘anti-individual’ or ‘individual *manqué*’, who (unwilling or unable to shoulder the burden of freedom, still less to celebrate it) aims to create a compulsory community of others like himself in which the voice of individuality has been silenced. As Oakeshott has said:  
the circumstances of early modern Europe bred, not a single character, but two obliquely opposed characters, that of the individual and that of the individual *manqué*; and in one idiom or other they have been with us ever since those times.<sup>10</sup>

For Oakeshott, the ‘individual *manqué*’ of early modern Europe was the prelude to the modern anti-individual:

From the character of the individual *manqué* [was] evoked the character of the determined ‘anti-individual’, one intolerant not only of superiority but of difference, disposed to allow in others only a replica of himself, and



united with his fellows in a revulsion from distinctness. And they (the leaders of the individual *manqué*) urged him to seek his release in a state from which the last vestiges of civil association had been removed, a *solidarité commune* in which there was no distinction of persons and from which no one was to be exempt; a therapeutic corporation devoted to remedying the so-called alienation with which they had infused their followers.<sup>[11](#)</sup>

The slow transformation of civil into enterprise association, the decline of individuality and the near-triumph of the collectivist mentality, was then supported throughout by the emergent character of the anti-individual. It is Oakeshott's claim that, whereas the anti-individual has never succeeded in altogether repressing the experience of individuality, he has succeeded in shaping much in the policy and character of the modern State.

What, then, is the alternative to collectivism? For this, we turn to two of Oakeshott's most explicit essays, 'On being conservative' and 'The political economy of freedom'. What is needed, for Oakeshott, is in the first place a return to a tradition of limited government, in which we expect of the State no more than it can give. For this to be achieved, however, we must acquire in respect of government a conservative disposition which we are far from showing in any other area of life. And a conservative disposition in respect of government has its spring in:

the acceptance of the current condition of human circumstances ... the propensity to make our own choices and to find happiness in doing so, the variety of enterprises each pursued with passion, the diversity of beliefs each held with the conviction of its exclusive truth; the excess, the over-activity and the informal compromise. And the office of government is not to impose other beliefs and activities upon its subjects nor to tutor or to educate them, not to make them better or happier in another way, not to direct them, to galvanize them into action, to lead them or to coordinate their activities so that no occasion of conflict shall occur; the office of government is merely to rule. This is a specific and limited activity, easily corrupted when it is combined with any other, and in the circumstances, indispensable. The image of the ruler is the umpire whose business is to administer the rules of the game, or the chairman who governs the debate according to known rules but does not himself participate in it.<sup>[12](#)</sup>

In Oakeshott's paradoxical contention — and like all true paradoxes, it contains a vital truth — that this conservative conception of government as

a limited activity involving the making and enforcing of general rules is, in fact, peculiarly appropriate to a culture and an epoch which is prone to restless individualism in virtually every aspect of its life. Oakeshott is not blind to the fact that the adoption of such a limited conception for the tasks of government would entail a transformation of current beliefs and expectations that is little short of revolutionary. But this change, however radical, can come about only if we can regain our understanding of what it was that made England, for example, a free society for much of the eighteenth and nineteenth centuries. For, as Oakeshott writes:

the freedom which the English libertarian knows and values lies in a coherence of mutually supporting liberties, each of which amplifies the whole and none of which stands alone. It springs neither from the separation of church and state, nor from the rule of law, nor from private property, nor from parliamentary government, nor from the independence of the judiciary, nor from any one of the thousand devices and arrangements characteristic of our society, but from what each signifies and represents, namely, the absence from our society of overwhelming concentrations of power. This is the most general condition of our freedom, so general that all other conditions may be seen to be comprised within it.<sup>13</sup>

At a formal level, then, what is characteristic of civil association is that the rules which constitute it are non-instrumental: they do not embody any specific project, but instead act as conditions whereby individuals and groups pursue their own several and diverse projects. In its moral aspect, civil association is that mode of association which exemplifies individuality — the condition in which human beings accept and celebrate their autonomy, separateness and mortality. In its political dimension, civil association is characterized by the diffusion of power throughout society — by a complex structure of countervailing institutions of precisely the sort that is threatened by contemporary collectivist projects (of the Right and Left) of transforming government into an enterprise association. What is to be said of this powerful and challenging conception?

### **The vicissitudes of civil association**

In isolating the germ from which liberal theorizing sprang and took root, Oakeshott has done a unique service. Purified of irrelevant doctrinal accretions, and clarified with an unsurpassed sense of its historical

contingency, civil association as Oakeshott has elaborated it for us contains much, if not all, that was valuable in 'liberalism'. There are nevertheless questions surrounding this conception, and difficulties in its structure, which are worth exploring. One I have already mentioned in passing concerns the relations between law and liberty. Consider in this connection one of Oakeshott's most recent statements:

The expression 'the rule of law', taken precisely, stands for a mode of moral association exclusively in terms of the recognition of the authority of known, non-instrumental rules (that is, laws) which impose obligations to subscribe to adverbial conditions in the performance of the self-chosen activity of all who fall within their jurisdiction.<sup>14</sup>

A number of difficulties are suggested by this formulation. In the first place, the non-instrumentality of a rule is often a matter of dispute and typically a matter of degree. The paradigm case of a non-instrumental legal rule is the law enabling individuals to make wills and testaments; in English law, at any rate, a legal power is conferred upon individuals, but they are left at full liberty to avail themselves of it as they will, in whatever fashion they choose. Here the contrast, thereby drawn by Oakeshott in many of his writings, between laws and commands, or laws and politics, is clear enough. It is far less clear in the criminal law, in the law of marriage, or in the law of property. Oakeshott's canonical statement of the rule of law in terms of adverbial qualifications on self-chosen actions is designed to reconcile the claims of law with liberty. It is plain, however, that laws may be adverbial in form but extremely repressive of liberty in substance. We need only think of laws in communist lands, which might well be formulated so as not to abridge liberty of expression, provided only that it be engaged in 'unbourgeoisly'. Even a law that in effect proscribes religious practice might be formulated as to attach on meetings of more than a few persons the adverbial condition that they not be conducted 'prayerfully'. The formal requirement that laws be adverbial in form provides no security whatsoever against their restraining liberty. Nor, in all cases, should it do so. For on any natural reading of it, the criminal law abounds with straightforward prohibitions, which are and ought to be restrictive of the liberty of criminals. Again, how would we characterize Mosaic law, or Islamic law, if we held to the requirement that law be devoid of commands? If Oakeshott's formalist account of the rule of law does not have all the difficulties of other, similar accounts (such as Hayek's<sup>15</sup>) it nevertheless

runs together criteria of generality, non-instrumentality and liberty in a way that darkens rather than illuminates our understanding of the relation of law, liberty, and civil association.

These difficulties in Oakeshott's account of law have their origin in difficulties in his account of morality, and they suggest amendments in his account of the relations of *lex* (law) with *jus* (justice). In *On Human Conduct* and elsewhere, Oakeshott characterizes moral practices (of which law is one) in terms of their non-instrumentality. He is doubtless on the right track in insisting (contrary to any Benthamite conception) that the *telos* of moral life cannot be altogether external to it; moral life cannot be merely a means to something other than itself (happiness, general welfare, or whatever). Note, however, that non-instrumentality is a feature of many other things aside from moral practices: it characterizes codes of etiquette, for example, and many human engagements, such as love, friendship, and fishing. Even if non-instrumentality were a necessary feature of a moral practice, it would not be sufficient to identify it. Note, also, that the contrast between moral and other considerations of a more instrumental sort is far from being as clear-cut as Oakeshott's account requires. No such contrast is postulated in the ethics of Aristotle, and even with respect to our own moral life, our moral judgments often have an instrumental or consequential aspect inasmuch as they encompass estimates of the likely implications of our actions for the interest and well-being of ourselves and others. With us, certainly, moral life and deliberation are consequence-sensitive, even if they are never (as Oakeshott rightly observes) only assessments of the consequences of our actions. But this suggests that we cannot avoid appraising the laws we have, and proposals for their reform, by reference to standards having to do with their consequences for the interests, well-being, and liberty of those subject to them. After all, there may be a wide variety of rules, each of them no more or less non-instrumental than the rest, which qualify the conditions under which we may marry or divorce, acquire or alienate property, speak our mind, or keep our peace. In assessing the laws we have we cannot help appraising their contributions to the well-being of those who fall under them. Such appraisal cannot be conducted by appeal to supposedly absolute statements of abstract right or general welfare, but equally, it cannot do without the necessarily vague and open-textured consideration captured by terms such as 'liberty', 'public interest', and so forth. It is indeed by reference to such terms that we establish the *jus of lex*

— and in no other way. Even though political reasoning, like moral reasoning, is always undetermined by general principles, we must nevertheless have recourse to considerations of desirability whenever we deliberate the aptness or justice of a law. And, to this extent, law — or at least the legislative part of law — cannot be other than an exercise in policy.

### **Tradition, liberty, and the conditions of civil association**

In arguing that Oakeshott's conception of civil association identifies the most essential ingredient in 'liberalism', I have also argued that it gives us this in a form that is shorn of the illusions of doctrinal liberalism. Oakeshott does not pretend that civil association embodies any sort of universal prescription for political conduct, since he is concerned to stress the historical singularity of the circumstances which, in many European countries, but especially in England, made civil association a reality. If his account has a clear normative implication, it is that civil association is the expression in the context of the modern European state of the individualist morality which is the most distinctive achievement of our civilization. We may go further than Oakeshott himself does, and argue that the conception of civil association may be an appropriate and compelling one for those societies throughout the world which under the shocks of modernity are discovering the necessity of forging a civil society where none had existed, or of repairing it where (as in the Marxist states) it had been repressed or nearly destroyed. The idea of civil association, though it rightly repudiates the doctrinal liberal pretension to universal authority, at the same time has reference far beyond the cultural traditions which gave issue to it.

There is another side to the question of the saliency of the idea of civil association to the dilemmas of the modern State, and that has to do with its realization in western liberal democracies. The difficulty is not, at bottom, that in these States civil association is confronted by a powerful rival, enterprise association, since, as Oakeshott puts it himself, they have long been such, and 'their relationship is that of "sweet enemies"'.<sup>16</sup> The deeper difficulty is that the fund of practical knowledge on which such social order depends, and in particular the experience of individuality which sustains the political tradition which is the matrix of civil association, have in recent years been dissipated in a flood of cultural change. Many of these charges

have been specified by Oakeshott himself. He has diagnosed one major source of our current malaise in the domination of our discourse by the harsh and monotonous voice of the theoretical reason. He has also shown us that the origins of modern disorder and rationalist illusion go back a long way — to the very beginnings of our cultural tradition. But, if this is so, then we can hardly hope for any easy or swift release from our condition. Indeed, given that the deformation of thought by rationalist error has now produced a comprehensive loss of confidence in many areas of practical life, it is hard to see how a return to practice can help us, since practice is itself sick. Oakeshott tells us that, in our current disorder, we have no alternative to relying on our own resources: ‘In the end, the cure depends upon the strength of the patient; it depends upon the unimpaired relics of his knowledge of how to behave.’<sup>17</sup> It may reasonably be doubted that such relics of practical knowledge are to be found to any considerable extent in any twentieth-century modern society (except, perhaps, Japan) and, for that reason, it may be an illusion to look to them for a recovery from decadence or a corresponding restoration of individual freedom. Furthermore, it is surely likely that, if we abandon the ruling rationalist illusions of our epoch, much of our practical life is bound to be transformed. For, with us, practice is not an autonomous activity to which theory comes as an after-thought. Instead, by now, false theory and decadent practice are complementary and mutually supportive, and it may be doubted if there is in most modern societies any enclave of practice innocent of corruption by rationalist theorizing. Oakeshott has suggested that the decadence of modern moral and political life has origins that are as old as our cultural tradition itself. Perhaps for that very reason, he has no sympathy with the conservative critics of modernity. In the end, it may be that Oakeshott's thought points not backwards but forwards — to a condition of post-modernity in which what is left of traditional life is preserved in the context of a new self-understanding. Of such a condition, Oakeshott is wise enough to say nothing, since if it comes about it will be as an alteration in our mode of life and not in virtue of an advance in philosophical inquiry.

The domination of much in modern practice by previous rationalist theory is further reason to doubt that such an alternative in our mode of living will come easily to us. In some societies, such as the United States, where perceptive commentators on Oakeshott such as Gertrude Himmelfarb<sup>18</sup> have discerned a far-reaching moral revolution in many areas

of private and public life, it may not occur at all. If such a moral revolution has indeed occurred, then we can no longer hope to draw from a reservoir of unimpaired traditional knowledge so as to counteract the effects of radical theoreticians. Our difficulty goes deeper yet. The upshot of Oakeshott's account of moral and political reasoning is that it is tradition-dependent and particularistic in character. Universalizing theories, contrary to their self-understanding, take whatever content they possess from the specificities of the tradition they abridge. Thus the political theories of Hobbes and Locke, like the political discourse of Tories and Whigs, expressed a single political and moral tradition even as they debated and disputed with one another. In our time, with the advent of mass migration and of mass media, which convey knowledge of other traditions, our societies are no longer unified by a single cultural tradition, but harbour several different ways of life. There is much to welcome in this development, which has already enriched our cultural inheritance in many ways. It poses a dilemma which few theorists — and especially those liberals who have been most prominent in affecting to welcome it — have as yet fully addressed. Liberalism as a doctrine implicitly presupposed, what contemporary cultural pluralism destroys or diminishes, a single cultural tradition as undergirding the institutions of civil society. Those who welcome cultural diversity (as I do) must be ready to confront the task of maintaining civil society without much help from the resources of the cultural tradition which gave it birth and sustained it to maturity. As for liberalism, it can offer little more than a programme for the restoration of cultural conformity. How might Oakeshott's conception of civil association accommodate this moral challenge?

The task of the theorist, Oakeshott has told us, is not that of seeking to correct the practical knowledge of his culture or society, but instead to illuminate it by identifying its postulates. We must abandon the project of a prescriptive or foundational political philosophy, issuing in 'principles' or doctrines, and instead seek understanding of our own tradition and history. For us, I submit, this means theorizing our circumstance as inhabitants of a society sheltering a diversity of traditions, linked with each other by family resemblances and the presently dwindling common capital of shared practices of civil association. Much, perhaps most, of the insights of theorizing our current circumstance will be sceptical, negative, and prophylactic, helping us to see through the ruling cults of contemporary



political culture. A sceptical perspective on the hubristic claims of theories of fundamental rights, for example, can only be a healing influence inasmuch as such theories have encouraged a legalistic politics of adversarial confrontation and weakened the understanding of political life as a sphere in which interests are moderated and subject to reasonable compromise. And this points us to a more positive result of theorizing — that of recalling to us the saliency of that Hobbesian vision of man and society which, gained in the circumstances of early modernity, seems ever more compelling in the context of late modernity, or (as it may be) early post-modernity. The image it projects, of a restless band of castaways, among whom order is ever at risk, and who have little in common but aversion to violent death and a passion for self-assertion, is hardly an inapt metaphor of our condition; it is, whether we know it or not, the way we live. In this predicament, the Hobbesian search for a *modus vivendi*, reached and renewed through dialogue, rhetoric, bargaining, force, and all the devices of the political arts, is for us an historical fate, from which we are distracted as much by the hallucinatory perspectives of liberal philosophy as by the inordinate demands of mass democracy.

In trying to make clear his view of the relations of theory with practice in political life, Oakeshott has referred to J.S. Mill, who: abandoned reference to a general principle either as a reliable guide in political activity as a satisfactory explanatory device [and] put in its place a ‘theory of human progress’ and what he called a ‘philosophy of history’. The view I have expressed ... he tells us may be taken to represent a further stage in this intellectual pilgrimage, a stage reached when neither ‘principle’ (on account of what it turns out to be: a mere index of concrete behaviour) nor any general theory about the character and direction of social change seem to supply an adequate reference for explanation or for practical conduct.<sup>19</sup>

The result of my explanation is that we need to take yet a further step in the intellectual pilgrimage begun by Mill — from a position in which the claims of a theory of history are disavowed in favour of the intimations of a tradition to one in which, without even the guidance of a single tradition of moral or political behaviour, we seek for co-existence in the fragile peace of civil association.

