DERIVING RIGHTS TO LIBERTY

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IN WHAT FOLLOWS, I defend the moral rights to liberty associated with classical liberal and libertarian political thought. I focus initially on the idea that persons are separate and that, while this is a statement of fact rather than of value, the fact that persons are separate and distinct beings is a condition of human life that is critically important for moral and political philosophy. The separateness of persons is a feature of human life that is inextricably bound up with the meaningfulness of justice as an ethical and practical problem. If human beings were not separate and distinct beings with ends and interests of their own, there would be no place for principles of justice to mediate conflict and resolve disputes.

I turn next to practical reason. Our separateness is an important fact about us, and so is our capacity for practical moral judgment. Here I argue for a contractualist model of practical reasoning that shows how persons seeking not only to be rational in accomplishing their own ends but also to be consistently reasonable in their conduct toward other persons will adopt moral constraints on their conduct, which in my account are traditional classical liberal or libertarian rights to liberty. In the model of practical reason that I advance, our ability to justify our conduct to others through principled argument among free and rational persons is a means of identifying what moral constraints on our conduct we have in relation to other persons because they are separate, free, and rational beings.

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The model of contractualist moral reasoning I propose enables us to identify and support principles of justice. These take the form of moral constraints on our conduct toward other persons that can perhaps fairly be described as natural rights insofar as they arise from conditions of human social life that are grounded in our nature as separate and distinct beings who are also free and equal moral agents. I argue that legitimate principles to govern social interaction are those that could not be reasonably rejected by all who would be subject to them and that agents must consider the reasons that can be offered for and against a proposed principle with a view to the separate existence of other persons. The consideration of proposed principles in this way yields general principles of just conduct that take the form of rights to liberty.

In section 1, I discuss how the separateness of persons infuses the circumstances of justice outlined historically by David Hume and taken up by more recent theorists. In section 2, I argue that persons who are presented with the values and ends of other persons cannot reasonably reject the idea that each is bound by moral constraints on their own actions, and in section 3 I show how this approach can be used to justify abstract and specifically articulated rights. What I have in mind in sections 1 through 3 is the general form of an argument of the type that Nozick suggested would be a "best explanation" for moral constraints on action. His sketch included a "strong statement of the distinctness of individuals" and a suggestion along the lines of Kant's second formulation of the categorical imperative, which maintained that persons should be viewed as ends in themselves and not principally as means to the ends of others.[1] This, as Nozick indicated, was merely a "sketch," but my aim here is to present a more complete statement of an argument of this type, and this is my chief focus.[2] While moral constraints do follow from the separateness of persons, they are not entailed directly by the separateness of persons in my account. That is, one might proceed by arguing that the separateness of individual persons is itself a moral idea from which moral principles follow directly. I argue instead that the separateness of individuals is part of the factual data that figure in practical moral judgment, and it is the latter, the nature of moral reasoning, from which we reach moral principles. My chief concern here is with practical reason as a method to arrive at principles of justice, and that is what I show in section 2, on practical

[1] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 32–34.

[2] Nothing hinges on whether what I am doing here is related to Nozick's suggested project. I do think, nonetheless, that what I outline here is one way to move his suggested project forward.

reasoning and contractualist justification in ethics. In section 3, I present an account of rights to liberty based thereon, identifying first abstract rights to liberty and then the means by which those may be specified in applicable forms.

1. The Separateness of Persons

The idea of the separateness of persons has often appeared as a critique of utilitarianism.[3] Utilitarianism aggregates individual preferences into a social preference for the choice that yields the greatest utility, and individuals are morally obligated to prefer that choice regardless of its consistency with their individual preferences. As a result, utilitarianism fails to acknowledge that persons are separate and distinct individuals by aggregating individual preferences into a social preference ordering. Utilitarianism, as Rawls puts it, treats a society as if it were a single person making a rational choice and thus "does not take seriously the distinction between persons."[4]

Furthermore, the aggregation of individual preferences means that the social choice may sacrifice some individuals' preferences on behalf of the preferences of others that happen to be consistent with the choice that satisfies the utilitarian standard. Utilitarianism thus morally requires individuals to prefer a social choice that runs counter to their own ends. That is, a utilitarian ethics may demand that we reject our commitment to our own ends (which is destructive of our integrity as individuals), not because these are morally deficient or inferior to the ends of others reflected in the social preference that yields the greatest aggregate utility, but solely because our ends are overruled by the social choice that yields a greater utility than one in which our ends are included. The ends of individuals are important for utilitarianism only insofar as they are pieces of a social preference ordering, and the fact that they are, individually, the ends of individual persons is morally insignificant. In the familiar argument offered by Nozick, Rawls, Williams, and others, utilitarianism denies the separateness of persons

[3] Nozick, *Anarchy, State, and Utopia*, 28–35; John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 22–27; Samuel Scheffler, *The Rejection of Consequentialism*, rev. ed. (Oxford: Oxford University Press, 1994), 6–13; Bernard Williams, "A Critique of Utilitarianism," in *Utilitarianism: For and against*, eds. J. J. C. Smart and Bernard Williams (Cambridge: Cambridge University Press, 1973), 108–18; Loren Lomasky, *Persons, Rights and the Moral Community* (Oxford: Oxford University Press, 1987), 52–55.

[4] Rawls, *A Theory of Justice*, 27.

because, first, it treats their individual ends as part of a social aggregate, and second, because it assaults the integrity of persons by morally compelling them to favor a social choice that maximizes aggregate utility but that denies their own ends.

For these reasons, utilitarianism fails even on its own terms because it fails to take seriously the distinction among persons. By aggregating their preferences, it disregards the very fact that gives us moral standing: our capacity to feel pleasure and pain in the satisfaction or frustration of our own ends. Utilitarianism does this because it regards the individual's preferences as valuable only insofar as they figure into the social calculation that promotes the greatest aggregate utility. In so doing, utilitarianism sidesteps or overlooks the separateness of persons that makes justice among persons a meaningful concept. This is why Rawls suggests that utilitarianism treats society as if it were one individual making a rational decision to promote its own ends rather than as a group of separate persons with distinct ends of their own.

1.1. The Objective Conditions for Justice

Part of the force of the critique of utilitarianism based on the separateness of persons arises from the fact that problems of justice are social problems among persons rather than rational maximizing choices for single individuals. The separateness of persons is part of what makes justice a meaningful concept, because principles of justice are means of resolving conflicts and disputes among separate and distinct individuals. When I use Hume's phrase "circumstances of justice," I mean that these are necessary conditions for justice in that they must obtain in order for justice to be meaningfully investigated as a topic of political consideration. In Hume's account, these circumstances include a rough equality of abilities, limited scarcity, and limited altruism.[5] If persons were not separate individuals, none of these conditions would make justice meaningful. Only separate persons can have a rough equality of abilities, demands for shares of scarce resources, and a limited altruism toward their fellows.

The three circumstances of justice outlined by Hume are those that make justice useful to human beings and are part of his explanation as to why social conventions of justice arise among us. Hart and Rawls, drawing on

[5] David Hume, *Enquiries concerning Human Understanding and concerning the Principles of Morals*, eds. L. A. Selby-Bigge and P. H. Nidditch, 3rd rev. ed. (Oxford: Clarendon Press, [1977] 1975), 183–92; David Hume, *A Treatise of Human Nature* (New York: Penguin, [1740] 1969), 546–47.

Hume, also maintain that these conditions are among those that give rise to a need for principles or rules of justice in society because under these conditions principles of justice enable us to cooperate with each other.[6] If any of these conditions are absent, we have no reason to expect others to cooperate with us, and principles of justice are not only not useful, but have no sensible function to perform.

In the accounts offered by Hume, Hart, and Rawls, each of these circumstances describes or reflects features that we share with one another and make us similarly situated. The rough equality of persons means that no one has powers so superior to others that he or she may regard others as beings of a lesser or different type than himself or herself. As far as our powers are concerned, we are similar to one another. That similarity in the form of rough equality means that there will regularly be conflicts among individuals that appear, in part, because we are generally equal to one another. Our general equality of powers also underscores our distinctness from one another. The second circumstance, limited scarcity, gives rise to competition and conflicts over material goods, but because scarcity is limited, principles that mediate competition and conflict have a function to perform. If there were a generalized extreme scarcity, so that one may survive only if another dies, principles of justice would have no expected function to perform to mediate competition and conflict between those concerned. The conflicts arising from both limited and extreme scarcity also underscore the separateness of individuals. The third circumstance, limited benevolence, also points to our distinct existence as persons. If benevolence were not limited, principles of justice would have no function to perform because there would be no competition or conflict among people. Our benevolence is limited because we accord greater weight to our own ends than to the different ends of other people. In doing so, we manifest our separate and distinct nature as individual human beings.

This does not mean we have a limited quantum of benevolence to bestow on other persons. Rather, it means that we tend to be partial to our own ends and interests as defined by us. These may even be directed toward benefiting others, such as when religious and moral beliefs inspire our ends. What does matter is that we place greater weight on the accomplishment of our own ends and advancement of our self-defined interests than we place on the advancement of other persons' ends and interests as defined by them. One might argue that moral theories are intended to overcome this

[6] Rawls, *A Theory of Justice*, 126–30; H. L. A. Hart, *The Concept of Law* (London: Oxford University Press, 1961), 189–95.

circumstance. Utilitarianism, for example, morally requires a person to place more weight on the collective choice than his or her personal ends and interests. But limited benevolence, or altruism, as one of the circumstances of justice is neither moral nor immoral, but part of the factual data in the background from which principles of justice are to be justified.[7]

Hume, Hart, and Rawls employ the circumstances of justice in different ways. For Hume, these circumstances of human social life help to explain why conventions emerge that enable us to live together and cooperate with one another. Conventions that protect property and freedom from physical harm are practically necessary for us to live in society with one another. For Hart, these circumstances show why, for human beings as we know them, there must be some prohibitions on conduct that protect us from physical harm and that enable us to make plans based upon our use of property in objects and agreements with others that dictate that some basic rules that must exist in order to ensure voluntary compliance with an order of rules that have a coercive sanction and enable human beings to live in society with one another. Hart regards such prohibitions as natural law in the sense that they are necessary for social cooperation among human beings as they are in our experience of them.[8]

These circumstances of justice reflect facts about human nature. They do not require any special insight into the essence of humanness or make any speculative metaphysical claims about what it means to be human. Further, the circumstances of justice do not of themselves make any moral claims or specify any particular moral principles. One may say, with Hart, that these circumstances show that a practicable legal system among human beings as we know them must include some prohibitions on physical aggression and theft. While this is a sound conclusion, it does not of itself show why we should assent to such a legal system or preserve our commitment to such a system when doing so does not advance our interests. Rather than being moral conclusions, the circumstances of justice consist of factual observations about human beings across time and cultures. A world in which any of these circumstances did not obtain would be very different from the

[7] As I argue later, we are entitled to bestow greater weight on our own ends because we are free and equal persons and other persons' ends do not of themselves have a special claim on our devotion. Their ends are important to them, and while we are morally obligated to recognize the special importance their ends have for them, that does not make them our ends too.

