

INDIVIDUAL HUMAN RIGHTS:
RECONCILING RIGHTS WITH VALUE PLURALISM

by

NEIL CORWYN HADDOW

A thesis
presented to the University of Waterloo
in fulfilment of the
thesis requirement for the degree of
Doctor of Philosophy
in
Philosophy

Waterloo, Ontario, Canada, 2007
© Neil Haddow, 2007

I hereby declare that I am the sole author of this thesis. This is a true copy of the thesis, including any required final revisions, as accepted by my examiners.

I understand that my thesis may be made electronically available to the public.

Abstract:

This thesis examines the foundations of individual human rights. The general thought that informs the discussion is that rights and values are two different kinds of moral discourse. Hence, any attempt to simply state rights in value terms will be problematic because the agent-relative character of values does not lend itself to grounding/ explaining interpersonal rules, like rights. The thesis outlines agent-relative values, showing their plausibility, and then proceeds to show how rights perform a different function. The attempt to move from talk about what is right to what rights we have is termed the ‘moralist fallacy’. Rights are kinds of restrictions that others face on their actions when they are promoting their own good. Axiology is about how best to achieve one’s objective agent-relative good; so values involve trade offs and calculations agents can perform about what is in their best interest, while rights are not open to trade offs and calculations because they are restrictions that agents face when they are pursuing their own good. The main problem the thesis discerns is how rights can be concerned with protecting the concerns of others when what people legitimately care about are their own concerns. Two different views of the motivational legitimacy of rights are examined—the agent well being view and the agent-recipient view. On the former, rights are motivationally appealing and justified because abiding by them can be shown to be part of what constitutes an agent’s (who is subject to abiding by rights) well being; on the latter view, abiding by rights constitutes part of the recipient’s (who has the rights) well being. Taken separately these two views are problematic. Rights legitimacy would seem to require something from both views. But since these views are contraries they do not seem open to combination either. The thesis will attempt to provide a solution to reconciling the agent well being and agent recipient views while trying to retain the nature of rights as restrictions not open to trade offs or reducible to value talk.

Rights function as restrictions, but why do they function this way and how are they justified when what people are mostly concerned with is their own agent-relative good? Rights must be a separate kind of moral claim, not reducible to talk about what values we have in order for rights to have the motivational and justificatory strength they need for interpersonal validity and to resist paternalist interferences. Rights will have this strength if they are based on something that all value pursuers require—such as recognition of one’s legitimate claim to possess oneself. First possession based on first come, first serve will provide legitimacy for a system of rights because it will appeal to and motivate agents by relating rights-respect to their well being. I will argue that abiding by others’ rights is in one’s best interest because doing so is a wise choice—while one might believe that not abiding by others’ rights might give one the best outcome, one cannot be sure about this and so ought to choose to abide by rights as a general policy. Also, agents ought to make sure that they voice their concerns over rights violations of others. Even though this may not be to their immediate benefit, it is rational for agents to speak out on this issue and reinforce rights-respecting behaviour because making the system effective will ultimately be in their own long-term self-interest. The thesis also tries to make sense of how rights are compossible and when rights might face thresholds beyond which they no longer hold.

Table of Contents

Title page...	i
Author's Declaration page...	ii
Abstract...	iii
Table of Contents...	iv
Chapter 1: Introduction to the Problem of Rights and Pluralism...	1
Chapter 2: Agent Relative Value and the Transmissibility of Practical Reason...	18
Chapter 3: Value Pluralism and the Value of Well Being...	54
Chapter 4: Agent Relative Value and the Value of Constraints...	72
Chapter 5: Deriving Rights...	96
Chapter 6: Compossibility and Rights...	143
Chapter 7: Conclusion...	171
Bibliography...	187

Chapter One:

Introduction To The Problem of Rights and Pluralism.

It might be thought that since the idea of human rights is enshrined in international law and lip service is paid to it in most countries, arguments attempting to explain the foundations of rights are superfluous. It is just a fact that we have rights and no amount of meta-ethical discourse will change this fact. Some might try to give a better explanation for the law of causation, but it is just a fact that causation exists and we take it for granted that the same thing under the same circumstances will produce the same effect. So just as scientists take causation for granted when they do what they do, the rest of us can take rights for granted when we engage in analyzing current events. If this line of thought is true then we could simply rely upon the UN declaration of human rights as having some foundation. But there are times when some seem to offer good arguments that they or their country do not fall under the UN's definition of rights. China, for instance, often claims that the UN definition of rights is 'Western' and its implementation in China would diminish diversity by constraining the rules of the Communist Party (Sen 1999). What rights are has great significance since the definitions we use will put limits and constraints on what can count as a right, and thereby, what sort of actions can be classified as ones we have a right to or not. The definition and understanding of 'right' has great practical

significance not just for those who practice law, but for all of us who wish to have a way to protect what is rightfully our own. So, getting the concept of rights right is important in order for us to have a better understanding of how we can treat others and they us.

It should not be thought that the philosopher just wishes to defend the status quo as a kind of apologist for the present system; but nor does he necessarily wish, unless he is a Pyrronist, to poke holes in the system simply in order to produce doubt about it. Philosophy should poke holes in the system—but when the system seems worthy of defense, this procedure is to strengthen the system, not demolish it. This thesis attempts to poke some holes in the idea of rights, but only in order to better strengthen the concept of rights.

So far much of history has the following story line: The attempt of some to better their own lot at the expense of others. The following thesis derives part of its motivation from the idea that rights are historical accidents accompanying revolutions based on power relations. If rights are just political favours governments grant citizens in order to keep the peace then there might not seem to be much of a moral reason for them. Recently, Mancur Olson (2000) has suggested that a kind of invisible hand that appeals to the self interest of those in control can show why they have powerful interests to institute a system of individual rights. It is not due to the benevolence of rulers that we have democracies, but to the fact that tyrants have encompassing and superencompassing interests that make it in their interests to secure property rights and allow more freedom. Eventually this process leads to elections and to a balance of power and the extinction of the tyrant. This is all probably true and important as an explanation of how is it was that self-interested groups gave up their power to create the equal systems of rights we have today; but what we are bereft of is an explanation for what sort of system of rights we ought to have—that is, why

these powerful interests give us a system of rights that looks like a system we *ought* to have. Without the normative take on rights, all we can say is that we are the beneficiaries of the political flotsam and jetsam of history. This thesis will endeavour to consider why self-interested persons will have reason to abide by a system of rights, have reason to accept the moral separateness of others, and also why adopting obligations towards others is the proper response to take.