## Notes

- [1](#) Michael Oakeshott, *Rationalism in Politics*, (London: Methuen, 1962) Preface.
- [2](#) Peter Winch, *The Idea of a Social Science*, (London: Routledge & Kegan Paul, 1956).
- [3](#) Michael Oakeshott, *On History and Other Essays*, (New Jersey: Barnes & Noble Books, 1983) footnote on p. 23.
- [4](#) Oakeshott, *Rationalism in Politics*, pp. 10–20.
- [5](#) *ibid.*, p. 6.
- [6](#) *ibid.*, p. 127.
- [7](#) *ibid.*, pp. 76–7.
- [8](#) *ibid.*, p. 77.
- [9](#) *ibid.*, p. 78.
- [10](#) Oakeshott, *On Human Conduct* (Oxford: Clarendon Press, 1975), p. 274.
- [11](#) *ibid.*, p. 278.
- [12](#) Oakeshott, *Rationalism in Politics*, p. 186.
- [13](#) *ibid.*, p. 40.
- [14](#) Oakeshott, *On History and Other Essays*, p. 136.
- [15](#) I have expounded and criticized Hayek's account of the rule of law in my *Hayek on Liberty*, 2nd edn (Oxford: Basil Blackwell, 1984) pp. 66–71.
- [16](#) Oakeshott, *On Human Conduct*, p. 326.
- [17](#) Oakeshott, *Rationalism in Politics*, p. 108.
- [18](#) G. Himmelfarb, 'Michael Oakeshott: the conservative disposition', in *Marriage and Morals among the Victorians*, (New York: Alfred Knopf, 1986), pp. 210–30.
- [19](#) Oakeshott, *Rationalism in Politics*, p. 136.

## Chapter twelve

# Mill's and other liberalisms

According to a common view, if anyone is a liberal, it is surely John Stuart Mill. In Mill's thought, so this conventional account runs, we find in the clearest form all the elements that together make up the liberal outlook. We find in Mill, accordingly, an uncompromising individualism, an unqualified affirmation of the priority of individual liberty over other political goods and the settled conviction that the human lot may be indefinitely improved upon by the judicious exercise of critical reason. Further, the political positions that Mill himself adopted during his lifetime — his support for democratic institutions, for the nascent feminist movement and for individual freedom from a tyrannous public opinion — would seem unambiguously to qualify him as a paradigmatic liberal thinker. After all, given these credentials, if Mill is not a liberal, who is?

My aim in this paper is to contest this received view by arguing that Mill's thought encompasses not one, but several distinct liberalisms. Within this variety of liberal perspectives in Mill's work, I shall argue, the dominant perspective is for many reasons the least compelling. The liberalism of *On Liberty* and *Principles of Political Economy* is, I submit, an ill-conceived compound of abstract individualism with proto-socialist Utopianism, which was eminently criticizable in Mill's time, and which we have every reason to repudiate today. It is this liberalism which among us is identified with Mill's, the incoherences of which I shall seek to trace in the complex structure of his moral theory. There is in Mill's work another liberalism, owing much to Tocqueville and to the vestiges of the Scottish

Enlightenment which survive in his thought, which has weathered the past century better than that with which he is commonly identified, but which we ought nevertheless to subject to criticism. This liberalism, with its recognition that progress depends on strong traditions and individuality on the preservation of a cultural inheritance, is a liberalism which goes against the current, not only of Mill's own dominant perspective, but also against that of the revisionary liberalisms which dominate (and occlude) contemporary political culture. This other, older liberalism has many important advantages over Mill's dominant liberalism, but also has decisive limitations which it shares with all forms of liberalism. For this reason, I shall contend, we need to theorize our condition in post-liberal terms which encompass a severe restriction on the scope and limits of political thought itself.

My argument for this view has three parts. In the first, I argue that the project undertaken in *On Liberty* — the project of grounding one very simple principle for the protection of liberty on a utilitarian foundation — was not, and could never have been, successful. Mill's project founders there, partly because of crippling disabilities in the Principle of Liberty itself, and partly because no account of justice can be theorized in entirely consequentialist terms. In advancing this first part of my argument, I shall invoke the revisionist interpretation of Mill's moral and political thought which has been developed by a number of recent writers,<sup>1</sup> including myself, and which I still hold to be accurate as an account of the intention and structure of Mill's doctrine of liberty. In the second part of my argument, I shall consider how the incoherences in Mill's fundamental moral theory bear on his proposals for social, economic, and political reform. Here I shall argue that Mill's dominant liberalism is in crucial respects indefensible, ill-considered, and flawed, both as a response to the circumstances of his age and to the dilemmas of our time. In the third and final section of my argument, I shall consider the relevance of the failure of Mill's dominant liberalism for the ruling liberalisms of our own age, in which many of Mill's errors and incoherences have been reproduced. I shall consider, in particular, the profound contemporary restatement of liberalism in the work of John Rawls, concluding that (despite its many advantages over Mill's predominant liberalism) Rawls's remains attached to the central errors and illusions of the new liberalism. Finally, I shall maintain that Rawls's

liberalism, no less than the liberalisms of Hayek and Nozick, is disabled by incoherences and indeterminacies that are fatal to liberalism itself.

### **The complex structure of Mill's utilitarian liberalism**

As it has been uncovered in recent work, Mill's is an indirect utilitarianism in which Utility figures as an axiological principle and not as a practical maxim. It is as a principle for the evaluation of states of affairs in the world, rather than a criterion of right conduct, that Utility operates in the account of the Art of Life which Mill gives in the *Logic*, and on which he trades in the theory of justice developed in the last part of *Utilitarianism*. The Principle of Utility tells us that happiness, and that alone, has intrinsic value. It does not tell us how we are to act. From Utility, it is true, Mill thinks there follows a Principle of Expediency, which specifies that an act is expedient if it issues in a net increment in utility, and maximally expedient if it brings about as much utility as any available alternative act. But the Principle of Expediency imposes no obligation on any agent to maximise utility. In Mill's theory of morality, agents have obligations, if and only if it is maximally expedient that they be liable to punishment for not acting as the obligation requires. It follows from this distinction between the expediency of an act and its obligatory character that an agent may act inexpediently without thereby failing to discharge an obligation grounded in utility. A person may act inexpediently, in other words, without acting wrongly. It is the aim of Mill's indirect utilitarianism to distinguish the requirements of morality from those of utility and, likewise, to distinguish within the sphere of practical life other domains, such as Prudence and Excellence, which have a similarly indirect relation to Utility.

In its applications in his political thought, Mill seeks to show how a system of maxims which constrains the pursuit of utility may none the less have a utilitarian justification. He tries to achieve this result by making the claim that, both individually and collectively,<sup>2</sup> direct utilitarian policy may be, often is, and sometimes must be self-defeating. Mill's political thought, and above all his doctrine of liberty, turn on the paradox, central to his moral theory, that we are best equipped to promote utility if we tie our hands in respect of the policies we may adopt to that end. Implicit in Mill's moral theory is the thesis, developed systematically in much recent work, that a world of direct utilitarian policy would not be maximally expedient,

since in it the sum of acts that maximized utility would not itself be a maximizing sum.<sup>3</sup> At the most formal level in the structure of his argument, it is this claim that Mill relies upon when he sets out to ground utility-constraining moral rights in the requirements of the Principle of Utility. This must be so, once we see the paradox in Mill's commending on utilitarian terms a principle — the Principle of Liberty — which stipulates that the fact that an act maximizes utility is no reason for doing it, if that act encompasses restraint of liberty where there is no question of harm to others.

For his argument that it is his Principle of Liberty, and not some other principle, that we are to adopt in our policy with regard to individual freedom, Mill relies on his conception of human happiness. As he theorizes it, human happiness is not a balance of pleasures over pains, a favourable accounting in a felicific calculus, but a condition in which persons flourish in the successful pursuit of self-chosen projects and activities. In this conception, which has clear Humboldtian and Aristotelian debts and affinities, the happiness of any person exhibits two features — the exercise of powers of autonomous choice and the expression of individuality. For Mill, happiness is a condition, somewhere between self-creation and self-discovery, in which a person realizes the requirements distinctive and even peculiar to his nature while at the same time exercising and enjoying his generically human powers of autonomous thought and action. The contention of the essay *On Liberty* is that happiness so conceived is best achieved in a free society governed by the Principle of Liberty. Mill's argument in that essay is not to be judged, as perhaps he intended it to be, as a self-contained exercise, sufficient to itself. Rather, it draws heavily on other passages in Mill's thought. Aside from those I have mentioned already, it trades on the account of the higher pleasures advanced in *Utilitarianism* — for the development of individuality, as theorized in *On Liberty*, comprehends the successful pursuit of ends chosen for their own sakes which are none other than the higher pleasures. Finally, as Mill's introductory reference to 'the permanent interests of man as a progressive being' suggests, the argument of *On Liberty* presupposes a theory of progress of the kind Mill was later to deploy in a more explicit and systematic fashion in *Considerations on Representative Government*. I will return later to the dependency of the liberalism of *On Liberty* on a flawed theory of progress.

The indirect utilitarianism which Mill applies in *On Liberty* is, then, a complex theory in which the Principle of Utility is an evaluative and not an action-guiding principle and direct utilitarian policy is condemned as self-defeating. This moral theory is put to work in *On Liberty* via a distinctive conception of happiness which Mill develops in that essay — a conception in which happiness has a link with liberty that is more than instrumental in virtue of the place of autonomy and individuality (and so, Mill supposes, of liberty) in the constitution of happiness. Whereas the formal structure of Mill's moral theory is given in the *Logic*, and a substantive content provided in *Utilitarianism*, it is in the *Liberty* that Mill's indirect utilitarian moral theory acquires its richest content. What are we to make of this train of argument and of the liberalism that it supports?

It is useful to begin by recalling Mill's own account of the project of the essay *On Liberty* — the project of formulating *one very simple principle*<sup>4</sup> for the regulation of individual liberty by law and opinion. Quite apart from the issue of whether Mill's principle is derivable, as he claims, from utilitarian considerations alone, it should be clear at once that it is singularly ill-fitted to perform the task he demanded of it in the *Liberty*. There are several reasons why the Principle of Liberty is not, and cannot be, the very simple principle Mill sought. In the first place, it specifies only the necessary, and not the sufficient condition of justified restraint: it tells us that an agent's liberty may be restricted, only if harm to others is thereby prevented. (I leave aside here an important ambiguity in the principle as to whether it be a general harm-prevention principle, or else a harmful-conduct principle.)<sup>5</sup> In other words, liberty may not justifiably be restricted *except* where harm to others may thereby be prevented. Now it is true that this is, on the negative side, a clear and simple enough principle. It is definite and unambiguous in ruling out as reasons for justifiable restraint paternalist, moralist, and welfarist considerations. (It also rules out the promotion by restraint of liberty of utility itself, so generating the central paradox of Mill's doctrine.) On the positive side, on the other hand, it tells us nothing as to when restraint of liberty is in fact justified: for that judgment, we must look to other principles — chiefly the Principle of Utility itself. Far from providing a simple, almost mechanical guide to policy about the restraint of liberty, Mill's principle is in its very nature radically incomplete. It tells us what we may not do, but not what we ought to do.



A judgment as to when liberty ought to be restricted must turn on the contribution such restraint makes to the promotion of general welfare. The successful application of Mill's principle, accordingly, presupposes that we are in a position to make disciplined judgments about aggregate social welfare. The deep difficulties in the way of making such judgments are familiar to us all even in the context of Bentham's felicific calculus and its successor-projects in the vain and absurd pursuit of a moral arithmetic. It may be, as some recent writers<sup>6</sup> have maintained, that problems of comparability and commensurability in respect of utilities can be overcome in at least some versions of utilitarianism — though I myself doubt this. There can be no doubt, on the other hand, that making judgments about aggregate social welfare poses intractable problems for Mill's utilitarianism. For Mill, after all, utility is not a simple property: it attaches only to happiness, but happiness is itself internally complex. How are we to weigh the distinct ingredients of happiness as to their on-balance contribution to utility? How, for example, are the higher pleasures to be traded off against the lower? (If less of a higher pleasure is worth more than more of a lower, how much higher pleasure equals how much that is lower?) It seems plain that, when happiness has been disaggregated into a diversity of ends pursued for their own sakes, there can in general be no global, on-balance judgments about aggregate happiness. The very idea of aggregation seems out of place in the context of Mill's conception of happiness. This is to say that Mill's problem is a deeper one than the traditional problem of making comparisons of utilities that are interpersonal — it is the problem posed by incommensurabilities which may arise in the context of a single life. This is a problem, identified in Mill's work first by Berlin and best theorized systematically in the recent work of Joseph Raz,<sup>7</sup> generated by indeterminacies and incoherences in practical reasoning in all of its modes. Applications of the Principle of Liberty, then, presuppose that we are able to make global judgments about personal and social welfare that are barely intelligible on Mill's own terms. It follows that, except perhaps in limiting cases, Mill's principle is useless in guiding policy about the restraint of liberty.

Even if the special problems of commensurability facing a utilitarianism, such as Mill's, in which happiness has been decomposed into a variety of intrinsic goods, could be overcome, there are crippling indeterminacies in the very statement of the Principle of Liberty itself. It is plain that, because

it always requires further principles for its application, Mill's principle does not tell us *how much* liberty may be given up for *how much* harm-prevention. But what, in any case, does Mill understand by harm? It is an obvious objection to Mill's project that conceptions of harm vary with competing moral outlooks, so that no Principle of Liberty whose application turns on judgments about harm can expect to resolve disputes between exponents of opposed moral perspectives. It was against this argument that I developed the theory of vital interests, maintaining that harm as Mill conceived of it consisted in injury to the interests in security and autonomy. But even if, as I still think, this is the most compelling interpretation of Mill's view, it fails to confer determinacy on his principle. For different policies of restraint of liberty, all of which are sanctioned by the principle as preventing harm to others, may effect the interests in autonomy and security in very different ways. Each interest may be injured (and promoted) in varying degrees. How are we to weigh a lesser injury to autonomy against a greater injury to security? Even within the Principle of Liberty itself, insuperable problems of commensurability break out when trade-offs must be made between harms to competing interests.

In some cases, perhaps, we are in a position to make the disciplined judgments about harm and welfare demanded by Mill's principle. I do not think this is often so, but where it is, other problems arise. Since it does not tell us how to trade off harm-prevention against restraint of liberty, the principle may license policies which are extremely inequitable in their resultant distribution of unfreedom. A policy of preventing serious harms by imposing severe restraints on the liberty of a small minority may well be the most utilitarianly efficient strategy in many cases. (This is so, whether the Principle of Liberty be construed as a general harm-prevention principle or as a harmful-conduct principle.) This is a result which must disturb any liberal, including Mill, but it flows inexorably from the maximizing structure of Mill's theory of practical reason, and it has large implications for the coherence of his indirect utilitarianism. It is not avoided by postulating (as I did in my book<sup>8</sup>) a Principle of Equity for the regulations of trade-offs between harm and liberty. Though there is textual support for attributing such a principle to Mill, there remains the fatal objection that, in the real world with which Mill was concerned, we can clearly identify some harm-prevention policies that are plainly inequitable but maximally

efficient. In those cases, adhering to a Principle of Equity is indefensible in utilitarian terms. I see no way out of this dilemma for Mill.

The problem of policies for the restraint of liberty that are at once maximally efficient and morally inequitable suggests other difficulties whose upshot is the unravelling of Mill's indirect utilitarian theory of morality and practical life. It is the central thesis of indirect utilitarian theory that, in virtue of the self-defeating effect of direct utilitarian policy, we are to govern our conduct by practical maxims which constrain our pursuit of general welfare. The Principle of Liberty is just such a maxim, as applied to law and opinion. The question now arises: why should we adhere to any such maxim when we know that by so doing we will sacrifice aggregate welfare? The question is not answered by making the rejoinder (which I made in my book<sup>9</sup>) that Mill's is not a rule-utilitarian but an indirect utilitarian theory. For though it is true that Mill's utilitarianism seeks to guide practice not only by the application of rules, but also by reliance on dispositions and sentiments, these latter will conflict with one another just as rules do. When we are in a circumstance of such practical conflict, how can we avoid ultimate appeal to the Principle of Utility? Within the context of Mill's thought on morality and practical reasoning, such an appeal is unavoidable. If this is so, then the barriers Mill seeks to erect between Utility, Expediency and Morality have been breached. This result can be circumvented only on the wholly fantastic supposition that a utilitarian moral code could be contrived within which such instances of practical conflict were unknown. In any imaginable real world, moral codes will contain gaps and contradictions and will confront novel dilemmas. In all such cases, appeal back to general welfare is the only recourse for a utilitarian theorist. Mill's indirect variant of utilitarianism then collapses into a form of sophisticated act-utilitarianism. For a sophisticated act-utilitarianism, however, there can be no question of adherence to exceptionless principle such as Mill's Principle of Liberty. Mill's doctrine of liberty founders in the wake of the collapse of his utilitarianism.