[8] Hart, *The Concept of Law*, 189–95.

one we know. The circumstances of justice are facts rather than moral principles, but they are facts that make justice a meaningful concept.

1.2. The Subjective Circumstances of Justice

Also bound up with the circumstances that make justice meaningful and with the separateness of persons is the idea that all individuals necessarily occupy different positions and have a personal point of view. Each individual sees the world through his or her own eyes. We each make decisions based upon the knowledge we have at the time we make them, as understood by us in light of our experiences and personality. Furthermore, as a result of our perspectival nature we necessarily find ourselves in conditions in which people have reasonable and good faith disagreements with one another about the value of the ends we and they wish to pursue.[9] Rawls regards these as "subjective circumstances of justice" because each person choosing principles of justice knows about themselves that they have ends, commitments, and a

[9] This is a different question from the one presented by the debate over the question whether intellectual peers with the same information can rationally disagree with each other over matters of belief involving facts and philosophical issues. See, e.g., Richard Feldman and Ted A. Warfield, *Disagreement* (Oxford: Oxford University Press, 2010). This issue arises under special conditions in which people with the same expertise or capacity have the same information before them and reach different conclusions. Those conditions are unlikely ever to be present in the kind of situation being considered here. The subjective circumstances of justice also present an issue that differs from that raised by either benign or coercive forms of paternalism. These theorists argue that since people are so prone to making mistakes in advancing their own interests, even as defined by themselves, political authorities should either incentivize better decisions or prohibit bad decisions. Common examples of such bad decisions involve health habits and debt. For a coercive form of paternalist argument, see Sarah Conly, *Against Autonomy* (New York: Cambridge University Press, 2013). For a more liberal or benign paternalism, see Richard H. Thaler and Cass R. Sunstein, *Nudge*, rev. ed. (New York: Penguin, 2009). Rather than addressing these issues, the less controversial point made here is that one of the subjective circumstances of justice is the observation that people have different conceptions of the good and that these differ from one another. On the one hand, this gives rise to conflict because the ends and plans of individuals may clash. On the other hand, this means that principles of justice should take into account the fact that persons' ends and plans compete and sometimes conflict with each other.

view of their own good when they choose principles of justice.[10] They are indeed part of the circumstances that make justice a meaningful concept because it is undeniable that human beings understand that they have ends, commitments, and a sense of their own good, that these differ among persons, and that these differences give rise to disputes and conflicts that principles of justice may mediate and resolve. Our differences on these matters make principles of justice both necessary and meaningful. Our ends may conflict, and our ends may be mutually exclusive. These facts are part of the circumstances of justice.

The separateness of persons is embedded in the circumstances of justice because separate persons have separate ends. In any society, persons will have some ends of their own, which they have by virtue of their individual position, personality, capacities, and desires. It is inevitable that in virtually any group, the individuals composing the group will have some separate ends, even if they have a common end that makes them a group. In a larger society, it is certain that most of the ends that individuals have will be their separate ends that they do not share with every other person in society.

What is important above all about the separate ends of persons is that they are not universally shared. A person may share ends with others and may form part of a group with a shared commitment. A common culture, religious idea, or political objective may unite people in an effort to achieve a shared end. None of these conditions overcome the fact that in any society, persons will have some ends that they do not share with everyone else in society. This means there are likely to be separately, and mutually exclusively, valued ends always present among persons in any society. It is the presence of competing valued ends that is one of the conditions that makes justice a meaningful issue to be resolved.

Persons are separate in that they are capable of choosing personally valued ends, pursuing those ends, and reaping the benefits of that pursuit. They are separate and distinct in their self-driven pursuit of self-chosen ends. This can readily be construed as a moral idea, but it is not necessary to do so to reach the more parsimonious conclusion that, as a matter of fact, persons have their own ends, commitments, and sense of their own good, and that this fact is one of those that makes the concept of justice a meaningful one.

[10] Rawls, *A Theory of Justice*, 127.

2. Reasonableness and Rights

The preceding section described the circumstances of justice as a factual account of human relations but did not set forth a theory of the good to be advanced by moral reasoning. In fact, I expressly rejected the notion that there is a scale of value to be maximized and that justice exists to serve. In this section, I offer a model of practical reason similar to others that have been termed "neo-Kantian" or "weak" contractualism,[11] by which we can identify and support principles of justice that establish rights as constraints on our conduct toward others. The circumstances of justice are the background data that provide substance from which to consider proposed principles of justice, but what is needed is a model of moral reasoning to show why some principles, and not others, could not be reasonably rejected by agents concerned with justice and not solely with their own ends and interests. Embedded within contractualism, which requires that we be able to justify our conduct by principles that other persons could not reasonably reject, is the acknowledgement of "the value of persons in the capacity for rational self-governance in pursuit of a meaningful life."[12] The circumstances of justice, factual rather than moral in nature, demonstrate not only the facts that make justice a meaningful concept but also the separateness of persons, which, in turn, supports the free and equal nature of moral agents whose claims must be justified to one another because none have inherent authority over other persons. The latter considerations do have moral significance, and these in turn indicate the kinds of reasons that support contractualism as a means of justifying moral principles. In order to reasonably reject a principle that allows or prohibits some act, persons must refer to the circumstances of justice, the separateness of persons, and the free and equal nature of moral agents in their objection to a moral principle. These are substantive categories of reasons that serve to narrow the range of reasons that can be offered for or against proposed principles of justice.

Contractualism as I outline it here requires us to take into account the interests of other persons, but it also limits the interests that we must take into account when considering principles of justice. These interests that we must take into account are those that we share as free, equal, and separate

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[11] Gary Watson, "Some Considerations in Favor of Contractualism," in *Rational Commitment and Social Justice*, eds. Jules L. Coleman and Christopher W. Morris (Cambridge: Cambridge University Press, 1998), 177; Gerald F. Gaus, *Social Philosophy* (Armonk, NY: M. E. Sharpe, 1999), 92.

[12] Rahul Kumar, "Reasonable Reasons in Contractualist Moral Argument," *Ethics* 114, no. 1 (October 2003), 15.

moral persons seeking to cooperate with others under the circumstances of justice. We are free in that the default mode of human interaction is one of freedom. That is, where there are no moral constraints, we are free to act as we choose. We are equal in that no ordinary adult has any natural claim of authority over any other ordinary adult. We are separate persons under the circumstances of justice for the reasons I offered in the first section. We are moral persons insofar as we intend that our actions toward others be justifiable in accordance with principles that no one can reasonably reject. Moral persons seeking to cooperate may reasonably reject principles that do not serve the interests of free, equal, and separate persons under the circumstances of justice—that is, the interests they share with all other such persons. These are limited in scope but powerful where they are present. My aim in this section and the next is to unwrap these ideas.

This model of moral reasoning requires some minimal idealization of the agents. That is, some features of the reasoning of people as we know them must be controlled for in the model so that we are considering a process of moral decision-making under the circumstances of justice. We could insist upon actual dialog among people as we know them, even if their dialog is governed by conditions designed to yield general moral principles. This is the approach of Jürgen Habermas's discourse ethics.[13] The kind of process Habermas envisions seems unlikely to yield determinate principles and instead establishes a democratic procedure that might produce very different principles among different groups of people. Habermas expressly recognizes this about his approach.[14] A highly idealized moral point of view, on the other hand, yields determinate results, but we may question the results of a highly idealized hypothetical exercise if the persons imagined in it are very different from people as we know them.[15] A third approach is a modestly idealized one. The aim of this approach is to model moral reasoning in a way that is, as Gerald Gaus put it, "accessible" to ordinary people because the model constructed is not too far removed from people as we know them.[16] This kind of model is idealized to the extent necessary to

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[13] Jürgen Habermas, *Moral Consciousness and Collective Action*, trans. Christian Lenhart and Shierry Weber Nicholsen (Cambridge, MA: Massachusetts Institute of Technology, 1990).

[14] Ibid., 92–109.

[15] Joseph Raz, "Facing Diversity: The Case of Epistemic Abstinence," *Philosophy & Public Affairs*, 19, no. 1 (1990): 3–46.

[16] Gerald Gaus, *The Order of Public Reason* (Cambridge: Cambridge University Press, 2011), 276–78.

describe moral reasoning among persons who seek to agree on the claims they may justly make upon each other. The model must make the participants consider the claims of other persons in good faith with the aim of seeking agreement on principles of interpersonal conduct they regard as just. This is idealized because it excludes the kind of self-interested hard bargaining and dishonesty we observe in real-world political debate.[17] The features of this model should include those needed to purge moral reasoning of considerations other than those aimed at deliberating on principles reflecting the claims that persons can make on other persons' conduct toward them. This is a model of moral reasoning, which human beings are capable of but do not always do in fact. It is true that people are often unreasonable.[18] That people do not always reason morally is not an embarrassment to a model of moral reasoning, which necessarily limits itself to that purpose and not a general account of human psychology and behavior.

The model of practical reasoning employed here leans heavily on the concept of reasonableness.[19] Reasonableness is a distinct concept from rationality: "There is no thought of deriving one from the other; in particular, there is no thought of deriving the reasonable from the rational."[20] Rationality refers to the methods by which we reach conclusions from the information we have, and full rationality requires not only flawless reasoning but also possession of complete relevant information to obtain the objective the reasoner has in view.[21] Reasonableness, on the other hand, involves a person's taking into account all of the reasons for or against some action (or principles allowing or forbidding the action). These will include not only the interests of the person making a judgment about the proposed action or principle, but also the interests of other persons as well. A rational person

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[17] Gaus, *Order of Public Reason*, 331–32; John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 48; T. M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998), 192.