Every day we see people proclaiming that their rights have been violated. Recently, we have seen riots erupt over cartoon portrayals of the prophet Mohammed. It has been claimed by many Muslims that their religious rights were violated by the portrayal of Mohammed with a turban in the shape of a bomb. Others assert that just the physical representation of the Prophet is enough to violate their religious rights. In either case, when it is said that their religious rights have been violated there is the presumption that the rest of us face a constraint or duty on how we can portray their religion; failure to recognize this constraint or duty means that we have seriously harmed them or their religion in some way and that they have the power to demand we make reparations and/or to show deference to their religion. For many people there is no difference between something's being the right thing to do and one's having a right. If it is right to pay deference to Allah, then how could one have a right to do anything different?

Clearly there is a relation between having a right and doing what is right. At the very least the relation is simply the use of the word 'right'—as a noun or an adjective. But can we simply infer a right to something from that thing being the right thing to do? Take the following:

If man is to live on earth, it is right for him to use his mind, it is right to act on his own judgment, it is right to work for his values and to keep the product of his work. If life on earth is his purpose, he has a right to live as a rational being (Rand 1964, 111).

This might be a tempting move to make but it seems like a fallacy of reasoning. The fact that something can be described as the right thing to do does not mean that it imposes a duty on others not to interfere with us and that we have a right to do it. There is often a wide gulf between having a right and doing what is right—for instance it might be right for a person to live rationally but this does not mean that one has a right to take any actions that would make one rational. Nor does one's having a right to do x make doing x right—perhaps smoking is one's right, but smoking may not be the right thing for one to do.

Another reason for holding rights at arms length from the good is based on the function of the two ideas. When we describe something as good we think of it as something that could be maximized, or had in various degrees; when we say that we have a right to something we mean to say that we have control over it, a control that one can either exercise or not. We usually say we have a right to something when we think that its importance must be protected from being subject to becoming part of the ends of others.

Traditional expositions of rights have often adopted the prisoner's dilemma as a way of showing the difficulties inherent in how a theory of rights can reconcile the problem of why we will find it rational to forego some of the things we desire in order to get a system of rights or rules. The traditional prisoner's dilemma situation supposedly shows how it's hard to find the trust we need amongst self-concerned persons in order to have a

system of rules we all will abide by. Agents will set out to abide by rules of cooperation they find rational because those rules will give them at least their second best option; but this option will not be chosen in practice because the situation is set up to makes agents believe that since others will seek to get a better deal by double crossing them, their best option is not to cooperate but to try to double cross the other first. This means that both agents double cross each other and both get less than they could have had. The solution is thought to require a bit of coercion that gets everyone to sacrifice some of their freedom to win a system of rights that protects their other freedoms. But my concern is more than the worry that trust is missing in order for agents to cooperate with each other; for even if we could get a regime of stable rights this way, this explanation leaves out an important aspect that any theory of rights must explain—why violations of rights are wrong not just because it is a failure on the part of the rationality of the duty-bearer, but also because it is a failure to recognize the moral status of the person harmed.

It seems that if rights are to be fully explained they need to be based on more than how they serve the interests of those subject to rights, or just how they benefit an agent who is a rights-holder. On an interest-based view, rights are simply sought by agents for how they function in promoting one's own good. This does the job of tying a right securely to an interest an agent has and thereby protects him against claims by others that he should pursue their version of the good life. But the reason why the interest-based view is problematic is as follows:

Take A who is robbed by B. A doesn't like being robbed of course and so she complains to B that he really should stop engaging in this sort of behaviour. When B asks why he should not rob her she says that she has been harmed, since without her money she can no longer

buy food for herself, her children, etc. B responds by asking why he should care about all that stuff? And so she appeals to the only thing that is left—the fact that B might be risking his own well being in doing this act if he is caught. What sort of a life will he have in jail? B thinks about it for awhile and says good point. The example might be thought to show that agents will respect each others rights when they (a) look out for their interests and (b) retaliate when their interests are illegitimately set back. But even assuming that we can say that their interests are legitimate and would warrant them retaliating, it does not seem to follow that we have a good theory of rights because the reasons why agents have rights are explained solely in terms of the interests of the agent who is the duty-holder. There is something strange in seeing A pleading with B by appealing to *his* values and *his* good life and not her own life that has been harmed by his actions. Surely what is wrong here is not so much that B's life will go downhill because of his act, but that he has harmed A and made her life worse. A theory of rights should be able to explain why harming another is wrong not simply for prudential reasons that the agent subject to them has, but because something wrong has been done to the rights holder.

Yet, we would also be wrong to think that a theory of rights could succeed if it tried to show that the agent subject to rights must abide by them solely because they are a way of recognizing the moral status of others. The reason for this is as follows. There are two theses of practical reason that each agent abides by (Mack 1999). The first states that one has reason and is motivated to pursue one's own good. The second is the claim that one does not have similar reason to be motivated to pursue someone else's good. This means that someone else's reasons for pursuing their own good do not necessarily transfer to me and become reasons for me to pursue or help him pursue his good. I need a reason to show

why such transference should occur. And if the justification for rights depends upon us having to do what benefits the rights-holder then we will have the problem of showing why what would benefit him gives us reason to help him benefit himself. This justification for rights must lead agents to sacrifice their own good in order to make sure that the rights of others are respected. So in arguing that agents need to abide by rights because doing so is a way of recognizing the moral separateness of others, we neglect to account for why agents would be motivated to do this and, also, what would happen to an agent's own rights that protect him against being made to sacrifice himself for the good of others.

The idea of reasonable pluralism is the belief that agents see their values as related to them in an agent-relative way, as personal and valuable for them, but also as objective in some way. Agents can understand what constitutes a human value, why agents value the things they do, but also see that their values are related to themselves in a way that makes them their own, not substitutable with anyone else's. If this way of looking at value best captures how agents hold their values, then we have the additional problem of showing these agents why they should respect other's rights when doing so may interfere with their achievement of their own objective values. The fact that values are always related to individuals does not simply mean that agents are necessarily selfish, but it does mean that any theory that attempts to show them why they ought to abide by a system of rights needs to appeal to their good lives. The objectivity of value lies not in the scope of how many agents are covered by it, but in how the value can be established as being a worthy human value. While agents want to feel that their values are important to others, this does not mean that their values' importance comes from being valuable from the point of view of the universe, so that the value's importance can be transferred from agent to agent simply

because the value has an objective quality that allows for such transference. In order to convince agents why they ought to accept our values we cannot simply appeal to the transmissibility of agent-neutral practical reasons; rather we will need to show them why they have reason to accept our reasons—which of course means that others may have quite different reasons to value what we value than we do. We will need to convince these agents why their agent-relative and objective goods will often need to be compromised in order to have a system of rights that endeavours to protect all agents' lives.