It is to be noted that the fatal objections to Mill's doctrine of liberty are not, primarily or centrally, ones which invoke the traditional resistance to a rights-based political theory being grounded in a goal-based moral theory. They do not turn on the supposition that moral theories may be grouped, clearly and usefully, into the mutually exclusive and jointly exhaustive categories of deontic and teleological theories. True, the arguments I have

advanced against Mill deploy a conventional distinction between aggregative and distributive considerations when they focus on problems of equity, but their fundamental intent is elsewhere. The most radical disability of Mill's doctrine of liberty is one that flows directly from his moral theory. It is in the inability of Mill's utilitarianism to make comparative judgments of aggregate welfare. The disaggregative or decompositional move which Mill makes in his theory of human happiness effectively disqualifies his making the aggregative judgments which are required of his theory if it is to retain its consequentialist character. This fundamental problem of commensurability is transmitted to the doctrine of liberty through the indeterminacies I have noted in the *Principle of Liberty* itself. It is these arguments, and not arguments that trade on banal and trite contrasts between deontic and teleological reasonings, which prove fatal to Mill's project in *On Liberty*. It is these arguments which have led Mill's most profound critics and interpreters to conclude that no defence of liberal values that is entirely consequentialist in content can hope to be successful. This is the conclusion reached by Berlin,<sup>10</sup> which seems to me irresistible. Contrary to the claims of Mill's most skilful apologists, such as Wollheim,<sup>11</sup> Mill's utilitarianism disintegrates under the critical pressure of the arguments I have adduced into a sort of muddled and unwitting value-pluralism. It should be evident enough that, from such a value-pluralism, no 'one very simple principle', of the sort Mill tried to state and defend in *On Liberty*, can possibly be derived. Mill's project in *On Liberty* fails, and is bound to fail, if only because of the incoherences in his moral theory which we have now identified.

### **Mill's predominant liberalism**

If the project of *On Liberty* fails, what of Mill's larger liberalism? The most distinctive elements in Mill's predominant liberalism are his conception of individuality and his theory of progress. It is on these foundations that his most characteristic liberalism stands — or, as I shall maintain, falls. By individuality Mill means a form of self-realization in which the powers of autonomous thought and choice that mark the human species are exercised in living a form of life in which the needs peculiar to each person's nature are satisfied. That individuality is a central value in any liberal perspective is not to be denied, but it is theorized by Mill in a radically defective way

that accounts for a fundamental error in his political thought. As Mill theorizes it, each of us realizes his individuality by making experiments in living. Such experiments are embodied in plans of life, often revised or altered by the use of autonomous thought and all autonomously chosen. They are conceived and implemented by individuals who have detached themselves critically from the social conventions which surround them and who, once so detached, are able to discover the unique needs of their natures. There are many objections, some of them fatal, to this way of theorizing individuality. By its invocation of a strong conception of autonomous choice, distanced from convention, it condemns as devoid of individuality all traditional forms of life. The man who accepts the way of life in which he was born as an inheritance to be explored and enjoyed, and who has no interest in trying out alternatives to it, cannot for Mill exhibit individuality, however stylish his personality may be. In ruling out traditional conduct as incapable of embodying or expressing individuality, Mill betrays a modernist prejudice which dismisses as repressive of individuality the ways in which almost all men have always lived. This objection has a reverse side. If a post-traditional society of Millian individualists were possible, it would be a society from which much variety had been drained and in which many options had been lost. At present, individuals may migrate across cultural traditions and established forms of life as well as practise variations on the one they have inherited. Again, traditions are not windowless monads, each uniquely individuated, but complex and elusive practices which mingle with and transform each other. These aspects of cultural traditions, or established forms of life, contribute greatly to the variety of experience among us. They ought to be cherished by all humanists and liberals. So far as I can see, however, they are inimical to the individuality Mill propagates, which (if it captures anything that is at all real) is a shadow cast by the form of life of the rationalist intelligentsia of late bourgeois Europe. In so far as it has had a practical embodiment, it is in the life-style of the anomic Bohemians of the world's great cities. It is an irony of this variety of liberalism that the conception of individuality which it celebrates should work so as to iron out differences among people to those, trivial and slight, which can be easily contained within the cramped life-styles of Bloomsbury and the Hamptons, with cultural variety being preserved in the great cities chiefly by their sheltering vast enclaves of traditional life (often contributed by recent immigrants).

Mill's notion of experiments in living, similarly, has intractable difficulties. Human lifetimes are mostly too short to permit any of us to sample more than a very few of the ways we might live. Besides, many forms of life demand a measure of commitment which sits uneasily with the attitude of an experimenter, and many have consequences that are irreversible. There is a very deep obscurity in the criteria of success and failure which are to be applied to experiments in living — an obscurity that arises, in part, from the strangeness of Mill's notion that each person has within him a quiddity, or unique nature, that is his to realize. The identities of persons are cultural artefacts, not natural facts. Each of us comes into the world with an endowment of biological uniqueness, but this becomes personal individuality only by our being initiated into a cultural tradition. We may have needs which our traditions do not satisfy or even recognize, but it makes no sense to suppose that there is in each of us a peculiar essence awaiting realization. As we know them, our identities are ramshackle and contingent affairs, the upshots of chance as much as of choice or endowment, they are complex and often discordant, and their careers often encompass radical or tragic choices in which some possibilities of development are curtailed or closed. As it is theorized by Mill, the idea of an experiment in living is a rationalistic fiction which neglects the artefactual character of personal identity and which does not acknowledge the dependence of personal individuality and human flourishing on a cultural tradition. This is to say only that there is much to support Hayek's attribution<sup>12</sup> to Mill of a false individualism in which individuality is set against social life and its sources in cultural tradition denied.

The neglect in Mill of the role of cultural tradition as the matrix of individuality infects his account of progress with a corresponding rationalist and abstract-individualist distortion. If we come to reflective awareness as practitioners of a cultural tradition, then all progress will depend on tradition, even if its result is utterly to transform the form of life which we inherit and are shaped by. The conception of tradition as the enemy of progress, and of individuals as unencumbered experimenters in living, refuses to recognize individuality as itself a cultural achievement and an artefact of tradition. Moreover, the enmity to tradition and custom which pervades Mill's work expresses his blindness to the indispensable role played by social conventions in enabling diverse individuals and ways of



living to coexist without constant recourse to legal coercion. A society without strong conventions would unavoidably be chaotic, resembling not so much the Bohemia which our great cities shelter, but rather a Hobbesian state of nature. The existence of social conventions is a precondition not only of peace, but also of liberty. This is so, even (or especially) when society contains — as ours does — several cultural traditions, and not a single dominant way of life. Each of these cultural traditions must exercise over its practitioners a constraint of opinion which Mill — possessed by an anxious concern with *liberté de mœurs* which is probably best explicable by his own deficiencies in self-assertion and by the self-divided contempt for bourgeois morality commonly found in intellectuals who are themselves incorrigibly bourgeois — must absurdly condemn as coercive. It is true that a liberal society need not be unified by a single moral code, but it cannot do without the coherence conferred on it by most social interactions being governed by convention. For this reason, convention and tradition are to be regarded as conditions of progress and not (as Mill ignorantly supposes) obstacles to it.

It follows from these considerations that progress is to be theorized very differently than it is in Mill's work. If there is such a thing as an experiment in living, it is collective and not individual, it is conducted by social groups held together by common traditions and practices and it is tried, not over a single lifetime, but across the generations. It is to experiments in living so theorized that Hayek refers when in his discussion of progress he observes: in social evolution, the decisive factor is not the selection of the physical and inheritable properties of the individuals but the selection by imitation of successful institutions and habits. Though this operates through the success of individuals and groups, what emerges is not an inheritable attribute of individuals, but ideas and skills — in short, the whole cultural inheritance which is passed on by learning and imitation.<sup>13</sup>

We need not endorse Hayek's version of cultural Darwinism<sup>14</sup> to see in these thoughts an invaluable corrective to rationalistic theories of progress of the Millian type. As Hayek perceives, successful innovations occur in social life via the unplanned adoption of new practices and by variations on established forms of life. It is not that new ideas emerge which then take hold in society, but almost the opposite: novel practices are tried out and, if they succeed, are theorized later. In this view, intellectual progress as the growth of theoretical knowledge is typically the step-child of innovation in



practical life. It is because he adopts this conception, in which the rationalist account of the relations between theory and practice is reversed, that Hayek has always followed his mentors in the Scottish School in asking what are the cultural and institutional preconditions of human progress. What allows novel and successful practices to appear, and to spread? And what inhibits them? These are questions which are barely addressed in Mill's work.

Hayek's remarks, then, embody an incisive criticism of Mill's conception of human progress. Aside from its reliance on a form of abstract individualism which suppresses the cultural matrices of individuality, Mill's account of progress — as stated canonically in the *Logic*, for example — is disabled by its uncritical intellectualism. According to Mill, it is the growth of knowledge that powers social change. For Mill, progress is an inherent tendency of the human mind, with historical development being controlled ultimately by innovation in the realm of ideas. What is most noteworthy in this conception is that the growth of knowledge is theorized as an autonomous tendency of the mind. Nowhere in Mill's writings, so far as I know, is there any extended or systematic discussion of the *institutional preconditions* of the growth of knowledge. Similarly, there is nowhere in Mill's work any systematic grasp of the institutional preconditions of the growth of wealth. Both dimensions of human progress are treated by Mill, with the utmost naïvety, in a psychologistic fashion in which their dependency on a specific framework of institutions is suppressed. It is, perhaps, worth remarking here that Mill's great blind spot regarding the institutional presuppositions of intellectual and technical change was not shared by Marx, nor by the Scottish thinkers from whom Marx learnt whatever is true in his doctrine. This vast lacuna in Mill's thought is all the more surprising when one recalls his father's (admittedly primitive and culturally chauvinistic) reflections on the conditions of progress in British India, and Mill's own consciousness of the dangers of 'Chinese stationariness'. His insight into the conditions of progress is limited to a recognition of the role that intellectual and personal liberties have had in it. Of the liberties of ownership and enterprise, and their role in a context of stable laws in facilitating the slow emergence of commercial society in England, Mill says little.

Mill's intellectualist and psychologistic interpretation of human progress, and his consequent neglect of its institutional conditions, infect many of his

proposals for reform with a sort of high-minded, and finally self-deceived, voluntarism. I do not mean by this to pass any blanket verdict of condemnation on Mill's reformist activities. Many of his proposals — for small-holdings in Ireland and for legal reforms in the status of women, for example — are acceptable from any point of view that is recognizably liberal. It is in Mill's most distinctive contributions to thought on key issues in public policy and political economy that we nevertheless confront the radical defects in the liberalism he was promoting. It is here that the traditional caricature of Mill as a fumbling and unprincipled eclectic best fits.

In his distributionist theorizings, in his proposals for a competitive syndicalism of worker-managed enterprises and in his utterly Utopian schemes for the attainment of a stationary state in the growth of population and capital, Mill evinced a distance from the real and irresistible trends of his own age which condemned his thought to political impotence. Throughout his writings on matters of policy and contemporary controversy, Mill's thought is infected with an anaemic intellectualism which, in neglecting systemic and historical constraints on comprehensive social change, succeeds only in generating delusive images of a reformed state of things which were taken seriously, if at all, only by a few devout bands of rationalist sectarians. For this reason, despite his immense influence as a logician and philosopher, Mill's political theorizing and reformist proposals had little, if any, impact on the law and opinion of his time, even as his attempt to build a half-way house between socialist and liberal theorizing about economic life was rejected or, more often, simply ignored by nineteenth- and twentieth-century working class movements. The most distinctive features of Mill's revisionary liberalism, motivated as it was by an interest in addressing the dilemmas of the day, is its utter practical nullity in the nineteenth century and in our own.

The limitations of Mill's predominant liberalism are partly limitations of his age, and partly of his own vision. He predicted none of the cataclysmic developments of the century following his death. Like almost all of his contemporaries, he tended always to extrapolate from the trends observable in his own time, and there is no doubt that he expected the dominant institutions of liberal England — parliamentary government and the free Press, for example — to spread across the world. It could not have occurred to him that the great bourgeois civilization of 1815–1914 would turn out to

be a century of peace and prosperity sandwiched between eras of war, poverty, and tyranny. With the likely exception of Nietzsche, all of his contemporaries shared Mill's lack of foresight: none of them glimpsed the apocalyptic twentieth-century realities of the Holocaust and the Gulag, of the inexorable proliferation of weapons of mass destruction, the rise of totalitarian political movements and the rebarbarization of former colonial territories by tribal conflicts and fundamentalist religions. For us, Mill can for the most part be only an eminent Victorian, whose thought speaks to us as little as does that of those other eminent Victorians so memorably satirized by Lytton Strachey.

If it shared fully in the prejudices and limitations of his age, Mill's thought also had weaknesses distinctive of and even peculiar to it. In spite of his attempts to free his view of man from the crudities of classical utilitarianism, his conception of human nature still seems to us at once narrowly rationalistic and unrealistically optimistic. Modern depth psychology has uncovered dark forces in the human mind that are deaf to the voice of liberal reason. Much of the history of our century has been dominated by mass movements, which Mill's account of human nature not only failed to predict but also cannot explain. The steady trajectory of progress which he expected depended in part on the realism of his account of man. Now that we know man to be more fixed and intractable than Mill's theory allowed, we have less reason to expect the human future to be an improvement on the past. History has not been kind to Mill's project of forging a new liberalism in response to the dilemmas of his age. His suspicion of democracy, and his proposals for the avoidance of a democratic tyranny of the majority, remain relevant to us, even if democratic institutions have not had the permanence and irreversibility Mill expected of them. Mill's central proposals for institutional reform are crippled by a voluntaristic Utopianism which fails to attend to the holistic aspects of economic systems and which has no grasp on the role played by the major institutions of commercial society in generating the steady growth in knowledge and wealth that Mill took for granted as an irresistible tendency of his time. For those reasons, Mill's project of a radical revision in liberalism is a failure, and his predominant liberalism has as little to say to us as it did to his contemporaries.

## **Our liberalisms**

Mill's political outlook is, throughout, one of studied ambivalence. His thought encompasses not one, but at least two liberalisms, of which the predominant one is the revisionary liberalism whose true progenitor he was. What chiefly distinguishes this new liberalism from classical liberalism (as that is found in the Scottish thinkers and in such French liberals as Tocqueville and Constant) is its peculiar combination of romantic expressivism<sup>15</sup> with hubristic rationalism. It is this revisionary liberalism, with its sentimental religion of humanity and abstract individualism, that Mill bequeathed to us and which pervades the conventional wisdom of our societies. There is another, older liberalism in Mill's work, the limits and scope of which I shall discuss later, but it is his revisionary liberalism which is replicated in all the dominant liberalisms of our time.<sup>16</sup> It is reproduced, most obviously, in such revisionary liberal theories as that of Gewirth, in which a vain attempt is made to ground positive welfare rights in the necessary conditions of human action, and in that of Dworkin, in which the requirements of an inchoate right to equal concern and respect are invoked as part of a programme of elevating to the status of universal truths the current banalities of American political culture. We have little to learn from these liberalisms, and nothing to hope of them.