[18] Shaun Young, "Rawlsian Reasonableness: A Problematic Presumption?," *Canadian Journal of Political Science* 39, no. 1 (March 2006): 164–65.

[19] I do not argue that rationality alone supports rights and duties to observe them. Alan Gewirth, in *Reason and Morality* (Chicago: University of Chicago Press, 1978), makes that argument, which suffers from the defect that, while I as a rational person may require and seek for myself the freedom to act on behalf my own ends, I may, rationally though unreasonably, seek to deny other persons that same freedom.

[20] Rawls, *Political Liberalism*, 51.

[21] Scanlon, *What We Owe to Each Other*, 31–32.

may seek to maximize what he or she values, but a reasonable person will recognize the force of norms that exclude some actions prohibited thereby.[22]

2.1. Reasonableness and Practical Reason

The circumstances of justice are conditions that obtain generally among strangers, or even among neighbors: limited scarcity, limited benevolence, and a rough equality of persons. It is these conditions that make principles of justice, characterized as rules of fair cooperation, meaningful to people who would adhere to them and be called upon to adhere to them. Reasonableness is a key concept in identifying such principles. In the context of articulating and defending proposed principles of justice, reasonableness is the quality of taking into account the interests of other persons.[23] Limited benevolence, limited scarcity of means, and rough equality of persons make justice a meaningful concept. If persons are to live together under such conditions, and if they recognize the separateness of others in their capacity to define and pursue their own valued ends and have a sense of justice about their relations to other people, claims that can be justified to them and that they can justify to others become the subject matter of justice and therefore of rights.

Reasonable persons "are ready to propose principles and standards as fair terms of cooperation and to abide by them willingly, given the assurance that others will likewise do so."[24] Reasonableness is a "moral point of view," though the phrase "moral point of view" is perhaps a misnomer. A specific point of view involves an individualized way of ranking or including and excluding particular interests, reasons, or considerations, and this is different than "evaluations 'all things considered,' with all relevant points of view taken

[22] To borrow Joseph Raz's terms, a "mandatory norm" is an "exclusionary reason." Exclusionary reasons are "second-order" reasons that rule out some acts not by outweighing or overriding first-order reasons but by excluding acts based upon those reasons. Joseph Raz, *Practical Reason and Norms* (New York: Oxford University Press, 1999), 73–76. Rights perform this function: "Deontological constraints might exhibit this same phenomenon. By grouping actions together into a principle forbidding them—'do not murder'—an action is removed from separate utilitarian (or egoist) calculation of *its* costs and benefits." Robert Nozick, *The Nature of Rationality* (Princeton: Princeton University Press, 1993), 62.

[23] Scanlon, *What We Owe to Each Other*, 33.

[24] Ibid., 49.

into account and each one given its due weight."[25] Thus there is not a moral point of view that is just one additional point of view among other points of view. Rather, a moral judgment is one that takes into account all relevant considerations and reasons and resolves conflicts among them. In this sense, it is not made from any particular point of view.

But as reasonable persons, we are not obligated to consider just any asserted interest or reason that other persons have but only interests or reasons that we share with them. The reasons and interests that other persons assert as bases for their claims must be reasons or interests that we share with them because they are reasons or interests that are comprehensible to us and that are the basis for free and equal persons to recognize as the bases for the reasonable rejection of principles for cooperation under the circumstances of justice. That is why moral obligation involves reciprocity among persons with equal moral authority. We are reasonable when we take into account the interests or reasons other persons have that we have too. The reciprocity of fairness delimits the range of interests that may be reasonably considered in principles of justice. These must be interests that we share. "I must justify my conduct in terms of some principle capable of being appealed to by all parties concerned, some principle from which we can reason in common."[26] The interests one can appeal to in considering principles of justice are generic or higher-order interests that are abstracted from the specific goals that individuals have and that are also held by other persons who have different goals and projects.[27] On the other hand, particular interests that I have, that I do not share with others, are not matters of justice. While they may be important to me in my conception of a good life, they are not matters of justice that I may employ as reasons to make demands upon other people. Stephen Darwall argues that the interests we share as free, equal, and rational persons are "in living self-directed lives on terms of mutual respect with

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[25] James Rachels, "Evaluating from a Point of View," *Journal of Value Inquiry* 6 (1972): 144–57.

[26] W. M. Sibley, "The Rational versus the Reasonable," *Philosophical Review* 62, no. 4 (October 1953): 557.

[27] Though I do not intend by implication to adopt anything else Alan Gewirth argues, his description of the "generic-dispositional view of goods" is similar to what I mean here: "Where the particular purposes for which different persons act may vary widely, the capabilities of action required for fulfilling their purposes and for maintaining and increasing their abilities are the same for all persons." Gewirth, *Reason and Morality*, 59.

others,"[28] which are comparable to what Rawls calls the "moral powers" of a sense of justice and the capacity to "form, revise, and rationally pursue a conception of the good."[29] Moral principles are those that persons fitting this description could not reasonably reject, given the mutual aim of finding principles that they and other persons could not reasonably reject to govern their interaction.

There are some minimal criteria that qualify persons as being capable of reasonableness. Reasonable persons can make normative demands on other persons, and they can reasonably accept those demands, when the persons involved are free and equal agents, each of whom has the equal moral authority to make moral claims on others and to accept the moral claims others make on them. We are free and equal in that the circumstances of justice do not place anyone in a position of authority over others. Instead, the authority we possess is to make moral claims on others. It is not a position from which persons are bargaining for advantage, because the aim of reasonable persons considering principles to govern their interpersonal conduct is to realize fair terms of cooperation. This does not mean that people making moral decisions are radically different from ordinary people. What it does mean is that the kinds of reasons they can offer for or against proposed principles of justice are constrained by the concept of reasonableness.[30] Further, it means that the kinds of motivation people can have when engaged in normative discourse include being disinterested and impartial and do not include seeking advantages over others. Real people are often unreasonable, and when they are unreasonable they are not engaged in moral judgment. Seeking to win an argument for the sake of winning or for advantage of some kind over other persons is not moral decision-making.[31]

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[28] Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Cambridge, MA: Harvard University Press, 2006), 308.

[29] Rawls, *Political Liberalism*, 525; see also Darwall, *Second-Person Standpoint*, 309.

[30] As I discuss below in the section on cognitive biases and heuristics, persons are constrained by principles of rational decision in deciding upon matters of fact. A willingness to adopt principles of rational decision-making in deciding upon matters of fact is associated with reasonableness as a disposition, notwithstanding the distinction between the rational and the reasonable in ethical theory. If, for example, one insists in ethical disputation that the world is flat despite ample empirical evidence to the contrary, one is being unreasonable.

[31] Certainly, there are some theories that take an approach based upon rational self-interest and agreement as the source of rights and duties. In contrast to "weak" or "neo-Kantian" contractualism, these are inspired more by Hobbesian

Reasonable and fair terms of cooperation are reversible. Kurt Baier and Gerald Gaus employ the concept of reversibility to help define what kinds of principles can be considered as candidates for principles of justice. Baier says of reversibility that behavior is reversible when it is "acceptable to a person whether he is at the 'giving' or 'receiving' end of it."[32] Gaus defines reversibility as follows: "A person's advocacy [of a proposed principle] must not depend on her knowledge that she will only occupy specific roles or positions."[33] But even if we know what role we will occupy, our judgment about a proposed principle cannot depend solely on how it affects us as opposed to other persons: If "I object to a principle's being universally governing because of the way it affects my interests as an equal member, though I wouldn't if it were someone else, then this is also an objection of the wrong kind to a candidate moral principle."[34] Reversibility is a concept of reciprocity. It means that no one can defend as fair a principle that they are unwilling to have applied to them.

Reasonableness means that I must take into account the interests of other persons. Reversibility means I must take my own interests into account, because the principle that is agreed upon is one that I am willing to have applied to me. I take my own interests into account because my interests are those at stake if I concede that a claim is reversible against me. If I make this claim reasonably, I must take your like interests into account as well because reasonableness means I am taking the interests of others into account. Reversibility is an idea of reciprocity. It means that the interests I have at stake on the proposed principle are interests that you also have. Because fairness requires reversibility, I take my interests into account, and because reasonableness means I must take the interests of others into account, fairness understood as reversibility means that I must consider the interests that I share with other persons.

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contractarianism. See, e.g., David Gauthier, *Morals by Agreement* (Oxford: Oxford University Press, 1986); Jan Narveson and James Sterba, *Are Liberty and Equality Compatible?* (Cambridge: Cambridge University Press, 2010), 123–68; Jan Narveson, *The Libertarian Idea* (Philadelphia: Temple University Press, 1988).

[32] Kurt Baier, *The Moral Point of View* (New York: Cornell University Press, 1958), 202.

[33] *Order of Public Reason*, 300.

[34] Darwall, *Second-Person Standpoint*, 308.

Rights as principles of justice are reversible. I claim against you the right to X, which imposes upon you a Hohfeldian duty[35] not to interfere with my Xing. To defeat my claimed right to X, you must offer a reason to reject that right as a fair term of cooperation under the circumstances of justice. One way to do that would be to show that the claim is not reversible in that the person making the claim is not willing to accept the same right to X being possessed by other persons. If it is not reversible in this sense, the person's claim is not fair. Every person making a claim to a right to X must be willing to accord the same right to other persons. To fail to do so would be unfair and thus unreasonable. Put in another way, it would be unreasonable for a person to reject others' right to X when they would prefer to have such a right themselves to not having such a right at all. Here we could consider a reason related to terms of cooperation why no one should have the right to X. This would enable you to reasonably reject a right to X if a right frustrates cooperation among persons. Thus, for example, a right to commit fraud or violent acts that interfere with the agency of other persons may be reasonably rejected because it frustrates cooperation among persons. Put differently, I make a claim to limit your liberty by denying you have the moral right to X. To defeat my claim, you must offer a reason against this restriction on your liberty that I cannot reasonably reject as a principle for fair cooperation under the circumstances of justice. While reversibility focuses on fairness, this question asks whether the asserted right prevents cooperation under the circumstances of justice. Anyone can reject a principle or right that would prevent cooperation under the circumstances of limited scarcity, limited benevolence, and rough equality of persons. For example, principles that grant ordinary adults different rights to liberty or grant special privileges to some and deny them to others would seem to do this. Likewise, principles that prevent persons from making rational financial or economic decisions would seem to do this as well. Further, principles that require more than a limited benevolence to other persons would seem to do this too where they compel us to serve others to our detriment. Anyone could reject as unreasonable principles that would frustrate terms of cooperation among persons under the circumstances of justice.