Of course having recognized this point, we can also see that a critical aspect of a system of rights is that it recognize the fact when an agent is harmed it is he who has had his rights interfered with. So while in showing the reasons agents have for abiding by a system of rights means showing agent-relative reasons for abiding by rights, these sort of AR reasons will not do the explanatory work of explaining why harming others is a harm done to them, not a harm one does to oneself by not acting rationally or in one's own best interest.

The following thesis will show how a theory of rights can be reconciled with a theory of reasonable value pluralism. The idea of value pluralism will be spelled out in Chapters Two and Three. Briefly value pluralism is the belief that there is no single end that all other ends are ordered to—so there may be many reasonable varieties of the good life. As Larmore (1996, 122) says: “Over the past four centuries, the nature of the good life in a great many of its aspects has come to seem a topic on which agreement among reasonable people is not accidental, but to be expected. Being reasonable—that is, thinking and conversing in good faith and applying, as best one can, the general capacities of reason that belong to every domain of inquiry—has ceased to seem a guarantee of unanimity”. I

will argue that we can interpret value pluralism in an agent-relative fashion by observing that it is the variety of individual goals related to persons that gives us the pluralism of different forms of life. Rather than the idea that different lives are only valuable if they partake of some cultural form of the good, or of some agent-neutral good, I claim that lives are pluralistic because each of us just has different goals to pursue. The idea of agent-relative value pluralism gives us a way to explain the great variety of values that exist in the world and how they are related to persons. Agents' values are not open to being easily interpersonally compared in value in order to make decisions about whose values are to be promoted and whose are to be sacrificed.

This gives us a framework for starting a discussion over how a theory of rights could work and its usefulness to agents. Rights is a domain of its own because of its role as a way of solving disputes between plural values. Because of the agent-relative nature of value we cannot rely on using values to solve conflicts of values. Agent one says that he needs my time to help him accomplish something that is very important to him; while I need his time to accomplish something that is very dear to me. He further claims that the reason that I ought to help him is that his need is more important than my need. So his need to (e.g.) learn English is more important for him than my need to learn French because, he says, we are living in an English country that requires one to speak English. But given the nature of value, what he must mean here is that his need to learn English is *for him* more important than my need to learn French is *for me*. Yet while I can understand that since we live in a predominantly English speaking country knowing English would be a very useful skill to have, relatively more useful than French, I do not have reason to also believe that his knowing English is as important to me as my own desire to learn French is for me. The

problem that enters here is when his learning English means that I am to give up learning French either because his actions will conflict with mine, or his needs require the use of my resources that I would put into learning French. He would like to think that his appeal to the valuableness of learning English proves that I should contribute to his endeavour; of course I would like to think the same duty falls on him because of how valuable French would be in my life. The role of rights is to provide a way of resolving this dispute—a dispute that seems intractable on value grounds alone.

We can see how rights capture an aspect of morality that is not captured in agent-neutral or agent-relative reasoning about values. For instance, if one did business in a another country and violated some of the rights of its citizens it might be thought that one could make up for the rights that have been violated by trying to give back something good to those who have been harmed, or to try to make things better for those who have not had their rights yet violated. But it seems that a rights violation cannot be made up for once it has happened. The reason for this is that the choice that has been taken away from these citizens when their rights have been violated is not replaceable with some other good. It might seem to be ‘replaceable’ if the person accepts your gift in return for the harm that he has done, but what makes up for this is the harmed person’s *choice* to allow the gift to make up for his harm. Choice is central to rights and explaining why people have been harmed and why attempts to replace what has been taken cannot work because people are harmed when their choice is taken away. This means that a theory of rights will need to explain how the value to everyone of their choices grounds rights, although as we will see in Chapter Four this does not mean that the value of choice need be reduced to the value of the object of rights. Everyone will be interested in having their choices protected, so the

feature that needs to be protected is the one that can account for person's ability to make choices over their lives and live a good life.

Since rights are reasons or rules for conflict resolution, their justification mirrors what has been called the search for public reasons. While I argue that agent-relative values will not provide interpersonally valid 'public' reasons for all to abide by rights, there are substantive meta-norms that allow us to argue that a system of rights will be an institution that is just and one that agents can depend upon to produce 'good' outcomes. If one were to accept Hobbes' search for a *modus vivendi* then one might only wish to have a system that produced good conflict resolving outcomes, and not care about whether those outcomes depended on 'right' reason (Gaus 2003, 78). This subordinates our epistemic rationality to our practical rationality since we mainly care about having a ruling that allows us to get what we want, not whether those rulings are true. But as Gaus notes we are unlikely to be satisfied with such a system (2003, *ibid*). We want our moral beliefs to be true because we want them to be worthy to pursue. A solution to this problem of public justification—not the central challenge of this thesis—is also similar to the problem of justifying rights in a pluralist context because we are looking for a theory of rights that can be publicly justified in a world of plural values. This thesis will try to show how rights can be reasons that are procedural, or neutral, by specifying domains of freedom that prevent agent's lives from being in constant conflict; but it also attempts to provide reasons that are substantive by showing how there is a basis for rights that appeals to agent's moral beliefs about how the world ought to be by appealing to a meta-norm that all agents share qua moral agents seeking a good life.

Arguments for rights tend to be called deontic, or anti-consequentialist.¹ The reason for this is that these arguments claim that there are reasons agents have to reject calls to sacrifice their own good, or the good of others, in order to promote an overall good state of affairs. Robert Nozick has argued that the fact that we are individuals who live separate existences shows that there “is no moral outweighing of one of our lives by others so as to lead to a greater overall *social* good” (Nozick 1974, 33). People have a prerogative against the requirements of impersonal optimality. The prerogative that allows us to pursue our own good in the face of agent-neutral good is also what makes us think there are restrictions against forcing us to pursue the overall Good. But does the ability to choose the promotion of our own good over that of impersonal good truly give us a promising basis for rights? Some, like Samuel Scheffler, have argued that the priority given to the personal point of view is sufficient “to insulate the personal point of view against external demands”(Scheffler 1982, 94). The protection of personal good that both Nozick and Scheffler give as a test for deciding who has the right and who the corresponding duty depends upon restrictions (rights) protecting only personal good in the face of impersonal maximization. But if value conflicts will consist of agent-relative values, then we need to explain how it is that our prerogatives and restrictions, which are legitimized by their protecting our personal values, can compose a coherent theory of restrictions when their purpose is to protect us from each other when we promote our values. If the hard task of

¹ Consequentialists assert that it is wrong to commit some act because of its bad effects—for a person or for society. Deontologists claim that what matters is not so much the end that is to be achieved but the way in which one goes about it. Some ways of achieving an end are intrinsically bad; the rightness or wrongness of achieving an end can be ascertained apart from the consequences of the choice itself. Rights then are like this in that they are kinds of restraints or constraints on how one can pursue some end. It seems to me (and others) that there cannot be a purely deontological or consequentialist theory of morality or rights. Rights seem to have more in common with deontic theories, but as I argue, rights need to somehow coordinate both a seemingly deontic aspect and a consequentialist aspect into a single coherent view. This means rights must explain a rights violation in terms of both the harm that is done to the character of the person who has the rights and also the consequential harm done to the person who did not abide by the right.

rights is to protect our values not so much against external maximization (that people organize their good according to some canon of impersonal good), but against the pressure for agents to organize their values according to other's canons of agent-relative good, then since the justification of restrictions is based on protection of agent-relative good, we need to explain how when these restrictions protecting personal good conflict we can decide who has the right and who the corresponding duty. We need a way to see how protection of agent-relative maximization can be a basis for rights because they protect our ability to promote our values in the face of agent-neutral good, but also how agent-centred perspectives can be judged to be adequate to delineate a coherent and just set of rights and duties when two or more agent-centred perspectives conflict.