The incoherences and indeterminacies, not indeed only of the new revisionary liberalism, but also of the older classical liberalism, are evident even in that most profound and subtle contribution to liberal thought made by the work of John Rawls. At the start of any criticism of Rawls's liberalism we must not neglect to mark the many decisive advantages it has over Mill's predominant outlook. Unlike Mill's, Rawls's liberalism is not disabled by the demands of a maximizing consequentialism which spawns inequities in the distribution of liberty and presupposes judgments of aggregate welfare which we are rarely in a position to make. Further, Rawls's central principle of liberty is not an intractably vague and inherently controversial harm principle<sup>17</sup> but, instead, a principle of greatest equal freedom which, despite its own difficulties, is a major advance on Mill's principle. Finally, and perhaps crucially, Rawls's liberalism, unlike Mill's, is explicitly a strictly political doctrine, which aims to depend at no point on comprehensive and disputable moral doctrines. For this reason, it does not depend on any endorsement of specific ideals of autonomy or individuality, though the legal order it sponsors will protect these ideals,

along with their rivals. In all these respects, Rawls's liberalism has crucial advantages over Mill's.

At the same time, Rawls's liberalism shares with Mill's certain deep and, in my judgment, intractable difficulties. These are first and foremost difficulties to do with the determinacy of the principles the theory is supposed to yield, and they are perhaps best considered in the context of Rawls's account of the content of the principle prescribing priority of liberty over other political and social goods. On the positive side, it is to be noted that in both of its formulations — as the Greatest Equal Liberal Principle and as the principle prescribing the most extensive system of equal basic liberties — the principle operates as a side-constraint and not as a maximizing principle. It aims to distribute the good of liberty to each, as each is owed it in justice, and not to try to maximize the good of liberty subject to the competing claims of other goods. This feature of Rawls's liberty principle is an important merit of it in terms of its consiliency with a liberal view in which persons are respected as ends, but it has (as I shall argue later) problems which afflict and paralyse any liberal principle of liberty which aims at fixity and determinacy. At this stage I wish to comment only on certain disabling aspects of Rawls's account of the priority of liberty as it has been developed in his recent work. As will be recalled, Rawls took a disaggregative or decompositional turn in regard to liberty when, in response to Hart's demonstration of the indeterminacy of the greatest liberty<sup>18</sup> he gave a content to his principle of liberty by working up a system of basic liberties. The disaggregative move was a boldly constructive one, inasmuch as Hart's challenge seemed otherwise bound to deprive liberalism of definite prescriptive content. For Hart's thesis, stated in its most fundamental and radical form, was that judgments of greatest or greater liberty could not in general be made without presupposing assessments of the importance, worthwhileness or value of the interests and involvements which the liberties under consideration facilitated or promoted. But this argument, if valid (as I think it is), gives a death-blow to the currently fashionable neo-Kantian and Anglo-American species of liberalism in which neutrality in respect of specific conceptions of the good is specified as part of the constitutive morality of liberalism.<sup>19</sup> It does so because it establishes that judgments of on-balance or maximal liberty express or rest upon judgments about the value or worth of the activities thereby released from restraint.

The ingenuity and resourcefulness of Rawls's rejoinder was in his combining a deliberately thinned-out and political conception of the good with a disaggregated and non-maximizing account of liberty. For all its radicalism and subtlety, however, Rawls's move fails, and its failure carries with it the coherence of liberalism as that political philosophy devoted to the priority of liberty, however conceived. Why is this?

Firstly, as I have argued elsewhere,<sup>20</sup> there is no compelling reason given in Rawls's later work for the attribution to the basic liberties of *fixity*. If, as Rawls correctly maintains, the content of justice as fairness is a distillation of the cultural and constitutional traditions of western Europe and the English-speaking democracies, there seems no reason why the content of the basic liberties should not vary as those traditions themselves change. Technological developments, cultural mutations, and the impact of contending political movements, will amend and transform the underlying traditions over time, so that some liberties that have hitherto been basic will wane and cease to be so, while others which have not will wax and become part of the basic set. The argument may be put in another way. It seems indefensible and unreasonably conservative for a particular moment in the life of the underlying traditions of the societies with which we are concerned to be selected and privileged as yielding a structure of basic liberties which, once derived, is carved in stone. I say this even though I have elsewhere argued,<sup>21</sup> and still hold, that Rawls's contractarian method is not, and cannot be, neutral in respect of the justice of rival economic systems, and therefore (in our circumstances) plausibly privileges certain economic liberties.

The deeper difficulty has to do with determinacy rather than fixity. Why is it supposed that a uniquely determinate set of basic liberties can be distilled (or constructed) from any given moment in the life of our political tradition? This second problem has itself at least two aspects. There is no reason that I can see for supposing that, even if we can reach agreement on the list of basic liberties, we can similarly come to convergence on the content of each of them. Even if freedom of expression, say, be agreed upon as one of the basic liberties, there is nothing in the theory of the basic liberties to tell us whether pornography (for example) is or is not protected as coming within freedom of expression. The content of each of the basic liberties is likely to be highly indeterminate. But, further, different specifications of the basic liberties will yield different conflicts among

them. If the content of each basic liberty is underdetermined by the theory of justice as fairness of which it is a central part, as I believe it is, then there is nothing to say that the system of basic liberties can be contoured so as to preclude conflict within it. Indeed, it is inherently plausible that the demands of the basic liberties will often conflict with each other — as, for example, when freedom of information collides with freedom as privacy — and I am unconvinced that such conflicts can be arbitrated within the theory. Finally, and most fundamentally, the borderline between the basic liberties and those that are not basic seems to be not only variable over time but often indefinite at any one time. The constitutionalist presumption that liberties may be ranked lexically into two categories, basic and non-basic, is defeated by judicial practice even in those jurisdictions, such as that of the United States, which refuse to acknowledge that conflicts among liberties often express the claims of contending political movements. The upshot of these multi-layered indeterminacies in Rawls's system of basic liberties is radical indeed. It is that no Principle of Liberty of the sort assigned a constitutive place in the political morality of liberalism — be it a Harm Principle, Greatest Equal Liberty Principle, or an account of the basic liberties — can be coherently or definitely stated.<sup>22</sup> In that case, liberalism itself becomes indeterminate and barely coherent. This is a result that undermines liberalism in both its revisionary and its classical formulations.

That classical liberalism is undone by this result, no less than revisionary liberalism, may be seen if we look briefly at recent attempts to restate and revise classical liberalism. Those formulations of contemporary classical liberalism that rest upon or issue in a theory of fundamental rights need not long detain us. Aside from its well-known foundationlessness and its dubiously Lockean character, Nozick's libertarian liberalism founders in the vagueness (and indeed opacity) of its central right or rights.<sup>23</sup> Lomasky's much richer and deeper account<sup>24</sup> nevertheless fails to give guidance as to how conflicts among rights are to be adjudicated and, at its foundational level, oscillates uneasily between a Kantian attribution of intrinsic value to project pursuit and a Humean conventionalist view of justice as a system of conventions whose observance is to the advantage of project pursuers. Fundamental-rights theory is in all of its forms subject to these vaguenesses and to the criticism, developed demonstratively by Raz in his recent masterly study,<sup>25</sup> that no political morality can ultimately be rights-based. Recent consequentialist formulations of classical liberalism fare little better.



In Hayek's system, to take the most systematic among recent statements, the priority of liberty and its demands are secured by a mistaken account of the rule of law as necessarily having a liberal content, and by an undefended conception of progress, in which a system of liberties encompassing economic freedoms of enterprise is defended as most conducive to material prosperity. For all the energy with which this view is worked out, it collapses in the end into a sort of cultural Darwinism which is easily criticized. Further, like any theory of progress, Hayek's is beset by intractable problems, akin to those which cripple Mill's account of happiness, inasmuch as it depends on the possibility of comparative judgments as between epochs and cultures having many elements that are incommensurable. The newer classical liberalism is then just as vulnerable to disabling indeterminacy and value-conflict as Rawls's revisionary liberalism.<sup>26</sup>

The lack of definite content of all our liberalisms with respect to the nature, distribution, and limits of the liberty it seeks to prioritize may be approached from another, and at first glance apparently contrary, perspective. For consider the device of the veil of ignorance in Rawls. Whereas its aim is to assure fair impartiality, its effect is to deny to the contractors knowledge of the particularities — the life-histories, historical inheritances and chosen attachments — which are constitutive of their identities. This is to say that, whereas few, if any, of us are Sandel's radically situated selves, we are all of us the characters we are in virtue of a network of diverse, sometimes conflicting, involvements and commitments — some chosen, others inherited. The device of the veil of ignorance is like any other universalizing move in devaluing the particulars which make us what we are for the sake of an abstract subjecthood which privileges the liberal form of life. We are then not Sikhs or Poles, Palestinians or Israelis, Blacks or Wasps, but merely persons, rights-bearing (and, doubtless also, gender-neutral) ciphers. The conception of abstract subjecthood which Rawls models in his conception of the person, whereas it does not exhibit the absurdities of Mill's notion of individuality, yet shares with Mill's conception the property of illicitly privileging the liberal form of life. Thus, the definite content which liberalism lacks as a genuinely culture-transcending doctrine is, accordingly, given it by its dependency on a particular cultural tradition — that which has secured a precarious hegemony over the miscellany of cultural traditions that Western societies

harbour. It is in the truth that liberalism's universal standpoint gains content only by its secreting a particular local perspective that liberalism's central and fatal incoherence is found.

### **After liberalism**

I have argued that Mill's work contains not one, but at least two liberalisms — a preponderant revisionary liberalism which is the progenitor of our presently dominant liberalisms and an older liberalism which harks back to the thought of the Scottish School and is informed by the realism and disillusionment of the post-revolutionary French liberals. Further, I have contended that both of the liberalisms spawned by Mill's work — that is to say, all our liberalisms — confront intractable problems of value-conflict and indeterminacy with respect to their constitutive principles. Finally, I have sought to identify as the core incoherence of liberalism itself the attempt to adopt a universal standpoint — whose content, however, turns out to be given by the local knowledge of Anglo-American political (or academic) culture. I submit that these difficulties of liberalism, together with the manifest historical and contemporary evidences of its exhaustion and debility as a practical political tradition, warrant our abandoning liberalism as a political doctrine.

Where, then, does the relinquishment of liberalism leave political thought, as it struggles to gain a leverage as political practice? Santayana says:

They [the liberals] were no doubt right to be confident that the world was moving toward the destruction of traditional institutions, privileges and beliefs; but the first half of the twentieth century has already made evident that their own wealth, taste and intellectual liberty will dissolve in some strange barbarism that will think them a good riddance.<sup>[27](#)</sup>

No doubt we would like to think Santayana mistaken in his assessment of the post-liberal condition, but how in any case is it to be theorized? It is far from my intention (or ambition) to attempt to sketch, even in outline, what a theory of post-liberal life (or, what comes to the same thing, of post-modernity) might look like. Two points are none the less clear. First, the sustaining myths of liberal modernity — myths of global progress, of fundamental rights and of a secular movement to a universal civilization — cannot be maintained even as useful fictions in the intellectual and political

context of the last decade of our century. If liberalism survives as a political faith, it will be in the irrelevant and formulaic way that Marxism has done in communist lands. The action, intellectual and political, will be elsewhere. The second point is that, with the abandonment of the hallucinatory perspective of universality, it is natural to seek to return theorizing to a consideration of the particularities of our circumstances, candidly recognized as such. Theorizing must then address human beings as we find them, with their particular histories, loyalties, and enmities. Such a move back to particularity cannot be innocent of a subversive impact on practice, however, inasmuch as our public rhetoric is still animated by the ‘fantasies of the *saeculum rationalisticum*, amid the dim ruins of which we now live’.<sup>28</sup> The very acknowledgement that liberal principles are a distillation from local practice, and not the deliverances of autonomous reason or the *telos* of historical development, must subvert current political practice in so far as it becomes reflexively a moment in public consciousness. Theorizing the post-liberal condition is, for these reasons, likely to be a factor in bringing it about, to the extent that theorizing the limitations of the liberal understanding is already to mark, and so to transgress, the limitations of liberal political culture.

As to the positive content of a post-liberal political theory, I have little to say on this occasion. A few remarks may be in order, however. Abandoning the fiction of universally apodictic rights or principles of justice, and returning to human beings in all their miscellaneity and local varieties, may well suggest the cogency of a perspective on political life in which it is theorized as the pursuit of a Hobbesian *modus vivendi*. Lacking universal principles with which to secure peaceful coexistence among us, we resort to compromise, bargaining and, in extremity, to the judicious use of force to preserve the peace. Though I cannot justify or defend this view here, I suggest that a Hobbesian view of political life, freed of the crudities of Hobbes's anthropology and psychology, shorn of the incoherent metaphor of social contract, and incorporating Humean insights into the role of conventions in doing what coercion alone cannot do to maintain peace, is likely to emerge as a powerful idiom in post-liberal theorizing. A perspective in which political life is viewed not as the attempt to realize abstract principles or ideals, or as a project of world improvement, but as the pursuit of intimations of peace (never itself to be achieved) may also incline the theorist to assess much of our historical inheritance of

institutions and practices from that point of view. The rule of law, a system of private or several property, and the limitation of governmental authority by constitution or (as in Britain) long-established precedent, may be seen as devices for circumventing occasions of conflict and for arbitrating it when it occurs. (It will be a distinctive feature of this view that, unlike any liberal view, it will acknowledge that not all occasions of conflict can be avoided, or resolved peacefully. It will indeed seek to return to consciousness that repressed idea — the idea of an insoluble political dilemma.) To this extent, post-liberal theorizing cannot easily avoid endorsing many of the institutions and practices that form part of the inheritance of liberal societies. In theorizing liberal practices as contingencies, as mutable artefacts which human inventiveness has forged in response to the singularities of our history and circumstances, we disprivilege liberalism itself, and acknowledge it to be only one among the political forms in which human flourishing may occur. If (as I would myself hope) we retain much of our historic inheritance of liberal practice, it will inevitably suffer mutation and amendment, now that our view of it is at least partly external.

It follows from these reasonings that a post-liberal theorizing of political life is inherently unlikely to be conservative in its relations with current (that is to say liberal) political practice. Other than that, it has no very determinate implications for practice. For it is distinctive of a post-liberal form of theorizing, I suggest, that in abandoning the search for universal principles of justice or rights, and returning thought to the vicissitudes of practice, it also relinquishes the liberal illusion that theory can ever govern, or even substantially illuminate practice. In insisting that what is essential in political life — the identities and communities which make us who we are — is contingent and accidental, and in refusing the myths of universal humanity and personhood, post-liberal thought also acknowledges the likelihood that its own prophylactic impact on practice will be limited. In repudiating liberal rationalism, we accept that our own criticisms of it are likely to have consequences that are restricted, but also inherently unpredictable. In this, we only acknowledge the homely truth that theory is the step-child of practice — a truth which many (especially in liberal cultures) will find boring, or even depressing. But, as one of our century's greatest liberal thinkers has recently noted,<sup>29</sup> there is no a priori reason for supposing that the truth, when it is discovered, should necessarily prove interesting; nor, I should add, that it be particularly comforting.