2.1.1. What Happens When Reasonable People Disagree?

Reasonable people may disagree. They may do so for a number of reasons. Rawls suggests the following: evidence may be hard to evaluate, we

[35] Wesley Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal* 23, no. 1 (November 1913): 30.

may disagree about the weight of different kinds of evidence or considerations, the concepts we use may be vague or indeterminate, the way reasonable persons "assess and weigh moral and political values" may differ because we have had different life experiences, it can be difficult to weight conflicting values against one another, and some considerations may not be vetoed, because there must be some limit to the range of considerations that can be counted.[36] A criticism of some forms of "weak" or neo-Kantian contractualism is that they seek to establish a procedure that will always yield a unique answer to moral problems, when a more defensible aim would be to establish an account of the kinds of reasons that are properly admissible in moral deliberation, accepting something less than a fully specified and determinate set of answers to all moral problems.[37] When someone reasonably rejects a principle, it cannot be the basis for fair terms of cooperation among persons seeking agreement on such terms. The result is what Gerald Gaus calls "blameless liberty," meaning there is no rule at all.[38]

Our cultural background and personal experiences influence our perceptions and values. One might suggest that the centrality of reasonableness is culturally biased because, for example, a particular culture might insist that women's proposals should not be considered. Another culture might insist that the proposals of some other racial, ethnic, or religious group should not be considered. Women could reasonably reject a standard of evaluation that discounted the proposals of women, as could persons who were members of other groups that a cultural perspective maintained should be discounted.[39]

Because we are considering whether one can defend universal rights, it is necessary that persons from multiple cultures who have different worldviews be included. With the objective of determining whether there are universal principles of justice—that is, human or natural rights—it is necessary that persons engaged in argument over asserted principles consider the norms of their own cultures or societies in a hypothetical and detached way so that they can view them critically.[40] Since our cultural and personal

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[36] Rawls, *Political Liberalism*, 56–57.

[37] Gerald F. Gaus, *Social Philosophy* (Armonk, NY: M. E. Sharpe 1999), 107–8.

[38] Gaus, *Order of Public Reason*, 321.

[39] This would be true for views with another basis, such as ideology or religion, that hold that some groups of persons are somehow less than human or not worthy of consideration.

[40] As Habermas argues, this requires that persons engaged in ethical discourse have realized a certain degree of socio-cognitive development. Specifically, they must

backgrounds contribute to our understanding of reasons, and reasonableness as I have defined it involves shared reasons, we must consider how persons from diverse backgrounds with different reasons and values can have a common standard for evaluating proposed rights as principles of justice. A reason, or "evaluative standard," as Gaus puts it, may be intelligible to us in the sense that we understand it as a reason.[41] Intelligibility means that we can recognize that *X* is a reason for another person even though it is not a reason for us. This alone is not particularly helpful in reaching agreement on proposed norms. That *X* is a reason for you does not make it a reason for me in any sense, including a reason I would include in reaching a conclusion about the validity of a proposed norm. Gaus suggests the similar but distinct concept of shared reasons, or "evaluative standards," as he puts it, which are standards of reasoning that you and I both use, even though we may place more or less weight on them than other persons do.[42] These are more helpful in the sense that we both actually use them, so the standard is not foreign to us, even if we do not agree with the weight another person puts upon it.

Gaus rejects the shared-standards model because it excludes some standards that are important to many, such as religious considerations that others reject. This is indeed problematic if our standard requires persons to endorse the validity of the norms being considered. It is less problematic if the standard requires that persons offer reasons to reject the rule under consideration that no one can reasonably reject. Reasonableness requires that persons offer reasons to reject a rule that other persons share. Here, it will not do to assert, as Gaus suggests, religious conscience or other conceptions of the good to defeat a proposed norm, because it is not required that all endorse the proposed norm. Instead, they must offer a reason to reject the proposed norm couched in terms of reasons that everyone has under the circumstances of justice.

This has the effect of reducing the number and kinds of claims that can be considered. It definitely eliminates what Rawls calls "comprehensive doctrines," which include a broad range of belief systems that include different moral and religious ideas.[43] Rawls's idea of the "burdens of judgment" relates to justifying substantive principles in particular political

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have reached the postconventional level of moral development in Kohlberg's categories of moral development. See *Moral Consciousness and Communicative Action*, 175–80.

[41] Gaus, *Order of Public Reason*, 283.

[42] Ibid., 286.

[43] Rawls, *Political Liberalism*, 13.

societies and seeking an "overlapping consensus" among comprehensive doctrines that most people in a society can accept. Recognizing the limits of the demands we can place on one another is a central part of a reasonable disposition, and it is supported by our moral equality.[44]

It is true that to consider one's own cultural norms and values in a hypothetical and detached way, as Habermas suggests, requires a high level of socio-cognitive development, higher in fact than most normal adults achieve in their lives. Does this mean that the contextualized reasons and values that persons who have not achieved such a level of development are to be disregarded? No, it does not, and in fact, their objections to proposed principles must be considered, as the impact of proposed principles on all persons concerned must be considered. But if their asserted rejection of a proposed principle is not a reasonable one, because it is one that does not reflect the generic interests of free, equal, and separate persons seeking terms of cooperation under the circumstances of justice, their asserted rejection need not be adopted and cannot be the basis for rejecting a proposed principle.

Are we able to hold persons responsible for observing principles that no one can reasonably reject if those persons are unable to consider proposed principles from outside the contextualized norms and values of their societies? Yes, and this is something that human societies do constantly and with good reason. Persons with a conventional level of socio-cognitive development are able to understand the content of principles of right and wrong and to govern their behavior accordingly. Prisons are full of persons who have a modest level of socio-cognitive development and yet committed horrible and violent crimes, knowing these to be wrong. After the Second World War, persons who unreasonably believed they were excused or justified in committing atrocious crimes against humanity were held responsible for them at Nuremburg, and the unreasonable beliefs these persons held that their actions were excused or justified were not reasons to not hold them accountable for their actions. Their unreasonable beliefs or principles do not excuse or justify their actions.

Approaches such as Rawls' that seek to present a fully determinate set of principles built upon assumptions fall prey to the argument that they are culturally contingent.[45] The contractualism I advance here remains aware of

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[44] Allyn Fives, "Reasonableness, Pluralism, and Liberal Moral Doctrines," *Journal of Value Inquiry* 44 (June 2010): 331–33.

[45] John Gray, *Post-liberalism: Studies in Political Thought* (New York: Routledge, 1993), 48–50.

cultural differences and their practical importance, which is reflected in the partial indeterminacy of abstract principles and their specification as parts of systems of rules that I examine in section 3.

2.1.2. The Problem of Cognitive Biases or Heuristics

People may disagree about factual matters, such as the likelihood of some event, and this is a reason they may also disagree about norms, insofar as disagreement about norms arises from disagreement about beliefs regarding matters of fact or likelihood. It is well established as an empirical matter that cognitive biases and the use of cognitive heuristics infect our ordinary reasoning and lead us to make systematic errors of judgment about many matters.[46] For example, one common cognitive bias is to misconceive chance. Considering coin flips, people are likely to consider clusters of heads or tails as unlikely and to expect alternating heads and tails to be more likely when, in fact, such clusters are entirely attributable to chance.[47] There are many such cognitive biases and heuristics (or mental shortcuts) people make that lead them to erroneous judgments of fact because these are based upon various kinds of misconceptions.

While it is humbling to recognize that our hunches are so often wrong, these researchers tell us that not all hope is lost. One reason for studying cognitive biases and heuristics is to learn how to overcome shortcomings in our capacity for reasoning well.[48] Ariely suggests that "although irrationality is commonplace, it does not necessarily mean that we are helpless. Once we understand when and where we may make erroneous decisions, we can try to be more vigilant, force ourselves to think differently about these decisions, or

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[46] See, e.g., Daniel Kahneman, et al., *Judgment under Uncertainty* (Cambridge: Cambridge University Press, 1982); Thomas Gilovich, *How We Know What Isn't So* (New York: Free Press, 1991); Dan Ariely, *Predictably Irrational*, rev. ed. (New York: Harper, 2010).

[47] See Amos Tversky and Daniel Kahneman, "Introduction: Judgment under Uncertainty: Heuristics and Biases," in *Judgment under Uncertainty: Heuristics and Biases*, eds. Daniel Kahneman, Paul Slovic, and Amos Tversky (New York: Cambridge University Press, 1982), 7–8; Thomas Gilovich, *How We Know What Isn't So: The Fallibility of Human Reason in Everyday Life* (New York: Free Press, 1991), 18–19.

[48] See Daniel Kahneman and Amos Tversky, "On the Study of Statistical Intuitions," in *Judgment under Uncertainty*, 494; Gilovich, *How We Know What Isn't So*, 185–94. See also the discussion in Gerald F. Gaus, *Justificatory Liberalism* (New York: Oxford University Press, 1996), 60–62.

use technology to overcome our inherent shortcomings."[49] We cannot expect people as we encounter them to have rid themselves of common defects in reasoning, but we can modestly idealize persons engaged in moral thinking about principles of justice to be willing not to rely on known cognitive biases or heuristics that lead to systematic errors of judgment. This is a degree of idealization and makes our agents different from the people we encounter on the street. On the other hand, it is at least in principle possible for people to recognize many kinds of errors in judgment. Since this degree of idealization is one that people can in principle achieve, it is not too far removed from the real people who would examine principles of justice. Gerald Gaus's "members of the public" are "idealized members of the actual public, but they are not so idealized that their reasoning is inaccessible to their real-world counterparts."[50] A modest degree of idealization is defensible where the idealized persons' thought processes are accessible to people as we encounter them. These are accessible in that people can in principle escape them, even if they fail to do so in fact.