Mack has argued that any theory that wishes to provide a justification for rights will need to show why we have a prerogative to pursue our own good but not a further prerogative to have the pursuit of our good protected. It seems that one cannot assert a prerogative to pursue our own good without a further prerogative that protects the first prerogative without entertaining a contradiction (Mack 2005, 361). My thesis will attempt to show how we can derive rights from the claim that there is indeed a second prerogative that obtains to protect agents' first prerogative to pursue their own good. First, I will show reasons why we need to identify a prerogative agents have against sacrificing their own values to others or some overall state of The Good. Chapter 2 will identify and explain why agents values are best thought to be agent-relative; the agent-relativity of value puts serious constraints on how much transmissibility practical reasons have. Chapter 3 will show why a form of value pluralism is a reasonable belief for agents to hold; but the chapter also shows why reasonable pluralism exacerbates the problem of moving from a theory of value

to a theory of rights. Chapter 4 will show why the rejection of restrictions as a distinct form of moral domain do not work. The chapter will also show some of the problems facing theorists who wish to justify rights or restrictions in terms of either the benefit to the rights-holder or the interests of the subject of rights, fail to provide a satisfactory account of rights. But since what motivates agents is agent-relative value, we will need to somehow show that there can be a very broad agent-relative reason all agents have to concede the rights of others.

In Chapter Five I present a positive account of why agents have rights and a need to recognize the rights of others. Following Eric Mack, I argue that if one accepts the prerogative to pursue one's own good, one must also accept that there is a second prerogative one has for others to allow one to pursue one's good; this latter prerogative gives rise to the idea that it is rational to expect others to constrain their behaviour when they deal with you. If they do not then they have failed to respect one's prerogatives. Yet, this only tells us why we have reason to accept a system of rights for ourselves. The idea why we will have reason to recognize others' rights depends on being able to recognize the moral status of others—Mack calls it the rational encumbrance thesis (1998). Mack defends the idea that the proper response towards others is to recognize them as ends in themselves—a status they have apart from any obligation that we may have towards ourselves—because we can recognize that we are each moral with incommensurable values. For Mack, only if the strong moral status of a person is not dependent in any way upon the duty-bearer's obligations to himself will it give others rights that are not open to violations. But I argue that we will not be able to defend the idea that others have this strong status because any argument will depend in some respect upon an agent-relative

reason that motivates us to concede others' rights—even Mack's argument depends upon the claim that duty-bearers must recognize the moral status of others because to fail to do so is to fail in a duty to oneself to be rational by paying proper heed to moral reality. I argue that while we ought to keep the idea of the rational encumbrance thesis as a way of showing why we recognize the moral status of others, we do not need to worry that appealing to an obligation to self will mean that we do not recognize the moral status of others; the reason is that rather than appealing to value incommensurability itself, we should appeal to some common feature that underlies all of our good lives. I argue that first possession is such a feature that is needed by all agents who wish to live a good life. But the reason why we will be motivated to abide by others' rights to be possessors of themselves is that doing so is to benefit ourselves. We will be benefiting ourselves because, since others can affect our well being for the worse, by conceding them rights to pursue their own good, we will be avoiding conflict.

In Chapter Six I discuss the issue of the compossibility of rights and thresholds. While the main focus of my thesis is why we have reason to concede others' rights, this issue is important because there is debate over whether rights must conflict by their nature, or if they can be laid out in a way in which they are open-ended but also not inherently conflicting. I argue that it might be possible that rights conflict, but that in order to avoid and solve such conflicts we ought to pay heed to the idea of first possession. First come first served should help us to solve disputes over rights. Finally, we will examine if our rights require us to engage in calculations of weighing one life against many others, so that we would have to say that one life could be sacrificed to protect the lives of many others. I will argue that our rights resist such maximizing calculations up to a point; so rights will

recognize and demand respect for the moral separateness of others up to a certain point, but beyond this point the emergency situation may demand the abandonment of rights in favour of some rule that seeks to protect the greatest number of lives (rights-holders).

Finally, Chapter Seven will first summarize the argument that rights are kinds of strong prerogatives then proceed to address some implications of the theory. I will briefly look at what sort of polity the theory might seem to support—basically a liberal one—and whether this theory can help to solve liberalism’s problem of reconciling its legitimacy with its claim that there are many good lives, even non-liberal ones, that are legitimate.

Rights are meant to protect the fact that we each have lives of our own to live. The agent-relative aspect of value shows why our values are incommensurable and how they are resistant to attempts to show that we all must follow the same agent-neutral good life and accept whatever trade offs may occur in the attempt to rank all lives according to that goal. Agent-relative values reflect how rights are resistant to trade offs and so they, rather than agent-neutral values, will be the starting point for grounding rights. The thesis shows why attempts to ground rights directly on values of either sort can be problematic because when we base rights on the goal of certain values we might make them less resistant to paternalistic interferences. Rights must be grounded on the aspect of agent-relative values that reflects their ability to be resistant to trade offs, but also on some kind of valuable feature that does not directly call for their maximization; the feature of first possession is common enough to all good lives that we can all agree that that is what needs to be protected by a system of rights, but also that its protection only requires that we recognize that others need space to pursue their own good lives, not that we need to directly help to promote other’s achieving their good lives. In this way the protection and promotion of

first possession is not a way of directly promoting other's good lives, but only does what the job of rights is meant to do—protect and promote the means necessary to live a good life.

Chapter Two:

Agent-Relative Value and the Transmissibility of Practical Reason.

§2.0 Introduction.

§2.1 Definitions of agent-neutral and agent-relative value.

§2.2 Agent-neutral value as external value and transmissibility of practical reason.

§2.3 Objectivity and subjectivity of value.

§2.4 Conclusion.