## Notes

- [1](#) For an account of the revisionary Mill scholarship, see my *Mill on Liberty: a Defence*, (London: Routledge & Kegan Paul, 1983), especially footnote 17, pp. 131–2.
- [2](#) On the self-defeating effect of many kinds of consequentialism, see Derek Parfit, *Reasons and Persons*, (Oxford: Clarendon Press, 1984) Part One.
- [3](#) This is the argument of D.H. Hodgson in his *Consequences of Utilitarianism*, (Oxford: Clarendon Press, 1967).
- [4](#) J.S. Mill, *Utilitarianism: On Liberty and the Considerations on Representative Government*, (London: Dent, 1972) p. 72.
- [5](#) I consider this ambiguity in my *Mill on Liberty*, p. 58.
- [6](#) James Friffin, *Well-being*, (Oxford: Clarendon Press, 1986).
- [7](#) See my *Mill on Liberty*, pp. 48–57.
- [8](#) *ibid.*, pp. 63–9.
- [9](#) *ibid.*, pp. 28–42.
- [10](#) Isaiah Berlin, ‘John Stuart Mill and the ends of life’, in *Four Essays on Liberty*, (Oxford: Oxford University Press, 1969) pp. 173–206.
- [11](#) Richard Wollheim, ‘John Stuart Mill and Isaiah Berlin: the ends of life and the preliminaries of morality’, in A. Ryan (ed.) *The Idea of Freedom*, (Oxford: Oxford University Press, 1979) pp. 253–69.
- [12](#) F.A. Hayek, ‘Individualism: true and false’, in *Individualism and Economic Order*, (London: Routledge & Kegan Paul, 1976) pp. 1–32.
- [13](#) F.A. Hayek, *The Constitution of Liberty*, (London: Routledge & Kegan Paul, 1960) p. 59.
- [14](#) I have criticized Hayek's cultural Darwinism in my *Hayek on Liberty*, 2nd edn (Oxford and New York: Basil Blackwell, 1986) pp. 140–5.
- [15](#) For a more sympathetic treatment of romantic liberalism, see Nancy Rosenbleum, *Another Liberalism*, (Cambridge, Mass.: Harvard University Press, 1987).
- [16](#) I have distinguished and discussed classical and revisionary liberalism in my *Liberalism*, (Milton Keynes and Minneapolis: Open University Press and the University of Minnesota Press, 1986), particularly [Chapter 5](#).
- [17](#) I characterize Mill's principle of liberty in this way, notwithstanding Joel Feinberg's definitive investigation of it in his magisterial *Harm to Others*, (Oxford and New York: Oxford University Press, 1984).
- [18](#) For a more extended discussion of this point, see my paper ‘Liberalism and the choice of liberties’, in [Chapter 9](#) of this volume.
- [19](#) For a powerful critique of neutralist liberalism, see Joseph Raz's *The Morality of Freedom*, (Oxford: Clarendon Press, 1986) [Chapter 5](#). The best defence of neutralist liberalism is in B. Ackerman's *Justice in the Liberal State*, (Newhaven and London: Yale University Press, 1980).
- [20](#) See my paper ‘Contractarian method, private property and the market economy’, in [Chapter 10](#) of this volume.
- [21](#) *ibid.*
- [22](#) I pass over Dworkin's claim that the constitutive morality of liberalism has to do with equality not liberty, since it is evident that the indeterminacy of Dworkian equality is even more hopeless than that of traditional liberty.
- [23](#) I argue this point in [Chapter 9](#) of this volume.
- [24](#) See L. Lomasky, *Rights, Persons and the Moral Community* (Oxford: Oxford University Press, 1987).
- [25](#) See Raz, *The Morality of Freedom*, [Chapters 7](#) and [8](#).
- [26](#) I distinguish between classical and revisionary liberalism in my *Liberalism*, (see note 16 above).
- [27](#) G. Santanya, *Dominations and Powers*, (Clifton, NJ: Augustus M. Kelley, 1972).
- [28](#) Michael Oakeshott, *Hobbes on Civil Association*, (Oxford: Basil Blackwell, 1975) p. 71.

[29](#) Isaiah Berlin, 'On the pursuit of the ideal', *New York Review of Books*, March 17, 1988 p. 18.

## **Postscript: after liberalism**

It is characteristic, and perhaps definitive, of liberalism that it should seek to ground the historical contingencies of liberal practice in a foundation of universally valid principles. No aspiration is more peculiarly liberal. For it is distinctive of liberal thinkers to deny that there is within the diversity of forms of government and society disclosed to us in history a legitimate variety of frameworks for human well-being. Accordingly, if, say, the feudal orders of medieval Europe are conceded any legitimacy, then it can derive for the liberal mind (as for the Marxist theorist) only from their role as necessary stages on the way to a form of life having universal authority. Liberalism, which in its applications to personal conduct aims for toleration and even pluralism, is in its political demands an expression of intolerance, since it denies the evident truth that many very different forms of government may, each in its own way, contribute to an authentic mode of human well-being. From the first, liberalism has always strenuously resisted this commonplace observation, since it cannot but undermine the claim to universal authority of liberalism as a political faith — a claim which exhibits the structural similarity of liberalism to the evangelizing Christianity of which it is the illegitimate offspring. No liberal can accept (without thereby ceasing to be a liberal) that liberal practice expresses and embodies only one among many ranges of often conflicting and sometimes incommensurable varieties of human flourishing. For the liberal, then, a liberal society is not merely one of the options open to human beings, but a



moral necessity. All non-liberal societies stand condemned, together with the excellences and virtues which they harboured. Because of its universalizing doctrinal zeal, liberal thought has always sought to elevate liberal practice into a set of principles, and then to demonstrate the unique claim on reason of those principles. In other words, more perhaps than any other intellectual tradition in western political thought (save the aberration of Marxism) liberalism has constantly tried to transform itself into an ideology. It is an upshot of the essays collected in this volume that this project of a liberal ideology is a failure, and can be nothing else.

In considering the most important recent contributions to liberal thought, I have examined and found wanting all the major justificatory strategies in the project of constructing a liberal ideology. Whether they be utilitarian or contractarian, rights-based or framed in terms of a conception of human flourishing, all these argumentative strategies founder in common incoherences and indeterminacies. This is to say that liberal ideology is beset with certain constitutive and incorrigible disabilities, which ruin it as a project, whatever its central morality may be. My aim in this postscript is to exhibit in a systematic and detailed way the failure of liberal ideology by assessing three dominant strategies of argument aiming to privilege liberal orders over other forms of political life. The result of this assessment is that none of the three strands of argument eventuates in a Principle of Liberty that is coherent or determinate, and none shows liberty to have a priority over other political goods that is universally compelling. If the supposedly universal principles of liberal political morality dissolve into indeterminacy on analysis, we can then begin to perceive the spuriousness of liberal notions of universal humanity and abstract personhood — notions whose only value is to summarize or abbreviate (very imperfectly) certain passages in the historic experience of specific liberal societies. A central disability of liberal ideology, then, in addition to the indeterminacies infecting its constitutive principles, is its blindness to the historical singularity of its distinctive forms of self-identity and self-understanding. If we abandon the delusive perspective of universality, however, then we can see liberal society as a historical achievement, an inheritance of institutions and traditions which informs our thought and practice in profound ways, but which we are bound to acknowledge has no universally apodictic character.

In the last section of this postscript, I shall consider what comes after we accept that liberal society cannot be justified by appeal to universal human nature or reason, but has only a local authority. What does this recognition portend for the liberal institutions and practices we have inherited? I shall submit that, as heirs to the modern experience of individuality and variety in forms of life and thought, we cannot pretend to roll back the heritage of liberal identity (as some recent communitarian thinkers have supposed we might) in the interests of an earlier, and largely imaginary pre-liberal form of non-individualist moral life. For us, at least, individualism is a historical fate, which we can seek to moderate but not to evade. Our circumstance, then, is the paradoxical one of post-moderns, whose self-understanding is shaped by the liberal form of life, but without its legitimating myths, which philosophic inquiry has dispelled. A question arises as to whether this circumstance is likely to be confronted by most or all contemporary cultures, as they struggle towards modernity only to discover the foundationlessness of the modern project. A larger and a deeper question arises as to what can be the task of philosophical inquiry, when not only the project of the Enlightenment, but also that of the Socratic founders of the very subject are seen to be misconceived. The ruination of the project of a liberal ideology will then be seen as encompassing the end of an intellectual tradition central to our self-understanding in the west, and this suggests a final question. What might replace the traditional conception of political philosophy (whose last instance is found in liberalism) when that has been subverted by philosophical inquiry? Let us, however, before we address these subtle issues, explore and assess the dominant modes of liberal argumentation in recent writings.

### **The argument from ignorance**

A persistent strand in liberal argument is in the claim that a liberal order is commended to us, and even forced upon us, by a recognition of human ignorance. The argument has many variations, but common to all of them is the thesis that, inasmuch as human knowledge and understanding are limited, and because they may be expected to develop and grow best in freedom, we are bound to adopt a form of society and government in which freedom, the most important among the conditions of the growth of knowledge, is guaranteed. Before we turn to look at this argument in its variety and detail, it is worth remarking on a neglected detail of it. It is a

consequentialist argument, in which the vital contribution to human well-being of the growth of knowledge is presupposed but undefended. It may be that human knowledge grows fastest in a liberal society (though this can at most be an exception-ridden generalization, and not a universal truth), but what is there to assure us that human welfare is thereby promoted? It is a cliché among contemporary moralists, but one which contains some truth, that the growth of scientific knowledge has not unequivocally or uniformly promoted human interests. The balance of advantage to human well-being may even be the other way. Aside from the technologies of mass destruction, which have been made possible by the growth of scientific knowledge and which may very well put an end to all human well-being, many other scientific advances have had a problematic and questionable impact on human interests. It is far from clear that developments in medicine, for example, have tended to enhance the quality of human life on balance (though there can be no doubt of their impact, along with better diet and hygiene, on longevity). Perhaps this is only to say that the contribution made to the human good by scientific and technological progress depends on the use we make of it — an exceedingly obvious truth.

We can go further, however, and reasonably question the contribution to human well-being of the growth of knowledge in other areas of human life. Is it manifest that the knowledge of other cultures given us by the mass media of communication has been a good, unequivocally or on balance? Is it plain that the insight into the mortality of all cultures given us by a highly developed historical sensibility is a good? It may well be that the growth of knowledge of other cultures and other epochs may weaken and undermine confidence in their own cultures by those who acquire it. It may be that modern life, with the explosive increase in cultural horizons and self-critical reflexivity it comprehends, triggers a disposition to sceptical reflection by which (as Bernard Williams has recently argued<sup>1</sup>) the sum of our moral knowledge is actually depleted. These questions may be unanswerable, partly because there may be no way in general of weighing the gains and losses to human well-being of the growth of different sorts of knowledge, and partly because (as Williams's argument suggests) the growth of one sort of knowledge (theoretical and discursive) may involve a decline in other (practical and unarticulated) sorts. If, however, we were unable to weigh the contribution to human well-being of the waxing and waning of different kinds of knowledge, no consequentialist argument of this sort could be

made. Less radically, we may not pronounce on whether an on-balance assessment of the benefits and costs of a rapid growth in human knowledge is, in principle, impossible, but instead observe that we lack the evidence on which to base a definite judgment. We may none the less find not unreasonable the suspicion, voiced by Rousseau among others, that the enlargement of human horizons produced by the increase of knowledge may weaken the human spirit as much as (or more than) it strengthens it. In general, if it is not to rest entirely on a Platonistic or Moorean assertion that knowledge has intrinsic value regardless of its positive or negative contribution to human well-being, this strand of liberal argument must be able to tell a plausible story about the relations between the increase in knowledge and the amelioration of the human lot. It cannot be said that any such story has yet been told.

In its most influential form, the liberal argument from ignorance is the argument from human fallibility. This is the argument of J.S. Mill in *On Liberty*, in which he affirmed that knowledge grows by constant contestation of received opinion, and moral knowledge by successive experiments in living, and it is the argument of Karl Popper in *The Open Society and Its Enemies* and other writings. We need not fasten on the most evident weaknesses of Mill's argument to show that it fails. We need not, for example, address Mill's absurd claim that censorship presupposes an assertion of infallibility on the part of the censor in his belief in the falsity of that which is to be censored, if only because we can easily enough envisage circumstances in which censorship of something known to be true can be justified on utilitarian grounds. The real weaknesses of Mill's argument are more fundamental and radical. Take first his claim that scientific knowledge grows best in a milieu of unfettered contestation. It is a result of recent work in the history, sociology, and philosophy of science, by Polanyi, Kuhn, and others, that the continued growth of scientific knowledge requires dogmatism in the scientific community just as much as criticism. In the real world, scientific communities bear very little resemblance to the relentlessly self-critical explorers and truth-seekers celebrated by Mill and Popper. It has indeed been powerfully argued by Feyerabend<sup>2</sup> that the history of science suggests the contrary — that scientific progress would be retarded or halted if practitioners adhered to Millian or Popperian methodologies. If it is unclear that scientific knowledge grows best in a scientific community devoted to unencumbered

criticism and self-criticism, it is just as doubtful that the progress of science depends upon the institutions of a liberal society. For all its manifold dependencies on western research, the Soviet scientific establishment suggests that the scientific community may be accorded a measure of freedom while freedom is denied to most of the rest of society, and yet scientific knowledge grows apace. In historical terms, to be sure, there may be a weak generalization to the effect that, on the whole, science has in modern times flourished best in liberal democracies, but there is plainly nothing inexorable in this connection.

It is in regard to moral knowledge that Mill's argument is at its weakest. Here Mill's contention is that moral knowledge — that is to say, knowledge of the forms of life most appropriate to individual human well-being and so (as Mill supposed) to the general welfare — may be accumulated by the adoption of experiments in living. Now it is thoroughly obscure how this knowledge relates to the knowledge articulated in a science of character, or Ethology, of which Mill wrote in the later sections of his *System of Logic*, but it appears that Mill thought of the knowledge yielded by experiments in living as a sort of practical knowledge from which, however, theoretical propositions could be derived. There are insuperable difficulties in this conception. We do not know what is to count as *a criterion of success* in an experiment in living. Does the experiment (in order to be successful) have to enhance the well-being of the experimenter? Or is it enough that it promote the welfare of society at large? Would an experiment that undoubtedly enhanced the well-being of the experimenter and of society, but which depended on beliefs that proved to be demonstrably false, be accounted a success or a failure? Again, how are we to know when the relevant evidence is before us? How are we to know when the experiment has been completed? Human lives are short and chancy affairs and few of us have the opportunity to alter our lives over and over again. Further, the attitude of an experimenter consorts uneasily with many forms of life which have long-term commitment as a constitutive ingredient, and it will always be a hard (and sometimes an unanswerable) question whether the abandonment of such a form of life by its practitioner is symptomatic of a failing in the form of life or in the practitioner. In short, there are vast impediments to the successful translation of whatever scanty practical knowledge may be gleaned from experiments in living into theoretical

terms. It is this difficulty which probably accounts for the absence from Mill's science of Ethology of any substantive or testable theories.

The defence of freedom of thought and action by way of the conception of experiments in living in any case faces a basic dilemma. On the one hand, the argument seems to presuppose that we have at present virtually no dependable knowledge as to how human life may profitably be lived, but must seek it through trial and error. This suggests, what is hard to envisage, that the entirety of received moral knowledge must be put to question — a procedure that is surely as impossible as it is undesirable. Our inheritance of practical and moral knowledge can be amended and refashioned (like Neurath's ship on the high seas) only piecemeal, in its parts — we only drown if we try to build it anew. On the other hand, supposing that the method of experiments in living were to yield definite results, would not the knowledge thereby gained effectively disqualify the forms of life embodied in failed experiments from protection by liberal freedom? In other words, what reason is there for according further freedom of action in respect of a form of life which experimentation has shown to be disastrous? There is here an irresolvable conflict between the claim of individuals to live as they please and the defence of that freedom in terms of cumulative moral knowledge of the conditions of human well-being.

It may be that we are here taking too literally and seriously Mill's talk of experimentation with forms of life. It is true that the project of a new moral science adumbrated in *A System of Logic* aims for just the sort of knowledge Mill hoped from experiments in living. At the same time, a number of perceptive commentators, including P.F. Strawson,<sup>3</sup> have seen in Mill's thought intimations of a deep scepticism about truth in ethics. If this were so, Mill would not be a fallibilist about moral beliefs, there could be no progress in morality and the choice of an ideal life would be merely a matter of preference. I doubt that there is much in Mill's thought that can reasonably be interpreted as adopting this kind of scepticism. Even if there is room for such an interpretation, it does not help Mill's argument for liberty, since from meta-ethical scepticism nothing follows for substantive morality. If ideals are a matter of taste alone, nothing can count against the adoption of an illiberal ideal of society and government, or against adopting an ideal of personal life that can be realized only in an illiberal society. Such a blank value-scepticism is a dead end for political philosophy, liberal or

otherwise, unless it is combined (as it is most subtly in Hume's political thought) with a no less strong naturalism about moral life.