Another way to see how it is defensible to invoke this cognitive idealization is that there are proponents of public policies that would institute corrective measures for these cognitive biases and heuristics. One extant policy supported by Thaler and Sunstein, for example, is the Pension Protection Act, a federal law in the United States that gives employers an incentive to automatically enroll their employees in defined-benefit plans, match their employees' contributions to those plans, and increase the amounts contributed to the plans over time.[51] The rationale behind this law is that employees often fail to take advantage of defined-benefit plans at work at all, much less take full advantage of these plans, and thereby save less for retirement than is optimal. To help those of us whose savings strategies are less than fully rational, this policy structures choices in such a way that people act more rationally in terms of saving for retirement.[52] The authors of this

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[49] Dan Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions*, rev. ed. (New York: Harper-Collins 2009), 322.

[50] Gaus, Order of Public Reason, 276.

[51] Richard H. Thaler and Cass R. Sustein, *Nudge: Improving Decisions about Health, Wealth, and Happiness*, rev. ed. (New York: Penguin 2009), 117–18.

[52] Can someone reasonably reject an intervention such as the Pension Protection Act, which requires employers to structure their defined-benefit plans for their employees in such a way as to make their employees act in a manner that is more rational (or, better put, perhaps more rational, depending upon one's discount rate of future to present benefits)? Employers (or anyone) can reasonably reject this

policy can be deemed to have become sufficiently aware of the cognitive bias against sufficient saving for the future to design a way to remedy the effects of that bias. In doing so, they have demonstrated why a modest degree of cognitive idealization in deciding upon policies is defensible. In the sense that articulating rights is akin to policy making, it is likewise defensible to invoke this degree of cognitive idealization.

Can we obligate people to adhere to principles that more ideally rational versions of themselves cannot reasonably reject? Consider the influence of cognitive biases and heuristics that lead to erroneous conclusions about states of affairs, probabilities, or decisions. To the extent that these types of conclusions figure into reasoning about normative principles of action, leaving these biases or heuristics in place means that there is a greater likelihood that the person will reach an erroneous conclusion. In this context, this would mean that the person might reject a principle that they cannot reasonably reject if they are reasoning correctly. If a person were to deny their obligation by a normative principle on the basis that they are entitled to reason incorrectly, those who reason correctly are likewise entitled to disregard the person's denial of their obligation. The person who insists upon maintaining their unjustifiable biases or heuristics has not removed themselves from the moral community of persons who may be held accountable for their actions and whose (relevant, as in the sense defined above) interests must be considered, but they fail to offer reasons for rejecting a proposed principle that no one can reasonably reject. Those who reason without those biases or heuristics can reasonably reject the account offered by a person who insists on including their unjustifiable reasons or heuristics. In a word, reasonable persons can justifiably ignore bad reasoning. This does not conflate reasonableness and rationality, which remain distinct concepts. Insofar as determinations of matters of fact figure in consideration of principles of justice, it is unreasonable to insist upon some factual matter that has been shown to be false so that no rational person, in the modestly idealized sense contemplated here, would insist upon it. Thus, if I insist in moral disputation with you that when a coin has been flipped and turned up heads five times in a row, there is now a greater than 50 percent chance that it will turn up tails on the next flip, my insistence is unreasonable because it can be conclusively demonstrated as a matter of mathematical probability that the likelihood of tails is always 50 percent on any such coin toss. My belief to the contrary is a failure of rationality for me, but it becomes

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requirement, which imposes burdens on the employers for the sake of a purported aggregate social benefit. For this reason, it is immoral to compel employers to structure their defined-benefit plans in this way.

unreasonable only when I insist upon this demonstrably false belief in moral disputation with you. It does not conflate rationality and reasonableness to maintain that insistence in moral discourse upon a factual matter that is demonstrably false is unreasonable.

Does modest idealization place too great a weight on practical reason as a feature of human life? Eric Mack argues that contractualism is flawed because it unjustifiably privileges human epistemic capacity, which is one of a number of important human capacities.[53] It is true that contractualism lays great stress on epistemic capacity. There are other human capacities that are important for other purposes, such as physical courage or strength, for example. While such capacities are important in other areas of human life, epistemic capacity has special relevance to the human activity of moral reasoning, so the stress that contractualism lays upon this capacity is warranted. Contractualism as I conceive it here does not unjustifiably privilege epistemic capacity above others. Instead, it reflects our understanding of human beings in the social conditions that make justice a meaningful concept to us. In this way it is rooted in the reality of our lives rather than simply a contractual agreement,[54] so agreement is not the basis for our rights. Rather, agreement is the affirmation of antecedently existing moral rights that we discover and articulate through contractualist reasoning. To show how it does not privilege epistemic capacity, contractualism as I am using it here to ground rights to liberty does not depend upon the epistemic capacity of the person having those rights. These rights can still be affirmed by other persons observing the objectionable conduct or acceptable conduct. Thus, for example, a person can object to conduct toward persons who, due to a cognitive defect, cannot defend themselves. Furthermore, people who lack certain epistemic abilities can still be held morally accountable for their conduct.[55] What is necessary is not the ability to engage in ethical reasoning at

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[53] Eric Mack, "Scanlon as Natural Rights Theorist," *Philosophy, Politics & Economics* 6 (1): 68. It is a defensible interpretation of Scanlon that he, as Mack argues, understands the agreement on what is rejected to be what makes conduct wrong. See also Thaddeus Metz, "The Reasonable and the Moral," *Social Theory & Practice* 28, no. 2 (April 2002) 277–78.

[54] This is a key distinction between contractualism of the "weak" or "neo-Kantian" variety and the contractarianism inspired by Hobbes's political thought, in which promises supported solely by rational self-interest are taken to be the basis for moral rights and duties.

[55] Incidentally, Anglo-American law gives effect to this moral principle because it only excuses adult persons from criminal liability if they are unable to appreciate

the highest level of socio-cognitive capacities. Rather, it is the ability to know that something is wrong in the conventional sense. It is correct to say, as Gerald Gaus does,[56] that the conventional level of socio-cognitive development is sufficient for his "members of the public," or public reasoners. This is enough for them to know what is wrong, and it is not necessary for them to be able to engage in the highest levels of ethical reasoning. This is what enables them to hold other persons accountable for their conduct.

2.2. Rights Are Not a Value to Be Maximized or Optimized against Other Values

One might think of rights as an instrument to promote a general value of liberty that can be weighed against other values and thereby produce morally superior consequences, all things considered. But the standard of reasonable rejection does not include aggregated social values. What matters is not whether we are maximally or optimally producing a certain kind of value but whether the principles of justice we hold persons accountable to observe cannot be reasonably rejected by anyone. For this reason, rights thus established are constraints on conduct and not an instrument for producing a general value of liberty as part of a calculus of social value.[57] In this section, I consider paternalistic consequentialism, social welfare, and economic equality as competing values that might be alleged to defeat rights to liberty. Because having these values as competitors in a calculus of rights against a generalized value of liberty produces principles that anyone could reasonably reject, none of these are candidates for abrogating or limiting rights that no one can reasonably reject as the basis for fair terms of cooperation under the circumstances of justice.

2.2.1. Paternalistic Consequentialism

The problem of cognitive biases and heuristics points toward other problems that arise from bad individual reasoning. It is clear that many people make bad decisions involving such matters as health habits, debt, and many other things. For this reason, some theorists argue that they should be

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the wrongful nature of their conduct. See, for a classic example, *Queen v. M'Naghten*, 8 Eng. Rep. 718 (1843).

[56] Gaus, *Order of Public Reason*, 214–16.

[57] See also Nozick, *Anarchy, State, and Utopia*, 28–30; Narveson, *Libertarian Idea*, 59.

prevented from making bad choices or compelled to make better ones.[58] Others argue instead that government should find ways to encourage people to make better choices.[59] Rights to liberty may allow people to make choices that harm themselves. Should we allow them to do that?

These paternalist arguments are based on consequentialist ethics, and similar considerations apply to both liberal and illiberal forms of paternalism that apply to utilitarianism (see section 1). Defects in human rationality may seem to justify intrusions on individual decision-making to produce superior results. For example, people may consume unhealthy foods, eat too much, or fail to save adequately for retirement. We can see how they may obtain better results if they are prevented from doing these things, or at least offered disincentives to do them. Policies that disregard the separateness of persons constitute intrusions on the integrity and freedom of persons for the sake of an aggregate benefit in much the same way that utilitarianism does. Integrity includes agent-relative reasons for action,[60] and these reasons can also be relative over time in a single person's life.[61] It is highly likely that some individuals' agent-relative reasons among a group of persons will differ from one another and that some, at least, will differ from the policy's chosen preference. A policy that breaches the integrity of persons' agent-relative reasons for action that is justified on the basis of getting it right most of the time is going to suffer from the same kind of defect as utilitarianism: it violates the integrity of some persons on behalf of an aggregate benefit.

One moral problem with these forms of paternalism is that they are concerned with consequences only and are thus plagued by some of the same problems as their cousin, utilitarianism. They disregard agency and ignore how the exercise of agency, apart from any inherent value it may have, also has consequences that may be desirable for the persons who experience them. For example, let us say that I have made various poor decisions in my life and, looking back on those decisions, I have learned from them. I have become wiser as a result of my mistakes, and I value the wisdom I have

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[58] See Sarah Conly, *Against Autonomy* (New York: Cambridge University Press, 2013).

[59] See Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness*, rev. ed. (New York: Penguin, 2009).

[60] This is a key part of Williams's critique of utilitarianism. See J. J. C. Smart and Bernard Williams, *Utilitarianism: For and Against* (Cambridge: Cambridge University Press, 1973), 108–17.

[61] Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984), 192–93.

gained in this way. Had I been prevented from making these mistakes by a benevolent dictator, I would indeed have avoided the negative consequences of my poor decisions, but I would be no wiser today than I was before. This is a bad result for me from my point of view, and it is a result that the benevolent dictator has imposed upon me, purportedly for my own benefit. I am on solid ground if I assert that the dictator's actions are unreasonable, regardless of the dictator's intention to act for my benefit, and anyone may reasonably reject them.