§2.0 *Introduction.* The following chapter seeks to show what a coherent theory of value looks like from a liberal perspective. But it would be question-begging to start with a liberal prejudice, or conclusion, to the effect that there are different good ways of life and then try to construct a liberal theory of value to shore it up. The belief that liberals just take unresolvable conflict from mere difference of opinion as basic and sufficient for pluralism is certainly one of the many criticisms leveled against liberalism by anti-liberals.

Historically, of course, it was intractable religious conflicts, not resolvable by further appeals to the Bible, which led to the hope that a *modus vivendi* would provide peace, if not the correct understanding of scripture. Of course this difference of opinion has not stopped any one from thinking his own interpretation is the one everyone should accept. The case

for liberalism will be strengthened if we can provide a justification for, and not just a historical explanation of, why values are plural and individuated apart from liberal presuppositions. So we start rather with a conceptual, not just historical, understanding how values are plural in order to understand how values exist and why those who have held them are so often at odds.

Of course in starting out with the individual and looking at the relation of value to him, we may be said to be prejudicing the inquiry in favour of the liberal view that the individual is the basic unit of society by not considering views that start with the group, or at least with how value might have some sort of social existence, say the way that meanings of words do. In regard to the first point it seems that only individual persons can have values; while I cannot extend the discussion much here, it should become clear that if the agent-relative theory of value is correct in making a description of value contain reference to an individual, then groups as such cannot be said to have values apart from the individuals who make them up. I will argue that value should either be defined as agent-relative, in which the description of value contains as essential reference to the person who has it, or as agent-neutral, where the value need not have an essential reference to the agent who holds it. It will be shown that agent-relative value is more plausible account of value because the agent-neutral view needs to implausibly make values' goodness external to an agent in order to account for their internally motivating features.

This chapter, in defending the agent-relativity of value, defends the two 'theses' of practical reason outlined in the introduction: (1) "that it is reasonable for each rational and purposive agent to seek his own well-being and to evaluate his natural and social environment in terms of its impact upon his well-being"; and (2) that attempts to move

beyond this to the further idea that practical rationality also requires A to promote B's well-being and the conditions for it, fail (Mack 1999, 89-90). The chapter will explicate the first thesis by explaining why values are dependent on agents, but also thereby defend the second by showing why the transmissibility of practical reason requires the implausible notion that values are agent-neutral. But also it will show that agent-relative values need not imply their subjectivity—that things become valuable just by being objects of our preferences—because even though things are chosen by people this may not be sufficient to make them objectively good. But the theory of agent-relative value also provides an explanation of the plurality of values, different as we will see next chapter in important respects from Isaiah Berlin-style 'objective value pluralism', that is central to liberalism. Finally I will note the problem that pluralism from the agent-relative perspective creates for constraints on the pursuit of one's values: if the agent-relative account of value is correct then the reason why an agent will abide by a constraint is if it is conducive to his own well-being or to another's. If the reason one has to be motivated to treat another with respect or to be under a moral obligation to them in general is because the other's ends transmit that reason to one, then if value turns out to be agent-relative such transmission cannot take place; hence, neither can this be part of a foundation used by rights-theorists to explain how agents are obligated to abide by others' rights.

§2.1. *Definitions of Agent-neutral and Agent-relative Value.* Suppose someone you don't know approaches you on the street with the wonderful news that she has just fulfilled some goal that she wanted to accomplish ever since she was young. She finds it strange that you don't seem to care, although you can agree that accomplishing some good goal that one has

always wanted to achieve is in fact good, *for her*. Had the person that who approached you been your friend then you could have agreed that it was in fact good for your friend but also because your friend's goals mean something to you, it was good for you as well. Why do we think about values as related to us in such a way? Is it merely some moral deficiency that makes our own ends valuable to us but the ends of others—even if they are indeed good—not valuable for us? Or is there some other explanation that can show why we need not be morally deficient if we fail to find (and promote) others' values as if they are our own?

I will be following Den Uyl (1991), Mack (1989 and 1993) and Long (2000, 36-7) in defining agent-relative values as: values, rankings, or reasons, essentially tied to how an agent would choose between alternative states of the world. If an agent (A_1) values a bit of sensory pleasure, S_1 , then this gives him a reason to promote a world (W_1) with S_1 over another world, W_2 , which lacks S_1 . As Mack states, the ranking of W_1 over W_2 provides a reason of value for promoting W_1 rather than W_2 (1993, 213). But the ranking of W_1 over W_2 by an agent need not provide any other agent with a reason also to do so; so, a state of affairs S_1 “is valuable relative to an agent A_1 if and only if S_1 's distinctive presence in W_1 is a basis for ranking W_1 over W_2 , even though S_1 may not be a basis for any other agent ranking W_1 over W_2 ” (Mack 1989, 84). For another agent, A_2 , the very absence of what A_1 values, namely S_1 , may be good reason for him not to promote W_1 , but instead choose the world lacking S_1 , namely W_2 . So, the agent-relativity of value allows A_1 to rank W_1 over W_2 , but also for A_2 to rank W_2 over W_1 , depending on how each would rank worlds with S_1 . So, reasons, values or rankings are agent-relative if their descriptions contain “essential references to an agent who has that value, prefers that ranking, or has that reason” (Mack

1989, 84). On the agent-relative theory to say that W is valuable is to implicitly hold the following: W is valuable_(in relation to A) or W is valuable_(in relation to B) etc.

Agent-neutral values are values which everyone has reason to promote apart from how the valuable thing stands to them. We could say that a state of affairs has agent-neutral value “if and only if its presence in W_2 is a basis for each agent to rank W_2 over an otherwise identical W_1 which lacks S_2 ” (Mack 1989, 84). If one world possesses some agent-neutral value that another does not then this world is better---not better in relation to anyone in particular but just better. So, even if W_1 was a world in which more individual preferences could be had, it is not as good as W_2 if it lacks some agent-neutral good which W_2 has. W_2 is the world that each agent ought to promote since it possesses the agent-neutral value. So, we could say that a “value, ranking or reason is agent-neutral if its description does not include an essential reference to a person who has that value, prefers that ranking, or has that reason” (Mack 1989, 84).

Notice that according to the agent-neutral view an agent cannot weight one world more than another simply because it is one’s own value. The value of W_2 on the agent-neutral view is impersonal; which is to say that if all value is agent-neutral, then moral reasons will not include an essential reference to the agent who has them. So, as Den Uyl notes, this would allow for a substitution principle to the effect that if A_1 has the value, reason or ranking to prefer W_2 , then so too does A_2 to A_n . One could add a clause to the substitution principle, making a necessary condition of the agent-neutrality of value that it stand in relation to someone, somewhere, sometime; but such a condition of making values describable in part by reference to an agent would make value relative, not agent-neutral. So the agent-neutrality of value implies that we could keep the same truth-value regarding

an agent-neutrally good state of affairs even if we substitute different agents in relation to that state of affairs. So if 'pain is bad' is agent-neutrally true, then 'pain is bad for Joe' is true, or 'pain is bad for Jan' is true, etc.