The Humean combination of naturalism with scepticism in ethics and politics is not open to Mill for a number of reasons. To start with, Hume thought that human nature was fairly invariant across epochs and cultures, and for this reason he thought we possessed already most of the moral knowledge we need to live well. There is little space in Hume's thought for the idea of progress in moral knowledge and none for the idea of experiments in living. Mill's thought, on the other hand, oscillates between the incompatible views that human nature is relatively fixed and knowable, and that it is largely indeterminate. This latter view, a commonplace in the sceptical liberalisms of our own time, has been trenchantly criticized by Santayana:

this liberal view implies a certain view of the relation of man in the universe. It implies that the ultimate environment, divine or natural, is either chaotic in itself or undiscoverable by human science, and that human nature, too, is either radically various or only determinable in a few essentials, round which individual variations play *ad libitum*. For this reason, no normal religion, science, art, or way of happiness can be prescribed. These remain always open, even in their foundations, for each man to arrange for himself.<sup>4</sup>

If the project of experimenting with life is to have any prospect of yielding cumulative knowledge, this sort of radical uncertainty about human nature must be discounted. If we do discount it, it seems that the experimental method must yield knowledge that weakens the case for liberty.<sup>5</sup> Either way, Mill's argument is self-defeating. For, if human nature is unknowable or indeterminate, there can be no reason for supposing that illiberal orders may not turn out to be the most successful experiments (supposing any such assessment to be meaningful and possible). If human nature is progressively knowable, and moral knowledge cumulative, the sphere of liberty will wane as human knowledge waxes. It was this frightening possibility of a post-liberal order — the possibility, that is to say, that the value of liberty dwindles as human ignorance is reduced — that Mill sought unsuccessfully to exercise in his important and neglected study, *Auguste Comte and Positivism*. That progressive enlightenment about the conditions and content of the good life may weaken toleration of forms of life which enlightenment has discredited, is an irony that haunts all those



liberalisms which ground the worth of liberty in the fact of human fallibility.

A different, and in many ways a subtler and more compelling argument from ignorance to liberty has been advanced in our own day by F.A. Hayek. Here the crucial claim is not a straightforwardly fallibilist one, but rather the claim that much of our knowledge is, and will always remain, practical knowledge, which cannot be entirely or even largely theorized or articulated. This is embodied knowledge, knowledge stored or buried in traditions, skills and dispositions, much of it unrecoverable reflectively and unstatable discursively. This argument for individual liberty is not one that can easily be weakened by scientific advance. It is the argument that a regime of liberty achieves, what no scheme of planning could emulate, a competition among rival practices and traditions in which those bearing the most practical knowledge prevail. In part this is the argument that a system of liberty enables us to use and benefit from knowledge which would be squandered or neglected in an authoritarian system. As Hayek put it:

It is worth our while to consider for a moment what would happen if only what was agreed to be the best available knowledge were to be used in all action. If all attempts that seemed wasteful in the light of generally accepted knowledge were prohibited and only such questions asked, or such experiments tried, as seemed significant in the light of ruling opinion, mankind might well reach a point where its knowledge enabled it to predict the consequences of all conventional actions and to avoid all disappointment or failure. Man would then seem to have subjected his surroundings to his reason, for he would attempt only those things which were totally predictable in their results. We might conceive of a civilisation coming to a standstill, not because the possibilities of further growth had been exhausted, but because man had succeeded in so completely subjecting all his actions and his immediate surroundings to his existing state of knowledge that there would be no occasion for new knowledge to appear.<sup>6</sup>

This is a most powerful argument against the sort of holistic social and economic planning attempted, with predictably disastrous results, in State-socialist regimes. There is in Hayek another strand of argument, in which it is claimed that there exists in free societies a sort of filter process whereby false beliefs and maladaptive practices are winnowed out in a competition between rival traditions or forms of life. Thus we find Hayek arguing:

in social evolution, the decisive factor is not the selection of the physical and inheritable properties of the individuals but the selection by imitation of successful institutions and habits.<sup>7</sup>

He goes on to say:

The existence of individuals and groups simultaneously observing partially different rules provides the opportunity for the selection of the more effective ones.<sup>8</sup>

Finally, and most unequivocally, he states:

It is, of course, a mistake to believe that we can draw conclusions about what our values ought to be simply because we realise that they are a product of evolution. But we cannot reasonably doubt that these values are created and altered by the same evolutionary forces that have produced our intelligence. All that we can know is that the ultimate decision about what is good or bad will be made not by individual human wisdom but by the decline of the groups that have adhered to the wrong beliefs.<sup>9</sup>

This is a much more disputable claim. It assumes that there exists in social life in general a filter mechanism for the selection of belief systems and practices akin to that which exists for business enterprises in an unregulated market. Nothing in Hayek's work specifies the nature of such a mechanism and it is, a priori, implausible that any such thing operates in social life. When we consider human history, we find nothing like the evolutionary functionalism that Hayek hypothesizes, but instead a succession of singularities. There are many cases, indeed, when cultural groups decline, not because their beliefs are false or their traditions maladaptive, but simply because political power is used to suppress them or their culture. The on-going genocide of Tibetan cultural traditions is a case in point — and one in which a noble and subtle culture is being destroyed and replaced by barbarism. It is, in general, absurdly optimistic to suppose that there exists in history any mechanism whereby the cultural groups that survive or prevail are in any morally acceptable sense better than those which perish — if anything, the contrary generalization would seem truer. Again, what is the criterion of functional success? In his latest work,<sup>10</sup> Hayek has suggested that it must be a criterion of human numbers: that social system, set of practices or cultural tradition is to be judged best in functional terms which secures the greatest increase in human numbers. Aside from the arbitrariness (and morally repugnant character) of this proposal, it should be obvious that nothing guarantees that it will be

satisfied by the liberal market society Hayek himself favours, since that may well prove to be short-lived. Other, authoritarian or totalitarian societies may outlast it and, over the long run of many generations, sustain a larger human population than have liberal market societies. Hayek's hypothesis of a filter mechanism which selects out false beliefs and outworn practices in human society has all the fatal flaws of the Spencerian cultural Darwinism it so strikingly resembles.

There are, in any case, radical objections to the idea that the transmission across the generations of traditions of tacit or practical knowledge approximates truth and so yields a genuine increase in knowledge. Our inheritance of practical knowledge doubtless contains much *tacit error* and it is not in the least clear why this should not be reproduced along with the truth our tacit beliefs contain. Tacit error is, indeed, likely to be transmitted and reproduced, if (as will presumably often be the case) it is in some sense functionally adaptive. This an objection to evolutionary epistemology in all of its forms — that there is no reason whatever for supposing that the web of belief which has emerged via natural and cultural evolution mirrors nature or tracks reality. It will do so, according to evolutionary theory itself, only in so far as such mirroring or tracking enhances survival chances. There is, in fact, nothing a priori to tell against the possibility that false belief-systems may sometimes give their holders a competitive edge in the survival stakes, if unreasonable optimism, or false religious or other hopes, are useful in sustaining them in adversity. In general, the evolutionary epistemology of which Hayek's cultural evolutionism is a variant neglects the fundamental insight that there is no pre-ordained harmony and no inevitable connection between human well-being and the promotion of truth.

This last point is a comprehensive objection to the argument to liberty from ignorance. Every such argument presupposes, what is often questionable and sometimes plainly false, that truth or the growth of knowledge are paramount among human interests. Often enough, the pursuit of truth comes into competition with other, weightier interests. This is an objection to that variation in the argument from the promotion of knowledge to liberty, advanced by Habermas and some classical liberals influenced by him,<sup>11</sup> which grounds individual liberty in *dialogue rights*. Such an argument takes for granted, not only that unencumbered dialogue results in convergence on common beliefs, but also that the human interest

in dialogue and truth-seeking is weightier than, say, the interest we have in reproducing our cultural traditions. The preference for truth over the perpetuation of our tradition may be a noble, if quixotic one, but it is just that — a preference which few are likely in the end to share. The dialogue route to liberty is a dead end, because it passes over the role of false beliefs in maintaining and reproducing human societies, including the liberal society it is designed to satisfy. It represses awareness of the possibility that unencumbered dialogue may destroy existing consensus without producing any new convergence on common values. And it evades the most subversive possibility of all — that there may be no body of objective truths about ethics and politics — a possibility which not only rules out (except as a lucky chance) that convergence on shared beliefs expected by Mill and Popper, but also undermines the claim on reason of liberal values as well.

The epistemological route to the justification of liberalism is a failure. If human knowledge grows best in liberal societies, that can only be an exception-ridden generalization, and one which in no way ratifies the full range of liberal freedom. Further, the epistemological strategy neglects the real possibility that the growth of knowledge (even if it does proceed fastest in liberal orders) is only one human good and may come into competition with others that are sometimes weightier. The Hayekian argument to liberty from tacit knowledge has force as a critique of collectivist planning, but it fails to privilege liberal societies over others. (It is perhaps not insignificant that in Michael Polanyi's thought the argument from tacit knowledge is used to support a closed and not an open society.<sup>12</sup>) Finally, as with scepticism in ethics, scepticism about knowledge has no determinate implication for political life — unless it be, as in Pascal,<sup>13</sup> the quietest implication that one lacks the epistemological resources to do anything but accept the order in which one finds oneself. This last is a combination which may prove congenial to a certain kind of conservative, but which is bound to be abhorrent to a liberal of any stripe.

### **The argument from agreement**

A strand of argument which has in recent years come to dominate liberal thought is one which aims to privilege liberal society as the unique outcome of a rational choice but to frame that choice without making essential mention of any consequentialist considerations. A liberal society in which

individual liberty is accorded priority over other political goals is, in this argument (developed in different versions by Rawls, Buchanan, and Gauthier<sup>14</sup>), a product of pure deliberative rationality. In Rawls, the working conception of rationality is Kantian: practical reasoning is a movement among universalizable maxims. In Buchanan and Gauthier, by contrast, reasoning is reckoning, as it is for Hobbes: rationality is a means-end affair, instrumental in its entirety, and refers only to a calculation we make about the most efficacious means of achieving our wants or goals. Despite their opposed conceptions of reason, these contractarian arguments share common disabilities in the wake of which the project of constructing a liberal ideology founders.

We may approach these difficulties by considering first what it is that makes agreement a legitimate source of obligation or, more generally, what it is that makes contract a compelling model of justice. At once we confront an intractable problem. All our ordinary moral thinking suggests that the authority of a contract or a promise is crucially dependent on the circumstances in which it was made and the reasons which motivated it. The fact of promise or agreement has no moral standing, if the agreement or promise was made under duress or in ignorance, or if the context in which the obligation now figures is in decisive respects different from that in which it was originally incurred. By itself, indeed, it is hard to see how agreement can justify or legitimate anything: everything turns on the reasons agreement might be supported by. It is in virtue of the moral emptiness of mere agreement that all contractarian theories seek to ground agreement in a conception of the person whose nature or interests are affirmed or fulfilled by the terms of the contract. Two centrally important features may be noted in respect of such conceptions of the person. They are abstract in that they select out from the miscellany of particulars which make persons what they are a set of features, held to be constitutive of them, by reference to which they are then modelled. They are not only abstract, but also (overtly or covertly) normative. This is to say that such contractarian conceptions of the person involve weighing some human interests more heavily than others, and, often, they involve according no weight at all to certain human interests that figure prominently in the real world. We see the prioritizing of certain preferred human interests in Hobbes when, contrary to experience, he privileges the interest in survival above all others. We see it in Rawls, when (again contrary to experience) he

connects self-respect necessarily with liberty. Even Buchanan and Gauthier, who aim to work wholly with a model of *homo economicus* which begs no questions about the content of human wants, in effect impart a powerful normative element in so far as they screen out all those motives which dispose human beings to engage in non-maximizing behaviour. In the absence of a conception of the person which has these properties of abstractness and normativity, the agreement theorized in contractarian philosophy will have neither the generality nor the justificatory force it needs if the resultant principles are to have a claim on our reason.

The project of so theorizing the person has many large drawbacks. These may all be considered under the head of the veil of ignorance. As we know them, persons are heterogeneous and refractory creatures. Some are religious, others deaf to transcendence, some are devoted to pleasure, others have a weakness for prudence. For some, their sense of their identities is bound up inextricably with membership of a collectivity or subscription to a tradition, while others may conceive themselves (with whatever degree of self-deception) as sovereign individuals who migrate across traditions and cultures and are defined by none of them. Given such manifold singularities, what is the justification for modelling the person in a way that will inevitably screen out much of the variety of personal life? The answer, of course, is that unless the variety of personhood is ironed out, there will be no agreement on principles and so no upshot of contractarian deliberation. On the other hand, any abstraction from the particularities of persons already begs every important question in favour of liberalism. Behind the veil of ignorance, we are no longer ourselves, but ciphers, constructed expressly for the purpose of grounding liberal society. The derivation of liberal principles is then circular, since it works with the artificial persons of liberal theory and not with the varieties of personhood we find in the real world.

This conclusion may be put in another way. Why is it supposed that hypothetical choices can give us reasons for action in the real world? The fact that an abstract or artificial person, screened by an imaginary veil of ignorance from that knowledge of his own life that is constitutive of any real person, would choose a specific set of moral or political principles, if he were able to choose anything at all, has no force for any real person. For any real person, only the values he in fact upholds, the projects and attachments he actually harbours, can generate reasons for action. A person



may then legitimately decline to step behind a veil of ignorance that is designed to disprivilege his projects in the interests of an ideal of impartiality or neutrality among ideals which he may well have good reason to repudiate. The manifest intention of the veil of ignorance, like that of any other universalizing move in liberal thought, is to entrench the liberal form of life. If the only justification for the veil of ignorance is that it assures a liberal upshot to contractarian deliberation, then contractarian deliberation will have itself no force in grounding liberalism.

So far, I have side-stepped an important range of questions about whether deliberation can in truth be conceived in the contractarian circumstance behind the veil of ignorance. I have done so, partly because the veil of ignorance is theorized as being more or less thick in different contractarian theories, and partly because the difficulties that arise from it are correspondingly different. Hobbesian theorists such as Buchanan and Kavka<sup>15</sup> typically work with a veil of ignorance that is gossamer-thin, excluding only knowledge of one's own final social position, whereas Rawls's veil is notoriously thick. In the Rawlsian conception, in which the hypothetical persons are not at all individuated, there is a real question as to whether agreement is even a logical possibility, since the position is so framed that only *choice* is possible (at best). All conceptions of the veil of ignorance appear to depend on a view of practical reasoning that is difficult to sustain. They all presuppose that reasoning about principles can occur in the absence of essential mention of particulars — particulars having to do with the reasoner's history, biography, and circumstances. Such a conception of practical reasoning is controverted by much in recent philosophical inquiry. On Kripke's reading of Wittgenstein,<sup>16</sup> at any rate, Wittgenstein shows successfully that judgment is always underdetermined by principles or rules. More radically, principles or rules acquire whatever authority they possess from the particular judgments we are inclined to make. As Wittgenstein famously put it: 'If language is to be a means of communication, there must be agreement not only in definitions but also (queer as it sounds) in judgments.'<sup>17</sup> Reasoning, on this plausible view, is not from principles to cases, but from case to case. Far from principles determining our judgments in particular instances, they are abridgements or summaries of our judgments in these particular instances. This is a general and formidable argument against the rationalistic or universalistic



conception of rationality which seems inseparable from contractarian theorizing (and, it may well be, from liberalism).

The particularistic objection to contractarian theorizing may be taken further. Whatever there is of definite content in contractarian deliberation and its deliverances, derives from particular judgments we are inclined to make as practitioners of specific forms of life. The forms of life in which we find ourselves are themselves held together by a network of precontractual agreements, without which there would be no possibility of mutual understanding or, therefore, of disagreement. The principles deliberated upon, and chosen in a context of contractarian reasoning, accordingly borrow all their content from particular forms of life and practical discourse — forms of life, furthermore, that are likely to be distinctive of our own culture. These points have been illuminatingly expressed by Flathman:

Rousseau argued that the selfconsciously adopted agreements that Hobbes proposed as the way out of the state of nature *presuppose* an array of shared understanding, common beliefs and matter of course or conventional behaviours that for the most part are implicit, tacit or at least unselfconsciously accepted and performed. As Ludwig Wittgenstein was later to formulate the same point, agreement and disagreement in ‘opinions’ presuppose agreement ‘in the language’ used by those who arrive at them. ‘That is not agreement in opinions but in form of of life’.<sup>18</sup>

Flathman's argument against contractarianism, which is expressed in the idiom of recent language-philosophy, is consilient with the classical argument against contract theory stated by David Hume. It was Hume's insight that society could not be founded on a contract or a promise, since contracting and promising are themselves already social practices. Wittgenstein's achievement was to supply what Hume (and Hume's errant disciple, Kant) lacked, namely, a demonstration that language, the vehicle of promising and contracting, was social and not private. Hume's argument tells most forcefully against Hobbes, inasmuch as Hobbes seems at times to suppose that it is society and not just government that is constituted by agreement, but it has considerable force against all variants of the contract approach. It suggests that, whereas societies may be sustained and renewed in agreement, among other engagements, it is to invert the order of things to argue as if they could *be founded on* agreement. Where it exists or can be

had, agreement is an incident in on-going practice, and not a foundation for practice.