Sarah Conly argues that we are likely to reason poorly when presented with challenges in the moment and should bind ourselves with rules designed by someone in a planning mode not faced with the need for a hasty decision.[62] She notes that "in *Nudge*, Sunstein and Thaler refer often to the doer and the planner: the planner is able to think about decisions where he is not subject to, for example, temptation—he decides on the day's food purchases while he is at home, not when he is standing hungrily in front of the bakery counter."[63] Anyone who wishes to improve their diet for health purposes will soon learn that planning is important to success. If they succeed in learning to do this, that person will have strengthened their capacity for choice through the exercise of their agency. The paternalist seeks to deprive us of such opportunities to enhance our capacities through the exercise of our agency, and it is for this reason that paternalism breaches our separateness and why any person can reasonably reject such interventions. The stakes, of course, may be larger than in the foregoing example. Suppose I value teaching my children frugality and saving, which I regard as virtues. My children and I must have the freedom to make mistakes to develop and practice these virtues. The paternalist seeks to impose barriers to my ability to pursue this end I value, and I, or any other person, can reasonably reject such barriers and the principles on which they are erected.

2.2.2. Welfare Economics

Even sound individual choices may in some cases produce socially suboptimal results. Should we override rights to liberty where some kinds of actions, taken in the aggregate, have a collective impact that reduces social welfare? If we regard rights to liberty as part of a calculus of social well-being and employ, say, a criterion of Pareto optimality as our moral yardstick, we would certainly override rights to liberty to produce socially optimal outcomes. Thus, for example, Robert Frank defends cash subsidies to

[62] Conly, *Against Autonomy*, 38–39.

[63] Ibid., 38.

farmers "who cannot make ends meet" compared to other, less efficient programs such as price supports.[64] More generally, individual action that is not wrong in itself may lead to collective results that no one prefers, such as individual contributions to malinvestment that lead to economic effects that are harmful in the aggregate.[65]

But there are very powerful reasons not to think of rights in the way someone such as Frank suggests. To explain these, I borrow some concepts from F.A. Hayek, who was not himself a theorist of rights. Hayek distinguishes between two kinds of social order: *cosmos* and *taxis*.[66] *Cosmos* is a social order that exists, not to attain specific goals, but rather to facilitate the pursuit of individuals' goals. *Cosmos* itself does not have a goal. *Taxis*, on the other hand, is an organization designed to achieve some known and specified goal or goals. Hayek also distinguishes the following categories of rules: *nomos* and *thesis*.[67] *Nomos* consists of principles that facilitate cooperation among persons and facilitate the pursuit of individuals' ends that are not known to others. Such principles are end-independent rules of conduct. *Thesis* consists of rules that are characteristic of organizations and that are designed to achieve known specific purposes.

It is clear that a welfare economist regards a social and political system as having the goal of attaining socially optimal outcomes, even if they do not consider such a system itself as a type of organization in the sense that a business or public bureaucracy is an organization. As a result, consequentialist ethical approaches that seek to produce a particular pattern[68] of social outcome, such as welfare economics, suffer from the same kind of defect that plagues utilitarianism in that these will compromise the integrity of individuals and treat a social decision as if it were a rational decision-making process for an individual. Individuals must regard the socially optimal outcome as their preferred choice even if that requires them to forgo opportunities to increase their own well-being or exercise their freedom in ways that might lead to a less-than-optimal social outcome. Thus, I am

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[64] Robert H. Frank, *The Darwin Economy: Liberty, Competition, and the Common Good* (Princeton: Princeton University Press, 2011), 115–16.

[65] John Cassidy, *How Markets Fail* (New York: Picador, 2010), 177–91.

[66] Friedrich A. Hayek, *Rules and Order*, vol. I of *Law, Legislation and Liberty* (Chicago: University of Chicago Press, 1973), 35–52. Cf. Michael Oakeshott's distinction between "civil" and "enterprise" associations in *On Human Conduct* (Oxford: Clarendon, 1975), 108–19.

[67] Ibid., 94–144.

[68] Nozick, *Anarchy, State, and Utopia*, 155–60.

morally obligated to prefer cash payments to farmers to my investing in some other enterprise that would otherwise advance my own purposes. A decision that generates a socially optimal outcome treats the social decision as if it were an individual decision to produce an efficient allocation of that individual's resources, but, as Rawls argued, this decision fails to acknowledge the separateness of persons. Where individual actions that are morally permissible contribute in some way to external effects that are undesirable, this result is not unjust, and injustice rears its head when we enter into conflict with one another over the appropriate response, which is highly likely since no one has done anything that is morally blameworthy.[69] Anyone can reasonably reject such a decision.

While Hayek is not a theorist of rights, his distinctions are useful in thinking about how rights differ from some other kinds of rules. In particular, the rights I have in mind here are rights that antecede any kind of political organization and are rights that persons have by virtue of being persons. Because, as I am arguing here, such rights are not derived from their contribution to aggregate utility or a Pareto-optimal social outcome, they are not to be weighed against such patterns of social outcome and are not overridden by such considerations.

2.2.3. Egalitarianism

Suppose that persons agree upon terms of their cooperation, interact repeatedly to establish a system of social and economic cooperation, and subsequently discover that some prosper more than others under this arrangement. Those who benefit less might assert that they are due compensation for their observance of the terms of cooperation, and they might reject these terms if they are not compensated. Where none of these persons can reasonably reject the terms of their cooperation, those who benefit more could reasonably reject the claim that they must compensate the others. After all, this is thus far a voluntary arrangement. But suppose further that the persons interact as part of a larger social and economic system established and perpetuated by rules enforced with coercive sanctions and that they have not actually consented to this arrangement. Now all are alike subject to a social and economic system to which they have not actually consented. Does this strengthen the hand of those who could reasonably reject these terms without compensation?

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[69] Tibor Machan, *Individuals and Their Rights* (La Salle, IL: Open Court, 1989), 144–46; Hans-Hermann Hoppe, *A Theory of Socialism and Capitalism*, 2nd ed. (Auburn, AL: Ludwig von Mises Institute, 2016) 162–63.

Thomas Nagel argues that it does.[70] He offers a contractualist argument employing the reasonable rejection standard[71] that given the historical states we have, which are based upon coercion and not voluntary choice, we should treat these states as an exogenous factor in settling upon principles of justice. Some people will prosper more than others in a given system, for a whole variety of reasons, many of which are beyond their power to control. Nagel argues that in these circumstances, those who prosper more should have some of their wealth redistributed to those who have less in order to promote material equality among all the people subject to this state. Part of the rationale for this is that those who prosper more benefit more from this arrangement than those who prosper less and that those who prosper less could reasonably reject this arrangement given that they prosper less. Nagel glosses over the fact that neither those who prosper more nor those who prosper less have necessarily chosen this arrangement. Generally, this kind of arrangement has been imposed upon all of them by some third party, by the force of history, or generally by the force of something external to them. It is not chosen by them, and it is not necessarily supported by them. And those who prosper more can reasonably reject a principle that requires the redistribution of their wealth by this third party who has erected or perpetuated that system to those who have prospered less. They are all equally subject through the coercion of this third party or by the historical circumstance that has imposed this system on all of them. So we cannot examine it just from the standpoint of those who prosper less but also from that of those who prosper more, and the latter can reasonably reject a principle that requires them, because of their being subject to this system, to have their wealth redistributed to others.

Nagel's argument about redistribution would be stronger if the principle were reached in a freely negotiated bargain among the people, so let us say the parties themselves agree that they will enter into a certain kind of social and economic arrangement with each other knowing that some might prosper more than others. They might agree that it would be a mutually beneficial bargain if they agreed to redistribute wealth among themselves

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[70] Thomas Nagel, *Equality and Partiality* (Oxford: Oxford University Press, 1991).

[71] While Nagel endorses Scanlon's contractualism, he arguably "treats Scanlon's general claim (an act is wrong iff some *principle* forbidding it is *un*rejectable) as equivalent to the claim that an act is wrong iff every principle *permitting* it is rejectable." Hanoch Sheinman, "Act and Principle Contractualism," *Utilitas* 23, no. 3 (September 2011): 289. See also Shelly Kagan, "The Unanimity Standard," *Journal of Social Philosophy* 24, no. 2 (Fall 1993): 149.

from the more prosperous to the less prosperous parties. But in the absence of such a bargain, anyone could reasonably reject a principle that required them to compensate others for their less prosperous position. Nothing in the circumstances of justice—that is, limited benevolence—mandates such a principle.

3. Articulating Rights: Abstract and Specified Rights

Rights to liberty are general principles derived via contractualist reasoning that require further specification to form part of working systems of rules to facilitate cooperation among persons under the circumstances of justice among separate, free, and equal persons. This section includes two parts. In the first part, I explain how the separateness of persons under the circumstances of justice and contractualist moral reasoning enables us to derive abstract rights to liberty. In the second part, I explain the problematic nature of abstract rights for a workable system of rules, and I show how contractualist reasoning not only establishes abstract rights but supports more fully specified rights as well.

3.1. Deriving Abstract Rights to Liberty

In sections 1 and 2, I showed how some principles are ruled out by the contractualist method of ethical reasoning in light of the separateness of persons considering principles to govern their social interaction under the circumstances of justice. I began in section 1 with the familiar objections of Nozick, Rawls, and Williams that utilitarianism fails to consider the separateness of persons because it treats a social decision as if it were a decision of a single person. Utilitarianism fails to respect the separateness of persons because it treats individuals and their preferences as fungible parts of an aggregate decision and morally compels individuals to prefer the socially preferred choice over their own, even at the cost of the integrity of their own goals, plans, and projects.[72] From there, I considered persons examining principles to govern their social interaction under the circumstances of justice, which are limited benevolence, limited scarcity, and a rough equality of persons. Under these circumstances, separate individuals, who are not morally required to give greater weight to the ends of others than their own, are likewise not morally required to give greater weight to a social preference

[72] Loren Lomasky calls them "projects," or ends chosen by persons, because they take on a motivating and guiding role in their lives. See *Persons, Rights, and the Moral Community*, 52–55.

ordering than to their own preference ordering. Under the circumstances of justice, persons are free and equal, and any person may reasonably reject a proposed principle that fails to acknowledge them as a separate, valuing individual who is not morally required to abandon their goals, plans, or projects for the sake of the goals, plans, or projects of other persons. Since utilitarianism demands that they do this, any person can reasonably reject a utilitarian moral principle as the basis for governing social interaction among persons under the circumstances of justice. In this way, contractualist moral reasoning enables persons considering principles to govern their social conduct under the circumstances of justice to rule out principles that anyone can reasonably reject.