Next we will examine a couple of classical arguments which claim that the agent-relative theory of value is not coherent. These objections, usually aimed at a substantive adherent to ARV, ethical egoism, are: 1. The claim that the relation of something valuable to one's self makes no difference in the ascription of that something as valuable. 2. Agent-relative value seems to be like egoism, which is contradictory because it holds that agents must each claim that his own view of the good is what each agent should aim at.

The first argument is the claim that there is no need to make any reference to an agent who 'possesses' a good. G. E. Moore has argued:

What, then, is meant by 'my own good'? In what sense can a thing be good *for me*? It is obvious, if we reflect, that the only thing which can belong to me, which can be mine, is something which is good; and not the fact that it is good. When, therefore, I talk of anything I get as 'my own good', I must mean either that the thing I get is good, or that my possessing it is good. In both cases it is only the thing or the possession of it which is *mine*, and not the *goodness* of that thing or that possession (Moore 1960, 68).

Moore is claiming that when one speaks of one's own good one can only mean that one has something which is good, not that one's possessing something, or its fitting into one's life in a certain way makes it good. If one says that 'pain is bad' it is not *my* possession of the

pain that makes it bad versus someone else's having the pain; rather, as James Griffin argues, "the 'my' and the 'your' are not part of the reason –generating consideration. The clause *because it hurts* lacks reference to me or to you, but it lacks nothing of what we take the disvalue to be" (Griffin 1996, 74; and cf. Sumner 2004, 40-1). So a statement regarding value or disvalue only needs an indexical part in order to locate in whom the pain or value belongs---but this reference is incidental to the value or disvalue being what it is.

As Mack argues, much of this criticism receives its force from portraying agent-relative value as a species of subjectivism. We will be discussing the subjective idea of value later; but for now it should be noted that agent-relative value states that it is not just one's possession of something that makes it valuable. Rather, the thing one 'possesses' must stand in some further and more "substantive relation, (e.g. its fulfilling my preference, its satisfying my desire, its being constitutive of my self-realization)" in virtue of which one has reason to promote it (Mack 1989, 85). For the agent-relative theory, it is not by some sort of axiological Midas effect of an agent's touching things, or by possessing them, that makes them valuable (Mack 1989, 85); rather, it is the recognition that often things are only valuable to an agent because they satisfy one's own preferences, etc., and would not be a value to another agent.

The second argument is also from Moore: he argues that if we believe that any single man's happiness, or interest, ought to be his own ultimate end, "this can only mean that man's 'interest' or 'happiness' is *the sole good, the Universal good*, and the only thing that anybody ought to aim at" (Moore 1960, 99). Moore concludes that this view ends in contradiction since if we hold these premises about the ultimate good as man's own differing ends, then we would have to conclude that each man's own happiness is the sole

good---“that a number of different things are *each* of them the only good thing there is—an absolute contradiction” (Moore 1960, 99). But this only follows if the agent-relative theorist would hold that each person can claim that his own end is the ultimate good which everyone ought to aim at. But why need he do this? It seems that the agent-relative theory need only hold that each person’s own good is that which he should aim at; it seems that if the good can be ‘relativized’ against Moore’s first objection, then his second one loses its effectiveness. But there is still a need to discuss the plausibility of agent-relative value in light of Moore and Griffin’s charges that only an agent-neutral view of value can ground our assertions about what is good or bad.

§2.2 Agent-neutral Value as External Value and the Transmissibility of Practical Reason.

In speaking of the value of something as not essentially related to the person whose it is, Moore and Griffin seem to be implying that values are things that exist ‘out there’ in the world. There is much debate in metaethics as to how exactly values and moral reasons exist. Here we will examine a few claims regarding the ontological status of values. I will argue that if one holds that values are agent –neutral like Moore suggests, then one must also hold that values are agent –external, which is implausible. So, the agent-relative nature of values will be offered as a best explanation of the ontological status of values.

There have not been many recent defenders of the agent externality of values. But it seems that if one wishes to really say that values are not essentially related to those who hold them then one will be committed to the idea that they exist somehow apart from us. Thomas Nagel warns that this view is fraught with difficulty since how can one hold the external existence of values and their practical significance? It would be, as Nagel argues,

to say that it would be a good thing if the Frick collection survived even though no one was around anymore to see it (Nagel 1986, 153). But there is a problem with those who wish to make values more related to people in order to get around this problem. The problem is that if one modifies the claims of agent-neutral value in order to help them retain their practical significance one will have to say that a necessary part of X's being a value is that it be related to an agent somewhere, sometime or somehow (Mack 1989, 88). This condition often shows up in definitions of 'intrinsic' value: a value is said to be intrinsic if it is either sought for its own sake, or if it exists as good in itself/ by itself. As Tara Smith notes, the two conceptions are not usually distinguished since people often assume that something sought for its own sake must be good in itself (Smith 2000, 63). But they need not be conflated since the sought for its own sake view may grant that a value is related to a person but it is not sought for any other end in relation to his other ends. But the honest to goodness view of intrinsic value, or agent-neutral value, is Moore's notion of something that is good in itself, full stop. So, it seems that either a value will contain some relation to an agent, or it really will be good in itself, in that a description of its goodness contains no essential relation to an agent. And, of course, it is Moore who has famously argued for this view.

If there are such things as intrinsic or external values I think it will be granted that they cannot just be perceived. Such values must be intuited or shown to exist by another route. Moore attempted to provide a way of showing that there are such things as intrinsic/ external goods via his method of isolation. Henry Sidgwick claimed that it would be irrational to aim at the production of beauty apart from any possible contemplation of it by

human beings. Moore thought he could produce a counterexample hence proving the plausibility of intrinsic value:

Let us imagine one world exceedingly beautiful. Imagine it as beautiful as you can; put into it whatever on this earth you most admire---mountains, rivers, the sea; trees, and sunsets, stars and moon. Imagine these all combined in the most exquisite proportions, so that no one thing jars against another, but each contributes to increase the beauty of the whole. And then imagine the ugliest world you can possibly conceive. Imagine it simply one heap of filth, containing everything that is most disgusting to us, for whatever reason, and the whole, as far as may be, without one redeeming feature. Such a pair of worlds we are entitled to compare....The only thing we are not entitled to imagine is that any human being ever has or ever, by any possibility, can, live in either, can ever see and enjoy the beauty of the one or hate the foulness of the other (Moore 1960).