The arguments I have developed so far have all been arguments against contractarian method. I have urged that contractarian reasoning presupposes what it seeks to show and so, in virtue of this circularity, cannot justify adherence to or adoption of liberal principles. I have argued, also, that practical reasoning as it is conceived in the contractarian method is not clearly a coherent possibility, in that both the deliberations and the principles that emerge from contractarian reasonings derive their content from judgments we are disposed to make in particular cases. I want now to set these deep methodological criticisms aside and ask a different question. If the contract method were viable, would it plausibly yield liberal results? This is a question analogous to that which may be asked about utilitarian arguments to liberty. We may question, not whether utilitarian assessment is generally possible, but whether it supports the value of liberty in the areas where it is a possibility. Setting aside the problems of incommensurability into which, I have argued earlier in this volume, fell liberal utilitarianism as a doctrine, one may reasonably ask whether Utility dictates a policy of liberty in those contexts where we are not troubled by incommensurabilities of value. I have argued that utilitarian appraisal does not uniformly, or even generally, support liberal principles of liberty in contexts where we can make a definite determination of its demands. A similar argument is plausible in regard to contractarian theory. The most credible form of contractarian theory, that which abstracts least from the particularities of persons and is most to be commended for its realism, is the neo-Hobbesian variety developed by Buchanan, Kavka, and Gauthier. Each of these writers argues forcefully that Hobbesian reasonings do not as a rule support the absolutist form of agreement Hobbes himself derived from them. Also, each of these writers reasons persuasively that certain important liberties are privileged by Hobbesian reasonings — economic freedoms in Buchanan's reconstruction of Hobbes's argument, and civil or personal freedoms in Gauthier's and Kavka's. Nevertheless, this most credible variation on the contractarian method falls far short of grounding a liberal polity and society, and would in some contexts have manifestly anti-liberal implications for practice.

The nub of the matter is that, in a Hobbesian view, the connection between the contractarian method and liberal principles will always be at

once contingent and only partly determinate. In a society having already strong and successful liberal traditions, it is likely that Hobbesian reasoning will ratify them, though even here a pious Hobbist may feel that (as perhaps in the United States) liberty is too often protected against the claims of peace and public order. Outside of established liberal societies and States, however, Hobbesian theory may mandate limited government, but it will not typically endorse liberal democracy. When established authoritarian governments are threatened by nascent liberal movements whose demands are potentially destructive of the peace, Hobbesian theory may even side with the proponents of repression. This is not to deny that, rightly understood and applied, Hobbesian theory will not ratify modern totalitarian governments, whose ravages upon life and peace have been worse than any Hobbes theorized as occurring in the state of nature. It is to deny that Hobbesian theory will consistently or typically favour the protection of liberal freedoms. It will do so, most likely, only in the limiting case of the stable liberal democracy. This is a result that should engender the deepest scepticism about recent projects of deriving liberal results from Hobbesian premises. In this regard, Hobbes (for all his extravagances) was wiser than most of his latter-day disciples. It is by Hobbes that the central thesis of all contractarian reasonings is stated with unsurpassable conciseness:

It is in the Lawes of a Commonwealth, as in the Lawes of Gaming: whatsoever the Gamesters agree on, is Injustice to none of them.<sup>19</sup>

The arguments against contractarianism in all its varieties are, however, overwhelming. Contractarian agreement presupposes a vast background of shared understandings without which contractarian method yields nothing. Contractarian method will yield liberal results, typically, only in contexts where liberal practices are already presupposed. Elsewhere, if it has any determinate upshot, contractarian deliberation may well (as it did in Hobbes) endorse illiberal outcomes. For all its profundity of insight into the political predicament of moderns, Hobbes's political philosophy encourages a rationalist illusion in so far as it suggests that social or political order can be the product of agreement. We are on far surer ground if we affirm, with Hume, that social life is primordial, and agreement (as Wittgenstein has shown) a possibility only within the framework of a common life.

## **The argument from flourishing**

The most direct argument to the priority of liberty which is to be found in liberal thought is from its unique contribution to the human good. This is the argument that it is only in a liberal society that human beings can flourish fully. The lineage of this line of argument, which surfaces in many liberal writers, including von Humboldt and J.S. Mill, is Aristotelian in that it ascribes to the human species a common nature which (with all its individual variations) it claims can best be realized in a regime of individual liberty. It is worth remarking at once that this is an argument that would have been unrecognizable to Aristotle or, if recognized, rejected by him. To be sure, it shares with Aristotle a conception of human nature that is metaphysical, essentialist, and teleological — a conception I shall shortly subject to criticism. And it has in common with Aristotle the naturalistic view that the content of the good can be derived from the demands of human nature. Aside from these formal properties which belong to any ethic of flourishing, the liberal argument from flourishing to liberty has nothing whatever in common with Aristotelian ethics, which controvert liberal morality at every important point. Thus, Aristotle explicitly rejects the liberal claim, made in his own times by the Sophists, that all human beings have equal rights by nature, and he defends the institution of slavery on the ground that some human beings are slaves by nature. Further, Aristotle attaches no intrinsic value to liberty, and does not after the fashion of liberal thought ever think that there is anything intrinsically valuable about choice-making. As Fred Miller has observed: ‘Aristotle is a trimmer on the subject of liberty. He tends to regard it as only an external good and not as essential to the good life’.<sup>20</sup> These are not incidental or accidental features of Aristotelian ethics, but ones upon which Aristotle himself laid great emphasis, and which he dwelt upon in the context of his harsh attacks on the proto-liberal movements of his day such as the Sophists.

The anti-liberal content of Aristotelian ethics is constitutive of it, not only by reference to Aristotle's own intentions for it, but also as an implication of its very structure. The central theses of any ethical theory that is recognizably Aristotelian are that each of us has a nature or essence and that goodness and virtue consists in bringing that essence or nature to realization. As his rejection of any notion of equal natural right testifies, Aristotle did not suppose that the good was the same for all persons, since he took it for granted that the natures of persons were different in crucial respects. The important points to note here are: first, that Aristotle grouped

the natures of persons into a few simple categories and; second, and even more importantly, that he ranked these categories hierarchically. Thus, though the life of contemplation is beyond the powers of most human beings, Aristotle is in no doubt whatever that it is *the best life for man*. Conversely, though any other sort of life is inferior to that of the contemplative man, Aristotle insists that the good life for the mass of men is precisely to bring to realization their admittedly inferior natures. There is in Aristotle's ethical thought, as in the moral and political thought of Hinduism, a crass functionalism about the natural purposes of persons in society that must be offensive to anyone touched by liberal sensibility.

The anti-liberal implications of Aristotelian ethics has deeper sources than this, however, and would persist even if, in modernist spirit, we were to abandon his hierarchical and functionalist conception of human beings. I take Aristotelian ethics to be a conjunction of two theses — the thesis that value is agent-relative and the thesis that it is objective. The latter thesis is, in turn, the thesis that what has value for the agent is not the satisfaction of his wants or the achievement of his goals as such, but the realization of his nature or essence. The content of value in any Aristotelian theory is given, then, not by the agent's own projects or commitments, but by his nature. And, as Lomasky has recently perceptively observed, it follows from this that, though Aristotle's conception of value is agent-relative, it is also thoroughly impersonal:

As I read Aristotle, there is no place for genuine value coming to be for an individual through an act of commitment to ends that are distinctively his own. The virtues, unlike projects, are *discovered* rather than *created*, the same for all men rather than variegated among persons. He recognises, to be sure, that people may undertake allegiance to other standards (for example, to an ideal of fame or a life of pleasure), but if they do so, then they are mistaken. No value, or at least no value that *truly deserves to be valued*, is thereby created. Value is prior to commitments, and one does well or ill in so far as one's commitments accurately exemplify or fail to exemplify that value.<sup>21</sup>

That Aristotle's ethics cannot accommodate the conception of persons as creators of value, and so as ends in themselves, is noted in the context of his discussion of Aristotle's account of friendship by Alastair MacIntyre when he concludes that:

For the love of the person, as against the goodness, pleasantness, or usefulness of the person, Aristotle can have no place ... Hence friendship for him will always be a kind of mutual admiration society, and this is just the kind of friendship which Aristotle describes.<sup>22</sup>

What is most distinctive of Aristotle, accordingly, is not merely the poverty of his vision of the variety of forms in which human flourishing may occur (a handful, for Aristotle, organized in a primitive hierarchy), but even more his view of persons as indifferent receptacles of impersonal value and not as themselves creators or authors of values.

None of this implies that there is no notion of natural right in Aristotle,<sup>23</sup> but only that it is a profoundly anti-individualist, and so an anti-liberal conception of right that is integral to his ethical thought. Aristotle's conception of natural rights is an anti-liberal one, if only because its foundational claim is not to a right of liberty, but rather of duties to self. The good for each man, according to Aristotle, consists not in success in his self-chosen projects, but in realizing what his essence demands. Since the foundational claim in this view is not a right to liberty but a duty to self, it easily and perhaps inevitably slides into paternalism and moralism. For if a man's choices are injurious to the realization of his nature, if they are imprudent or vicious and encompass a neglect of his duty to himself, what right has he to complain if his liberty of action is curtailed for the sake of his flourishing? It is only his nature, which is the source of all that has true value in his life, that is being safeguarded. There seems to be no reason why duties to self should be less a proper subject of enforcement than any other duties — especially when one recalls that, for Aristotle, liberty is not essential for the good life, nor coercion inherently a bar to it.

In all of this I have not so far subjected to criticism the constitutive feature of Aristotelian ethics in which the good is given content by the demands of human nature. Let us begin by making the criticism that, in truth, the content of human nature radically undermines moral and political life. Even if we grant sense and usefulness to the analogy of flourishing, it should be evident to any eye that is not blinkered by the local conventions of our own culture that human flourishing can come in many different forms. The form of life of a troubadour poet, of a Japanese *bushido* warrior, of a Desert Father, or a Renaissance courtesan, are in no obvious sense lesser forms of human flourishing than that of Aristotle's leisured, contemplative gentleman. (As Pascal remarks: 'How many natures there are



in human nature!’<sup>24</sup>). This is only to say that human beings belong to an inventive species, and have contrived a great variety of forms of life for themselves. From this follows something else — the insight that human nature, unlike perhaps that of the other animal species with which we are familiar, is only partly determinate. Unlike acorns, caterpillars or chicken eggs, human individuals do not have within them a blueprint for life. Like other living things, we have a life-cycle, but how it is lived depends on chance, choice and the cultural traditions we inherit. Our identities as persons are artefactual things, transformations wrought upon our natures and not essential properties of them. It becomes clear, then, that our natures are matrices of possibility, bounded only by the constraints of our natural endowment and circumstances. If any of us asks, what sort of life does my nature demand?, his question will go unanswered. For it is, in reality, the question: which of the many natures latent in my nature shall I adopt as my own? And that is a question no Aristotelian account of flourishing can answer.

For Aristotle, as for the Greeks in general, such questions were answerable, but on terms that are unavailable to us. Aristotle's conception of the universe was a teleological one, in which each natural kind had its own natural end or perfection, and which cohered together as a system which had perfection as its end. This is a metaphysical conception, at once rationalistic and optimistic, in which tragedy is only bad luck and contradictions in our thought express metaphysical impossibilities rather than limitations of human understanding. This bland picture of the world is necessary to Aristotle's ethical theory for, without it, the link between our nature and the good life is threatened. Among persons as we know them, we find those to whom callousness, cruelty, and even disinterested malice, seem entirely natural. What is there to say that such persons, in exhibiting such dispositions, are not realizing their natures? As Bernard Williams has noted:

There is ... the figure, rarer perhaps than Callicles supposed, but real, who is horrible enough and not miserable at all but, by any ethological standard of the bright eye and the gleaming coat, dangerously flourishing. For those who want to ground the ethical life in psychological health, it is something of a problem that there can be such people at all.<sup>25</sup>

Aristotelian ethics can respond to this only by a sleight of hand, maintaining against all common sense that such vicious traits are only misuses of



inherently good capacities for sympathy and fellow-feeling. The commonsensical judgment that there are vices which may well express their practitioners' natures can be resisted only by invoking the mystical notion, shared by Aristotle and Aquinas, that evil is merely a privation. I take this to be a thought that cannot be expressed in ordinary empirical terms, and which nothing in our experience supports.

Recent uses of Aristotelian theory,<sup>26</sup> to buttress the shaky foundations of liberal practice, have taken from Aristotle the optimism which suffuses his metaphysics, but without giving that optimism any coherent metaphysical statement. They have little else in common with Aristotle's ethic. They import into the conception of the good, attributes — such as productivity, entrepreneurship, the disposition to trade and to transform the world with the technological extensions of human energy — that Aristotle regarded as incorrigibly vulgar and as being no part of human perfection. What explains the radically divergent content given to human flourishing by Aristotle and his latter-day liberal disciples? Patently, both Aristotle and his contemporary liberal followers have simply written into their conception of the human good the local virtues of their time and place. Writing for a leisured minority in the Greek city-state, Aristotle prescribed the life of the cultivated country gentleman as the true end of man. (Women figure in Aristotle's conception only by their exclusion from it.) Writing in an age of mass democracy and wage-labour, Aristotle's latter-day liberal followers prescribe a life of bourgeois virtue — of thrift, industry, prudence, and creative work. However one assesses these ideals, the salient point is that in each of them the content given to human flourishing is taken wholly from the conventional norms of the theorist's local culture. It is far from clear what is the claim on reason attributed to these ideals.

Other difficulties in an Aristotelian morality of flourishing are, perhaps, still more fundamental. Essential to any such theory is the thesis of the unity of the virtues — a thesis which, I take it, cannot seriously be entertained. In our moral life as we know it, one virtue often crowds out another, virtues are often uncombinable in a single person (or society) and sometimes virtues are indissolubly linked with, or even depend upon, vices. These features of moral life were as evident to the Sophists as they are to us, yet Aristotle blithely ignores them for the sake of saving the appearances of his theory. As MacIntyre has recently and correctly observed:

There is ... [a] feature of Aristotle's conception of practical rationality that is ... at odds with dominant modern conception. On a characteristically modern view the claims upon particular individuals of some good may be inconsistent with the claims of some other good, thus creating dilemmas for which on occasion there may be no mode of rational solution. Precisely because Aristotle's logic in practical argument is the same deductive logic employed in theoretical argument, and precisely because there can only be at any one time one right action to perform, the premises of any Aristotelian practical argument must be consistent with all other truths. It cannot be true of someone on Aristotle's view that he or she is required by the claims upon him or her of some good to do such and such and by the claims of some other equal or incommensurable good not to do such and such. The difference between Aristotle and the modern view is perhaps most clearly apparent in the different interpretations of tragedy which each engenders. From the modern standpoint the incompatibility between the demands of one good and those of another can be real, and it is in terms of the reality of such dilemmas that tragedy is to be understood. It *can* therefore be held to be true of someone that he or she should do such and such (because one good requires it) and also that he or she should refrain from doing such and such (because some other good requires such refraining). But if these both can be held to be true, the concept of truth has been transformed; this is not truth as transmitted by valid deductive arguments. It is for this very reason that from Aristotle's point of view the apparent existence of a tragic dilemma must always rest upon one or more misconceptions or misunderstandings. The apparent and tragic conflict of right with right arises from the inadequacies of reason, not from the character of moral reality.<sup>27</sup>

Aristotle's evasion of the common experience of radical choice among incommensurables — an experience which, unlike MacIntyre, I believe was found among the ancients, and theorized by such Sophists as Carneades — is then integral to his moral theory. He is bound to repress the experience of moral tragedy, in which wrong is done whatever is done, even as he cannot (or will not) recognize that there may be a competition of perfections, when we must choose between radically divergent goods. But Aristotle's evasion of moral conflict goes even deeper. For Aristotle, unlike us, there can be no deep distinction between morality and prudence, and so none between those excellences that are moral virtues and those that are not (like, perhaps, the

beauty of someone's face). For Aristotle, accordingly, the prudent cannot (except in the rarest extremity) conflict with the right, nor the good with the beautiful. It is thus that he can avoid, without solving, a problem central in all recent natural rights theorizing — the problem of sanctions against rights-violation (and, in general, against viciousness). For Locke, as for Aquinas, rights-violation is always imprudent, since it will be punished in the hereafter if it is not punished on earth. Contemporary natural rights theory, in virtue of its insistent and often obsessional secularism, lacks this recourse. What motive can the vicious man then have for refraining from injustice when he believes, or knows, that there is no likely punishment in store for him? He will fear the sting of conscience, the liberal modernist will doubtless reply. The spectacle of the retired torturer or well-defended tyrant basking like a lizard in the sun of his self-esteem and the affection of his family tells another story — but one to which the liberal mind is deaf. It is deaf, too, to the distinctively twentieth-century experience of totalitarian societies, wherein many must for reasons of prudence commit acts which leave an indelible moral stain on them.