In section 2, I employed the foregoing approach to rule out some alternative principles. Paternalist consequentialism fails to respect the separateness of persons because it compels or prohibits certain choices to generate "better" choices, where "better" is defined in terms of want satisfaction or well-being. Paternalist policies breach the separateness of persons because they compel or prohibit choices and actions by everyone in order to advance the want satisfaction or well-being of persons who would make "worse" choices. As I argued in section 2, there are legitimate, value-related reasons why people may want the freedom to make mistakes, even if this results in some "worse" choices, because these develop their capacity for choice, and some persons may simply have an individual preference ordering that reflects different values or discounts the future differently than many other people do. Not only these persons, but anyone, may reasonably reject paternalism for these reasons. Welfare economics supports policies that breach the separateness of persons though regulation, taxes, subsidies, and the like. These breach the separateness of persons because they compel or prohibit individuals to pay, act, or refrain from acting as they otherwise would in order to promote an outcome deemed socially superior in terms of preference satisfaction. Everyone is morally required to subordinate their goals, plans, and projects to the social goal of efficiency as understood by welfare economics. Anyone can reasonably reject such policies because they fail to respect the separateness of persons, subordinating them to an overarching social goal. Finally, egalitarianism and its associated policies of redistribution and prohibitions on acts that would upset an egalitarian distribution also fail to respect the separateness of persons. Egalitarianism does this because it harnesses individuals with their separate goals, plans, and projects to the social goal of material equality. Anyone can reasonably reject this principle, as well as paternalism and egalitarianism, because in breaching the separateness of persons, these principles and their policies fail to give due regard to the generic interests that persons share under the circumstances of justice.

The foregoing set forth the structure to derive rights to liberty from the background conditions of justice and associated separateness of persons conjoined with contractualist moral reasoning to show why there are abstract rights to life and liberty as traditionally understood in classical liberal and libertarian thought. The arguments presented in sections 1 and 2 can be used to derive and defend rights to liberty in the following way. The circumstances of justice underscore the separateness of individuals. These circumstances—limited benevolence, limited scarcity, and rough equality of persons—mean that persons can be expected to be partial to their own ends and that the ends of individuals may conflict. The function of principles of justice, including rights, is to mediate such conflicts. Separate persons have their own ends and commitments and a sense of their own good, and rights to liberty enable them to pursue and promote those. To reasonably reject a principle, a person must refer to the circumstances of justice, the separateness of persons, the free and equal nature of moral agents, and the generic interests of such agents to show that someone or anyone could reasonably reject a proposed principle. In considering such principles, each must consider the claims of others in order to find principles that no one can reasonably reject, since reasonableness includes the quality of taking into account the generic interests of other persons. Darwall nicely characterizes these kinds of interests as those we have in "living self-directed lives on terms of mutual respect with others."[73] Principles that no one can reasonably reject will be reversible in the sense that each person cannot reasonably reject having that principle applied to themselves as well as to other persons.

I showed in sections 1 and 2 how claims people may make on each other in several approaches to moral and political philosophy may be reasonably rejected by persons in light of the separateness of persons and the "neo-Kantian" contractualist procedure for considering claims. Negative rights to liberty, as principles of justice, are subject to the same scrutiny and will withstand that scrutiny. Negative rights to liberty, as traditionally formulated, will survive such scrutiny because they take into account the separateness of persons who are partial to their own ends and commitments and have a sense of their own good. Free and equal moral agents have the generic interests encapsulated in Darwall's idea of self-directed lives on terms of mutual respect. Negative rights to liberty protect those generic interests by permitting persons to pursue their own ends and commitments as defined and chosen by them subject to the reversible and thus equal nature of negative rights to liberty as principles of justice. This means that such rights

[73] Darwall, *Second-Person Standpoint*, 308.

are not absolute and that they must be defined in such a way that persons may exercise their rights equally as negative rights to liberty.

The contractualist procedure for identifying such principles embodies the concept of reasonableness in that (a) a principle surviving examination would be one that will enable people observing it to justify their conduct consistent with that principle to others, so that others cannot reasonably reject the principle permitting or proscribing the conduct, (b) insofar as proposed principles include factual claims, these claims have not been proven false, and (c) insofar as the arguments over the principle and conduct rely on proffered ends, each person must accept that each person may pursue their own ends. Condition (c) does not require that each person give equal weight to the ends of other persons in considering principles to govern their social interaction. That condition does not require that any person disregard the greater weight they bestow upon their own ends. Instead, it requires that as a condition of practical reason, each person must recognize that others have ends and reasons of their own that perform the same function for those other persons as his ends and reasons do for him. He cannot reasonably disregard this characteristic of other persons in promoting his claims and considering theirs. Each person must be able to justify his conduct to others in terms of consistency with a principle that all others must concede is a legitimate rule to govern their social conduct because none can reasonably reject that principle.

Persons considering principles of just conduct could not reasonably reject the basic rights to liberty that are generally recognized among liberal societies that protect freedom of thought, expression, conscience, and action and that correspond in a rough and general way to the classical liberal rights to "Life, Liberty and the pursuit of Happiness."[74] Rather than identifying a collection of such rights, I employ some of them as examples here to show how to offer a contractualist defense of such abstract rights, which I follow in the next section with a contractualist method for specifying them. These abstract rights are prima facie rights in that they must be given more specific form as rules that function as part of a system of rules to govern interpersonal conduct.

Rights are grounded in the separateness of persons because each person may reasonably reject any principle that would subordinate their ends to any purported social objective or to any end but the protection of the like liberty of other persons. Anyone can reasonably reject forcible prohibitions on freedom of thought, expression, and association. The basis for

[74] Declaration of Independence, ¶ 2 (1776).

considering such norms is to establish morally acceptable conditions under which persons may choose and pursue ends that are valued by them. It is inherent in the idea that an end is valued by a person and promoted by that person regardless of the end's object—that is, to promote the well-being of others.

Persons considering rights cannot reasonably reject principles protecting the rights of themselves and others to pursue their self-chosen ends. All persons advancing a contention that they should be permitted to pursue their own ends must agree that others should have the liberty to do the same. Thus, for example, rights protecting freedom of conscience protect the rights of persons to worship, or not to worship, as they choose. The same is true of rights to freedom of expression, travel, and choice of an occupation or subject of study.

Anyone could reject a principle that granted persons unequal rights to liberty of action. Where one person contends for the freedom to pursue his or her own ends, that person must concede a like freedom to others as well. Rights to freedom of action extend to a freedom to engage in categories of action, and such rights are compossible. That is, everyone can exercise those rights, where the object of the rights is to engage in categories of acts in pursuit of one's self-chosen ends.[75] In this sense, rights establish "moral territories"[76] in which individuals can choose and act, and it is the compossibility of those territories that is the subject matter of the justice of rights. It is for this reason that persons considering such rights should not prevail with the contention that their freedom to act is nullified by the acts of others that are mutually exclusive with their own, such as winning a foot race. If the ends of agents are mutually exclusive, an actor may defend the position that their successful acts that entail the failure of another's are reasonable, provided each agent retained freedom to act in promoting their own ends.

Universal moral rights as I conceive them here are abstract principles and do not of themselves comprise a full-blown legal regime of rights. Such principles must be interpreted to be applied to particular cases or to be formulated into more specific legal rules for governing interpersonal conduct, but abstract principles help to narrow the bounds of collective decision by ruling out some alternatives that would clearly violate these general

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[75] Cf. Hillel Steiner, "The Structure of a Set of Compossible Rights," *Journal of Philosophy* 74 (1977), 767–75.

[76] Douglas B. Rasmussen and Douglas J. Den Uyl, *Liberty and Nature: An Aristotelian Defense of Liberal Order* (La Salle, IL: Open Court, 1991).

principles.[77] This is not an embarrassment to a philosophical theory of rights. In Locke's formulation of natural rights, he notes that "the law of nature being unwritten, and so nowhere to be found, but in the minds of men," it is subject to erroneous interpretation by them "through passion or interest."[78] Generally, "there wants an established, settled, known law, received and allowed by common consent to be the standard of right and wrong, and the common measure to decide all controversies between them: for though the law of nature be plain and intelligible to all rational creatures; yet men being biassed by their interest, as well as ignorant for want of study of it, are not apt to allow of it as a law binding to them in the application of it to their particular cases."[79]

Lockean natural rights are general moral principles that are more specifically defined in legislation, but these function as limits on the content of legislation: "The obligations of the law of nature cease not in society, but only in many cases are drawn closer, and have by human laws known penalties annexed to them to enforce their observation. Thus the law of nature stands as an eternal rule to all men, legislators as well as others. The rules that they make for other men's actions, must, as well as their own and other men's actions, be conformable to the law of nature."[80] The function of universal moral rights, in Locke's system, is a negative one: rights prohibit some interpretations of these principles but do not constitute a set of fully specified rules that must be applied uniformly throughout all human societies.

3.2. Specifying Rights

The rights I have described in the preceding section are abstract rights. That is, they are general principles that do not of themselves fully specify the actions permitted or prohibited thereunder. Abstract rights are indeterminate in that there may be more than one morally acceptable means of implementing them. In this section, I consider the function that such rights perform in a system of rules governing individual conduct. My chief conclusion is that abstract rights go a long way toward eliminating a broad range of alternatives because of their negative nature and function and are therefore critically important to any set of rule-making institutions or processes. Further, I argue that the contractualist method of practical reason

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[77] Cf. Gaus, *Order of Public Reason*, 335.

[78] John Locke, *Second Treatise of Government*, sec 136.

[79] Ibid., sec. 124:

[80] Ibid., sec. 135.

in ethics can be employed to specify rights in particular contexts or systems of rules.

It is a mistake to assume that universal, abstract rights must translate into a fully specified legal system. Such rights are blunt instruments that impose prohibitions on individual and collective behavior. They are blunt in that they are sufficiently open textured[81] that there is room for reasonable disagreements about their application in readily imaginable cases. Because universal, abstract rights are justified from a decontextualized, abstract moral point of view, the process of justification yields abstract principles that do not of themselves contain the keys to their application to particular contexts. This should not be a great surprise. Such principles as "Congress shall make no law… abridging the freedom of speech" do not of themselves explain how to interpret and apply them to specific instances. The problem is how to apply abstract principles, formulated in a decontextualized milieu, to concrete cultural and historical situations while not violating the abstract principle.