Moore argues that given our ability to conceive of such a state of affairs existing apart from any person's contemplation of them that it would be irrational to hold that the ugly world should exist rather than the beautiful world. It seems open for Sidgwick to reply that Moore's own method requires that persons contemplate the very thing in question—namely, whether something can be good apart from anyone's contemplation (Bates 1973, 165). So, this is a flatly self-contradictory exercise since Moore needs worlds that are not imaginable for his thought experiment to succeed.

But even if we could grant Moore the coherence of this method of isolation, it still is implausible to hold that the value (or lack of value) of these two worlds exists apart from any agent. It seems that we need persons to agree to say that the beautiful world really is beautiful; this requires agents to look at the whole, say an agent's getting a certain amount of pleasure from the contemplation of the beautiful world, and then asking him to contemplate the world apart from the pleasure he get from it. Here one must adhere to his principle of organic unity which states that the value of the whole (the world) must not be assumed to be the same as the sum of the values of its parts (the bits of good things in the world); for Moore then it might be that all the good things in the world have one common property for the agents who contemplate them--say, they produce pleasure for the agents—but we do not need to assume that the whole is valuable because it also possesses this property, or is made up of all the bits of personal pleasure. But then what Moore wants us to do in the case of the beautiful world is to imagine that it has some property over and above the common property of producing pleasure for the particular agents contemplating it. But what is this property? Is the property something in pleasure that makes it good, or is the property just pleasure considered abstractly? If the former then we might be off on an infinite regress of further good-making properties, or if the latter then it seems odd since pleasure's goodness is usually tied to agents who experience it. Moore does seem to think that pleasure can be contemplated as good apart from any particular bit of pleasure an agent might experience. But, as Bates argues, this is absurd since pleasure "to be pleasure must be the pleasure of some sentient being, but once the sentient being gets back into the picture, it seems that Moore's ideal of absolute isolation is lost" (Bates 1973, 167).

It is plausible then to suggest that the search for a purely intrinsic value be given up. Even pleasure as a value is related to some particular agent who has it. But there are more complex arguments designed to get around the problem of the existence of extrinsic disvalues or values. One could argue that there are still agent-neutral reasons for saying that something is a value or disvalue without trying to answer the problem of how exactly these reasons of value retain their practical significance even though all sentient life might be extinguished. These arguments are a direct challenge to the claim outlined in the introduction that one cannot move from the first thesis of practical rationality to the second. If Nagel's argument for the impersonal disvalue of pain holds, then there may be a bridge from thesis one to the claim that we have reason to value or disvalue what others do *because* those things really are valuable or of disvalue. We will look at Nagel's arguments on how pain can be thought to be an impersonal disvalue next. But if the adherent to agent-neutral value must accept some sort of relational clause as a necessary condition of his description of value, then, as I noted above, he must accept that value is really agent-relative and not agent-neutral; and, also, that the bridge between thesis one and the reasons we have for valuing other's ends doesn't hold.

Griffin argues that there is a transmissibility of practical reasons for action which can be derived from certain normative and factual presuppositions. He claims that there are the same values at stake for all human beings; also "motivation is internal to something's being a general human interest" (Griffin 1996, 73). From this he argues that it is a small step to go from general human interest to reasons for action. "If something is such an interest [for all humans], then it is capable of generating a reason for action" (ibid.). He says that the step from what gives me a reason for action to what gives you a reason for

action has seemed daunting; so, what gives you a reason for thinking your own pain bad seems much different from what my reason would be for thinking your pain is bad. But there is no step according to Griffin since, as we saw before in the case of Moore and Griffin, the ‘my’ in the claim ‘this pain of mine is bad’ does not add anything to the claim that pain is bad. He notes that ‘egoists’ (or in this case agent-relativists) will charge that pain cannot just be bad *simpliciter*, rather it is always bad for someone (Griffin 1996, 74). He claims that there need not be much more to say to those who do not take pain as bad *simpliciter*, except to argue that “given the best background against which to look at it, this seems the natural way to take it” (Griffin 1996, 75). There is no other reason we need to account for why I would take your pain as bad since *because it hurts* contains the disvalue and generates the response for anyone who understands it.

But this argument is problematic. First of all, the transmissibility of disvalue from your pain to my also disvaluing requires that pain be something that is bad in itself, since the motivation for avoiding the pain is internal to the pain’s badness. While Griffin wants to disavow himself of subjectivism (or what Griffin calls the Utilitarian view that well-being is wholly a question of one’s conscious states (Griffin 1996, 75)) in making the disvalue solely dependent on an agent’s own internal perspective, he goes too far in making a person’s reason for pain’s being a disvalue something external to any agent’s reasons; or at least Griffin seems to hint that we want to say more than the claim that disvalue is determined statistically, by what a majority would when polled call ‘bad’. The problem with such claims of reference to persons is that it seems to make ‘good’ and ‘bad’ wholly dependent on person’s changing whims. Moore and Griffin hold not that cruelty is wrong because we (or a majority) say it is, rather we decide to call cruelty wrong because it is

wrong. This sounds sensible enough and I will have more to say on this a bit later because it does seem that the agent –relative theory of value the agent-relative can affirm the latter part of the Euthyphro question above, contra subjectivism. But there is still the hard question of how a practical reason, say about why you have reason to disvalue your own pain, can easily transmit itself to another in an important way---so that one comes to also disvalue your pain as you do. The transfer of the practical significance does not occur simply because there are generic values and pains that we all agree on. For instance, it might seem upon first glance that pain is always described as a disvalue. But what about G. Gordon Liddy who liked to hold his hand over a hot stove in order to show his ability to withstand pain? The factual description of the pain would remain the same but there are not the same practical reasons that give rise to the judgement *pain is bad*. The point here is that the factual reasons or description of pain may be the same as usual---the thing what we all want to avoid---but the practical reasons do not remain the same since they are somewhat dependent on Liddy's own desires and goals (Den Uyl 1991, 31). It may be that Liddy wears oven mitts when he bakes cookies, but in this case his goal is to bake cookies and not to touch the hot stove to prove his machismo. So the motivational reasons do not seem to be internal to the description of pain. It is open for Griffin to argue, in order to save the notion that pain will always have negative motivating reasons, that that we should re-describe what Liddy is feeling as something other than pain—say, a sort of pleasure. But this seems to be case of going against ordinary usage (The No True Scotsman Fallacy) in order to save the idea that motivation is internal to a general human interest. There is another problem with this line of argument better brought out by Loren Lomasky's defense of a similar claim.