Aristotle's evasion of moral tragedy is in part inspired by an aversion to variety in moral life. The thought that there may be indefinitely many incommensurable forms of human flourishing is alien to his outlook. The observation that a person's nature or essence may be complex and harbour uncombinable needs (between which a choice must be made) cannot be accommodated in his theorizing. Forms of life which he rejects as species of non-flourishing, we accept as instances or varieties of it. (How in any case is the boundary between forms of flourishing and forms of non-flourishing to be drawn? Can a life devoted to pleasure be one in which a person thrives? Or that of a Carthusian monk? The unanswerability of these questions suggests the inadequacy of flourishing as a criterion of the good.) These constitutive defects have important implications for the theory of liberty. We have already noted a problem in the case of the person who opts freely for a form of life in which (granting the jargon) he will not flourish; what value can these be in any Aristotelian theory in his liberty to live a worthless life? A parallel, but larger difficulty arises as to the relations between a liberal society and virtue. We need not deny that liberal societies shelter virtues — those of truth-telling and friendship — that are endangered in tyrannous and totalitarian regimes. It is obvious, however, that many virtues and excellences are weak or absent from liberal societies.

The virtues of a courtier, of a warrior, or of a pious peasant, presuppose a social order which cannot coexist with liberal society. We may go further. It may well be, as the civic humanist writers and the Scottish liberal thinkers darkly suspected, that a liberal order undermines important virtues, including virtues upon which that order itself depends. The hedonism characteristic of market societies may threaten the martial virtues that are indispensable to it, and individualism may weaken the familial virtues on which an individualist order rests. The connection between liberal freedom and the virtues is a contingent and sometimes a delusive one — as an older and wiser liberal tradition (that of the Scottish School) recognized. An ethic of the virtues may, for that reason, sometimes endorse as superior to liberal society an authoritarian order — and did precisely that in Aristotle's political theory.

Aristotelian theory fails as a foundation for a liberal ideology. It neglects the variety, uncombinability, and incommensurability of human goods, and the fact that only some of them can flourish in a liberal society. (It is for this reason that a genuine pluralist about values cannot be a doctrinal liberal.) Because it suppresses the mystical and religious context of Aristotelian, Thomist, and Lockean thought, contemporary liberal rights theory in this tradition cannot produce a coherent conception of natural law and, further, cannot resolve the conflict between prudence and justice or supply a motive for moderation in the tyrant. In its most plausible modern statements, in the political philosophies of Spinoza<sup>28</sup> and Hume, natural law theory dictates conservatism (as Spinoza and Hume explicitly affirm) or, at the very least, it underdetermines liberalism. There are many reasons for supposing that an ethic of flourishing or natural law founders in problems of incommensurability and indeterminacy. Even if we suspend our disbelief about the claims of such theories, we have no reason to suppose that they mandate a regime of liberty, for in their best developed forms, in Aristotle and Aquinas, they did almost the opposite.

### **After liberalism: Pyrrhonism in politics**

The debacle of the project of a liberal ideology exhibited in the preceding sections has two sources, distinct but connected, in the peculiar incoherences of liberal reason. A liberal ideology should contain a Principle of Liberty (or an account of rights) which gives guidance to practice by

specifying the contours of legitimate restraint of liberty. No such principle has been stated by any liberal theorist. All candidate principles dissolve on critical reflection into indeterminacy or incoherence as they founder in conflicts between competing and sometimes incommensurable liberties and between these liberties and other human goods. Nor is there anywhere in liberal theory a compelling demonstration of the priority of liberty over other political values. This last failing is explained by the deepest incoherence in liberal reason, which is its inversion of the relations of practice and theory. Liberal reason aims to elevate the local practice of liberal society, with all its historicity and singularities, into a universal doctrine. But to attempt this is to neglect the character of the principles constructed within liberal theory — their character as abridgements of innumerable individual judgments grounded in specific practices. The spurious universality of liberal principles is a consequence of the self-deception of liberal philosophy, which is bound to deny the particularistic character of all genuine moral and political reasoning.

There is in twentieth-century liberalism a deeper self-deception of which I have so far said nothing. It is common among latter-day liberals to represent themselves (as I did myself in an earlier work<sup>29</sup>) as heirs to an intellectual tradition that is centuries old and which even has origins in the ancient world. I take it to be a result of recent work by Pocock, and others inspired by him,<sup>30</sup> that this self-image of ourselves as heirs of a long and cohesive intellectual tradition is an illusion. The liberalism of Locke has little in common with that of Mill and it is an error to see the two liberalisms as moments in a continuous historical process. The upshot of this recent work has been to effect a historical deconstruction of liberalism as an intellectual tradition and to retrieve for us the discontinuities, accidents, variety, and historical concreteness of the thinkers indifferently lumped together under the label of liberalism. This recent work in intellectual history has been invaluable to our present self-understanding, since it has exposed the mythical character of liberal historiography — so passionately and banally expressed in J.S. Mill's invocation of an antinomian tradition extending from Socrates to himself — and it has thereby illuminated the function of liberal historiography in legitimating contemporary liberal dogmas.

With what, then, are we left on this account of things? We are left with the historic inheritance of liberal civil society. This is a complex structure of

practices and institutions, embracing a system of private or several property, the rule of law, constitutional or traditional limitations on governmental authority, and a legal and moral tradition of individualism, which is the matrix of moral and political life as we know it. It is this civil society that was theorized in different fashions by Hobbes, Locke, and Hegel, and which is given a systematic treatment in the works of Smith and Hume. Further, it is civil society which is constitutive of our most fundamental western traditions and which is perhaps beginning to assert itself in states (such as the Soviet Union and China) where it was weak or repressed. The task of the post-liberal theorist is to illuminate the forms of civil association which are the most profound elements of our historical inheritance. But what would such theorizing look like, and how would it differ from the traditional conception of political philosophy that is articulated in liberalism? Aside from making no claim that the results of such philosophical enquiry have a universal application or give a foundation to practice, theorizing of this sort would have two contributions to make to our self-understanding as heirs (if not residuary legatees) of modern civil society. The first is sceptical and prophylactic. A post-Pyrrhonian<sup>31</sup> method of philosophical inquiry applied to our present circumstances — that is to say, a mode of theorizing in which to the sceptical Pyrrhonism of Hume is added the insight that our forms of self-understanding are narrative historical creations — would, in the first place, displace from their current dominance the ruling abstractions of the age. It would, for example, undermine the inordinate demands of contemporary rights theory by exposing the discourse of rights as at best a part of political rhetoric in our culture and as having neither determinacy nor authority as a guide to practice. In its prophylactic role, then, this mode of theorizing would be one which dispelled the vast hallucinatory perspectives that distract us from the task of repair and renewal of the practices and traditions we have inherited. This form of theorizing is post-Pyrrhonian in that it involves a return from a position of comprehensive scepticism — which, as in Hume but contrary to the later Wittgenstein,<sup>32</sup> it does not seek to exorcise — to the primordial practices of common life.

Post-Pyrrhonian philosophy has, then, a more positive role. It suggests to us — as it did to Hume, whose historical writings are an application of this method — the project of a phenomenology of the forms of moral and political life we find among us. It was this that Hume undertook in his



account of the virtues in his moral philosophy. Our own intellectual environment is different from Hume's, and the move we make from scepticism will not be (as he thought his was) primarily a return to nature. It will, instead, be a return to history, in which we seek to uncover the genealogy or archaeology of our present forms of life and to understand them as historical creations. It is this project which is attempted, however extravagantly, by Foucault, but which in another (and far more judicious) form is undertaken by Oakeshott in his *On Human Conduct*.<sup>33</sup> In both cases the conception of philosophy as a search for foundations and as involving (even to some degree in Hume) a recurrence to nature has been abandoned. Inquiry of this sort begins only when philosophy has ended, and it is perhaps for this reason that Oakeshott prefers the term 'theorizing' to 'philosophy' as a characterization of the activity in which he is engaged.<sup>34</sup>

In the wake of philosophy, the object of theorizing is the attainment of self-understanding as practitioners of the historically contingent and specific forms of life we inherit or adopt. This is a conception as post-classical as it is post-modern. For not only the subject matter but also the result is particularistic. We seek to understand, not personhood, but ourselves, just as we are. We may be helped in this by an analogous phenomenological exploration of remote cultures and forms of life, since it may bring out more sharply what is distinctive of our own and even suggest profitable borrowings we may make. But what is characteristic of this form of theorizing is that, wherever it is done, it speaks with a voice that is its own and does not pretend to be that of humanity at large.

If it were to have any implication for practice, post-Pyrrhonian philosophy (or theorizing) would not always or necessarily be conservative in its impact. In so far as it tended to deflate the ruling fictions, its effect would tend to be subversive rather than conservative. In political orders founded on stupendous absurdities (such as all communist orders) it could not fail to have such an effect. The relationship between this post-liberal perspective and liberal societies is, as is natural, a dialectical one. The post-liberal perspective may be a critical one in so far as it questions and dissolves many of the pervasive banalities of liberal culture, but it may be conservative inasmuch as it yields a better grasp of the particulars of our traditions.

For the political Pyrrhonist, by contrast with the liberal, there are few universal political dilemmas and no universal solutions. He may adopt



liberal positions on a variety of questions, and even defend his own liberal order as one among the legitimate forms of political order. He may, as recent writers have done,<sup>35</sup> seek to identify the postulates of liberal society, and to give a defence of liberal political morality that aims to be compelling for his readers. Whatever he does, he will not engage in the vain project of constructing a liberal doctrine. Indeed, if his inquiries have a practical aim (and they need not), it will be to protect the historical inheritance of liberal practice from the excesses of an inordinate liberal ideology.

## Notes

- <sup>1</sup> Bernard Williams, *Ethics and the Limits of Philosophy*, (London: Fontana Press/Collins, 1985) [Chapter 9](#).
- <sup>2</sup> Paul Feyerabend, *Against Method*, (London: New Left Books, 1975) especially [Chapter 9–11](#).
- <sup>3</sup> P.F. Strawson, 'Social morality and the individual ideal', in *Freedom and Resentment*, (London: Methuen, 1974).
- <sup>4</sup> G. Santayana, 'Liberalism and culture', in *Soliloquies in England and Later Soliloquies*, (Ann Arbor: University of Michigan Press, 1967) p. 174.
- <sup>5</sup> I take it that this is part of the rationale of Feyerabend's attribution to Mill of a sort of epistemological pluralism rather than fallibilism. See Feyerabend, *Against Method*, p. 53.
- <sup>6</sup> F.A. Hayek, *The Constitution of Liberty*, (Chicago: Henry Regnery, 1960), p. 38.
- <sup>7</sup> *ibid.*, p. 59.
- <sup>8</sup> *ibid.*, p. 63.
- <sup>9</sup> *ibid.*, p. 36.
- <sup>10</sup> In Hayek's book, *The Fatal Conceit, Collected Works*, vol. I, (London: Routledge, 1988) pp. 16–28, 135–8.
- <sup>11</sup> I refer here most particularly to Dr Shearmur's 'The political thought of F.A. Hayek' (Ph.D. thesis, University of London, 1987), in which a Popperian fallibilistic epistemology is combined with a Habermasian conception of unconstrained argumentative communication and in which liberal property rights are defended as dialogue rights.
- <sup>12</sup> See Michael Polanyi, *The Logic of Liberty*, (Chicago: University of Chicago Press, 1951), [Chapter 7](#).
- <sup>13</sup> B. Pascal, *Pensées*, (London: Penguin Books, 1966) p. 46: 'It is a funny sort of justice whose limits are marked by a river; true on this side of the Pyrenees, false on the other.'
- <sup>14</sup> See: John Rawls, *A Theory of Justice*, (Oxford: Oxford University Press, 1972); James Buchanan, *Limits of Liberty: Between Anarchy and Leviathan*, (Chicago: University of Chicago Press, 1975).
- <sup>15</sup> See Gregory S. Kavka, *Hobbesian Moral and Political Theory*, (Princeton, NJ: Princeton University Press, 1986).
- <sup>16</sup> See Saul Kripke, *Wittgenstein on Rules and Private Language*, (Oxford: Basil Blackwell, 1982).
- <sup>17</sup> L. Wittgenstein, *Philosophical Investigations*, (Oxford: Basil Blackwell, 1958), Part 1, Section 242.
- <sup>18</sup> See Richard G. Flathman, 'Convention and freedom', *Ethics*, 98, (1), October 1987, 94–5.
- <sup>19</sup> Thomas Hobbes, *Leviathan*, (London: J.M. Dent & Sons, 1914), Chapter 30, p. 185.
- <sup>20</sup> Fred J. Miller, 'Aristotle and the natural rights tradition', *Reason Papers*, no. 13, Spring 1988, 178.

- [21](#) Loren E. Lomasky, *Persons, Rights and the Moral Community*, (Oxford: Oxford University Press, 1987) p. 49.
- [22](#) Alastair MacIntyre, *A Short History of Ethics*, (London: Routledge & Kegan Paul, 1967) p. 80.
- [23](#) See Miller, 'Aristotle and the natural rights tradition', for an argument to this conclusion.
- [24](#) B. Pascal, *Pensées*, p. 62.
- [25](#) Bernard Williams, *Ethics and the Limits of Philosophy*, (London: Fontana Press/Collins, 1985) Tp. 46.
- [26](#) I refer to such works as T. Machan's *Human Rights and Human Liberties*, (Chicago: Nelson Hall, 1975). For a critique of such views that is completely demonstrative, see Robert Nozick's 'On the Randian argument', in J. Paul (ed.) *Reading Nozick*, (Oxford: Basil Blackwell, 1982) pp. 206–31. The attribution to Aristotle of a belief in the moral centrality of choice-making (made by Machan and others) is all the more incongruous in that the belief plainly presupposes an affirmation of the freedom of the will which Aristotle does not make. For a powerful argument against freedom of the will, see Galen Strawson, *Freedom and Belief* (Oxford: Clarendon Press, 1986).
- [27](#) Alastair MacIntyre, *Whose Justice? Which Rationality?* (London: Duckworth, 1988), p.1 42.
- [28](#) For an excellent account of Spinoza's political philosophy see Douglas den Uyl, *Power, State and Freedom*, (Assen, The Netherlands: Van Gorcum, 1983).
- [29](#) See my *Liberalism*, (Milton Keynes and Minneapolis: Open University Press and University of Minnesota Press, 1986).
- [30](#) See, especially, John Pocock's *The Machiavellian Moment*, (Princeton University Press, 1976) and the published and unpublished works of Istvan Hont.
- [31](#) I owe the term 'post-Pyrrhonian philosophy' to Donald W. Livingstone's superb book, *Hume's Philosophy of Common Life*, (Chicago: University of Chicago Press, 1984).
- [32](#) I refer in particular to the Wittgenstein of *On Certainty*, (Oxford: Basil Blackwell, 1977) in which an attempt is made to achieve a sort of euthanasia of sceptical doubt.
- [33](#) See Michael Oakeshott, *On Human Conduct*, (Oxford: Oxford University Press, 1986).
- [34](#) *ibid.*, pp. 25–30.
- [35](#) See, most particularly, Joseph Raz, *The Morality of Freedom*, (Oxford: Oxford University Press, 1986) and Richard Flathman, *The Philosophy and Politics of Freedom*, (Chicago: University of Chicago Press, 1987). Both writers defend a liberal view of government and society, but since neither claims for this view an apodictic character, it is no longer liberalism as a doctrine that is being defended.

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