How far can the "neo-Kantian" contractualist method I have defended here be used to specify the content of rights to liberty? It can go quite a long way, though it does not of itself fully specify the content of these rights and leaves multiple options for implementing them; hence their partial indeterminacy. Kurt Baier distinguished "true moralities" and "absolute morality" as follows. True moralities are those of particular groups. These may differ from the true moralities of other groups, but what makes each of them a true morality is that they can all "pass the test which moralities must pass in order to be called true."[82] Absolute morality consists of the shared features of the "true" moralities: "Every true morality must contain as its core the convictions belonging to absolute morality, but it may also contain a lot more that could not be contained in every other true morality."[83] I suggest that this distinction is useful for the partially indeterminate contractualist method I have defended here. The contractualist method of practical reasoning and the general principles that can be derived from it from the background of the circumstances of justice and separateness of persons are shared by all morally defensible systems of rules. These systems may have content that differs from others' and yet remain defensible from this contractualist perspective.

Gaus, for example, who argues that more-specific rules applying abstract rights require public justification, recognizes that public justification

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[81] Hart, *Concept of Law*, 120–32.

[82] Baier, *Moral Point of View*, 181.

[83] Ibid., 183.

yields a "socially eligible set" of interpretations of an abstract right but not a unique agreed-upon interpretation.[84] The specification of abstract rights is thus limited in scope yet partially indeterminate. If there are two interpretations of an abstract right, and no one can reasonably reject either interpretation, both interpretations are morally permitted. If no one can reasonably reject a right, for example, against unprovoked violence, and if there are two interpretations of (a) what constitutes adequate provocation and (b) whether provocation is a complete defense against prosecution or only a partial defense that reduces the severity of a charge for violence, none of which can be reasonably rejected, then all of them are morally permitted. All of them are morally acceptable, and this is a reason for the indeterminacy of abstract rights, indeterminate in the sense that to the extent they can be interpreted in more than one reasonable way they may have more than one application that could be used in different places at different times. In fact, both across time and across jurisdictions, provocation as a defense against prosecution for violent actions has been treated differently, both as to what constitutes adequate provocation and as to whether it is a partial or (in a minority of jurisdictions) a complete defense against prosecution for some violent acts.[85] Unless someone can offer a reasonable rejection of some of these alternate interpretations of this aspect of the right against violent assaults, there is therefore a "blameless liberty" of choice among them. That is, all of them are morally acceptable and none are morally proscribed, and yet the right against unprovoked violence remains justified as an abstract right.

Even when formulated into constitutional rules, rights protecting liberty will take the form of abstract principles, such as "Congress shall make no law… abridging the freedom of speech."[86] Reasonable interpretations of this general principle may incorporate limitations on the exercise of this right that are defensible in terms of the agency claims that a right of free speech protects. Thus, for example, one could reasonably defend a limitation denying legal protection to speech that was intended to incite persons to immediate violence and was likely to be successful in doing so under the circumstances.[87] One could defend this interpretation of the First Amendment's Speech Clause in terms of the agency interest it protects in

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[84] Gaus, *Order of Public Reason*, 369–70.

[85] See, e.g., Mitchell N. Berman and Ian Farrell, "Provocation Manslaughter as a Partial Justification and Partial Excuse," *William & Mary Law Review* 52 (March 2011), 1027–1107.

[86] U.S. Const. amend. I.

[87] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

preventing violent injury. There could easily be other formulations of this limitation on speech that could be defended in the same way, such as a denial of protection to speech that posed a "clear and present danger"[88] of bringing about some harm to the physical safety or agency claims of other persons. In this example, the "clear and present danger" rule authorizes a narrower scope to freedom of speech because it does not require that the speaker intends to incite others to bring about harm to anyone. Either of these formulations could be defended in terms of the agency claims that support a right of freedom of speech, and as a result both might populate the "socially eligible set" of interpretations, to borrow Gaus's term. The question presented here is not the particular limitation on speech but rather the scope of the right of freedom of speech. The set of rules that delimit that right are those that no one can reasonably reject, in terms of the agency claims on which the universal and abstract right of liberty is defensible in the first instance, as an alternative to having no rule to protect freedom of speech at all.

What would it take for an application of this rule to become one that anyone could reasonably reject on the grounds that it breaches the separateness of persons to promote an end that is not their own? One historical interpretation of this rule was the "bad tendency" test, which required no evidence that the speech would result in violations of the law. Thus, for example, a group of left-wing activists were prosecuted for publishing their objections to President Woodrow Wilson's decision to send US forces to Russia to intervene in the fighting among Bolshevik and other forces at the end of the First World War and for calling for a general strike by American workers to signal their opposition to this military action. The Supreme Court affirmed their convictions for violating the federal Espionage Act on the ground that, had American workers heeded the call for a general strike, this could have obstructed the US military effort.[89] There was no evidence that there was a danger of this happening. The "bad tendency" test is one that anyone could reasonably reject as an interpretation of a right of freedom of speech because, inter alia, it prohibits pure speech that is not likely to result in a violation of any other person's rights to liberty or personal safety. It is not simply that there is another, better test available, but that anyone can reasonably reject this rule on its own merits. In this case, the test prohibited speech criticizing a public policy on the ground that it might successfully convince people to oppose the policy, and anyone could reasonably reject a rule prohibiting such criticism because this is precisely the agency interest that separate, free, and equal persons have against a purported

[88] *Schenck v. United States*, 249 U.S. 47 (1919).

[89] *Abrams v. United States*, 250 U.S. 616 (1920).

overarching social goal such as continuing a war effort unhindered by the expression of dissenting views.

For example, consider four attributes that might constitute the requisite act for a specific rights violation: intent, recklessness, negligence, and strict liability. These options are drawn from American law.[90] *Intent* means that the actor intended the consequences of their actions. *Recklessness* means that the actor consciously disregarded a substantial and unjustifiable risk of harm to others and caused the consequences of his or her actions. *Negligence* means that the actor should have been aware of the risk of harm to others posed by his or her actions but was not and caused the consequences of those actions. *Strict liability* means that the actor caused the consequences of their actions. A group of persons is to consider whether an act that causes a physical injury to another person constitutes a violation of the latter's rights. It seems unlikely that anyone could justify to others a rule that permitted intentional, reckless, or negligent acts that cause physical harm to others and refused to regard such acts as violations of their recipient's rights to physical integrity.[91] Likewise, it seems unlikely that one could justify to others a rule that would hold a true, faultless accident as a violation of another person's rights. The reasons that support a universally held right must themselves be universal. Any person could reasonably object to a rule that permitted intentional, reckless, or negligent acts causing physical harm to others. The reasons that defeat a universally held right must also be universal reasons. In this case, the universally held right to autonomous choice refutes the claim in favor of a rule that would punish or otherwise hold liable a person's choice that plays a causal role in a true, faultless accident.

This conclusion has important implications for the function that rights perform: rights to liberty impose conditions on rule-making processes and eliminate some rules from consideration. A rule-making process that articulates a rule prohibiting intentional, reckless, and negligent acts that cause physical harm to others is a justifiable protection against violations of rights. On the other hand, it seems that a rule that prohibits acts that result in true, faultless accidents is not justifiable because reasonable persons could interpose defensible objections to such a rule. These objections could themselves readily be grounded in rights to liberty on the basis that a person has the right to do that which does not violate the rights of others, and acts

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[90] See, e.g., *Prosser and Keeton on the Law of Torts*, 5th ed. (St. Paul, MN: West, 1984).

[91] Consent can, of course, be a moral (and generally a legal) defense to such activities as surgery and boxing.

that play a causal role in true, faultless accidents do not violate the rights of others and hence are permissible acts.

Note that in the foregoing example we are still in the realm of abstract rights. Thus, it will not do to say that there might be some persons who would punish others or hold them financially liable for true, faultless accidents, because they would be unable universally to justify such a rule. Hence, such a rule is excluded from consideration. It is not difficult, though, to find issues for which more than one rule might be an acceptable means of giving expression to a general right, and this illustrates why these general principles are indeterminate.

The standard of reasonable rejection would tend to render rights to liberty negative rather than positive, or at least would seem to rule out some kinds of positive rights. The distinction between negative and positive rights is a familiar one, and I will not outline the distinction here.[92] I have shown that people cannot reasonably reject abstract rights to personal or civil liberties, but I have not addressed whether people can reasonably reject proposed rights to some kinds of positive rights, such as rights to due process. Note that I am not making the stronger claim that it would rule out all positive rights. Instead, I am claiming that we can see how this approach would rule out some kinds of positive rights.

Recall the discussion earlier about how some moral theories, such as utilitarianism, violate the separateness of persons by placing some persons at the service of others' ends, depending on where they come out in the social calculation of utility over choices of principles, rules, or policies. It seems clear that positive rights of some sorts would have a similar effect. For example, a policy designed to give effect to a "patterned" principle of distributive justice, to borrow Nozick's term, would have the effect of denying persons the liberty to enter into mutually agreeable transactions or to require confiscation of property for redistribution. Under the circumstances of justice, the conditions of limited benevolence and limited scarcity would permit persons to reasonably reject claims that they were obligated to advance a patterned principle of distribution that would restrict their liberty in these ways.

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[92] See Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (New York: Oxford University Press, 1969), 118–72.

4. Conclusion

There are solid moral foundations for the rights to liberty championed by classical liberal and libertarian theorists. These foundations, I have argued, rest initially on the idea that the separateness of persons is embedded in the circumstances of life that make justice a meaningful concept. We can discover the duties justice imposes on us through a procedure for identifying principles of justice based on the concept of reasonableness, which supports a testing procedure for proposed principles for human interaction. A contractualist ethics vindicates principles that establish duties to others that also constitute rights to liberty, which are principally negative in character and rule out many forms of social decision rules and intrusions upon individual liberty that anyone could reasonably reject. The indeterminacy of these prima facie, abstract rights is not an embarrassment to them. The same standard of reasonable rejection can be used to specify such rights into applicable rules, including qualifications and variations of their application across time and place.