Lomasky argues that what we want in the type of situation we are looking at is an explanation of the reasonableness of why a practical reason transfers its significance from one agent to another. He argues that realizing that one is an agent in a world with other such agents is logically sufficient to “provide the basis for transmission of rational motivation” (Lomasky 1987, 63). He argues that this recognition gives agents some reason to act so as to advance the ends of others---but not in the trivial sense of A promoting B’s end because it pays A to do so, but, rather, by understanding B’s end to be of value A then becomes by that understanding motivated to promote B’s end. Lomasky believes that values are best looked at in terms of being bundled together as projects that agents pursue. Values then are not impersonal things, like Moore and Griffin believe, but are inherently related to the individuals to have them. They are basically agent-relative. But he argues that even though B’s reason to promote E_2 is not exactly the same as A’s also having reason to do so, there is a sense in which “A recognizes that there does exist reason for bringing about E_2 ” (Lomasky 1987, 63-4). The argument runs as follows: “one who recognizes R as a reason for E_2 is thereby logically bound to admit that it is not totally and in every respect indifferent in respect to whether E_2 obtain. R *is* why E_2 should obtain; otherwise R could not be conceived to be a reason...To understand what it is for someone else to recognize the existence of evaluative grounds that have not been provided by oneself for oneself....Because we can make sense of personal and impersonal value as both being *value*, there ought to be some link between them. The transmissibility of practical reason is such a link. Recognition that someone values end E is sufficient warrant for one to judge that there is value that attaches to E; one need not first note that the one who values E is indeed none other than oneself” (Lomasky 1987, 64).

So Lomasky's claim is that one can come to a rough understanding of why another values what he does, since the other can give reasons for his valuing it. But there is a problem with the inference from the claim that we can understand why another values something and this is sufficient for our coming to value his end. Lomasky switches from B's giving a reason for why he values end E_2 , to A's just coming to value that end because he sees that B's valuing E_2 is sufficient warrant for our doing so too. But does A come to value E_2 because of the reasons B gives, or just because he sees that E_2 is valuable? It is not clear which –or even if just seeing that another values E_2 is sufficient to give it intrinsic, impersonal value. But if this is the claim then it goes against what Lomasky argued a few pages earlier.

Here Lomasky (1987, 60-1) wants to point out that those who try to ground rights by inferring that since rational agents each value their own projects (in an agent –relative sense), and each value having rights that will protect their status as a project pursuer, to the further claim that therefore each is committed to also holding to a regime of rights since it “is a *common good* that each has reason to advance” is fallacious. The fallacy involved is that of composition since, as Lomasky continues, what “each is rationally obliged to value is not a world in which rights are generally respected but a world in which *A is accorded the status of a rights holder*” (Lomasky 1987, 60). He concludes, each “values rights for *himself* but because of the presence of that indexical reference, each is not valuing the same imagined state of affairs. Of course, *A might* value a world in which everyone is accorded rights---and B, C., might also value that world---but A is not *committed* to anything so charmingly democratic. He need merely value his own having rights” (Lomasky 1987, 60). The problem is that one cannot take as composed in the conclusion, say everyone's valuing

everyone else's rights, from what is necessarily individuated in the premises, each's only valuing his own rights. All that follows from the premises is the weak claim that each person values his own rights, not that he necessarily values anyone else's. As will be discussed in the next chapter this is often how people try to move from a theory of value to a ground for rights. But not even Lomasky thinks it will work, at least on the agent-relative view of value, or what Lomasky calls the personal nature of projects.

But I think the same problem that Lomasky points out above in the move from one's having reason to value one's own projects and rights to the further claim that one can come to have reason to promote another's ends *because those ends are valuable in themselves* besets his argument for the transmissibility of practical reason. As was noted in the introduction, given that values and value-related reasons are agent-relative, the first claim about practical reason is that rational agents are interested in promoting their own values and well-being, we need a good argument to the effect that "in order to show that A has reason to promote it [B's end, E_2], what has to be shown is that E_2 or B's well-being has value-for-A. It does not suffice to point to the ultimate value of B's well-being or the contribution that E_2 makes to that ultimate value"(Mack 1999, 89-90). But the fallacy of composition Lomasky raises rests upon the idea that one will only have reason to promote one's own projects and the rights that protect them; but one cannot move from this to the idea that an agent will come to value other's rights because he comes to value the other's projects. A project has importance to an agent and motivates him because it is his own preferred set of values; the idea of being a project pursuer runs so deep that Lomasky also argues that "one component of a person's identity over time is constituted by his commitment to projects" (Lomasky 1987, 32).

So projects, or values, are motivating and have their importance *because* they are necessarily related to—even part of a description of— one’s identity. But to then say that another’s end can be seen to be good (apart from our own ends) and therefore provide a reason for our promoting it is to make the same move Lomasky says cannot be done: namely, to say that since each has reason to promote his own end because he values it—it has practical significance to an agent because it is his end—that A can come to promote B’s end because A can recognize B’s reasons for valuing his end. It would seem that either A must recognize some inherent, agent-neutral worth in B’s ends which just motivates anyone who recognizes such worth, or A must come to be persuaded (by B) that his ends are worth promoting. But to affirm the former is to deny the agent-relative nature of projects—and why it is important that they are not really comparable or open to tradeoffs as Lomasky wants them to be—or he is really saying that B’s value is really agent-relative, and while B might give A reasons to help him promote his end E_2 , this is not equivalent to saying that B’s motivating reasons for holding E_2 transfer to A just by A understanding them. B can surely explain his reasons for why he values E_2 , but the practical significance of E_2 need not also accompany A’s understanding. B might love fixing up old cars and share his reasons for thinking such a thing ought to be promoted with A; but A’s understanding B’s reasons need not give A reason to take up such a hobby. So I think Lomasky’s move from A’s personal project (E_2) being of value to A, to the claim that B’s understanding of A’s reason, R, for E_2 gives B a reason of value to promote E_2 fails because it exhibits the same problem he shows in his example of the fallacy of composition.

So far I think there have been some plausible attempts to deny the first thesis of practical reason by citing some sort of external value which is internally motivating, and therefore to deny the second claim (that one cannot move from one's own values as what one has reason to promote) to the idea that another's ends can be inherently valuable and motivating. But I do not think that we have yet had good reason to think that practical rationality requires an agent to advance another's end apart from how that other's end related to the agent who must do the promoting. Such a claim would require a robust principle of transmissibility of practical reason "whereby S's having reason to promote X by transmission leads to B's having reason to promote X, [so that] X's value reemerge[s] as agent-neutral" (Mack 1989b, 78). Because Thomas Nagel's arguments for the impersonal nature of pain are important and have influenced Lomasky and Griffin's arguments about the transmissibility of practical reason, they will make up the last part of this survey before moving on to the next section on the objectivity and subjectivity of value. If Nagel's arguments succeed in showing that practical reason requires that A come to promote B's end because of the externality of the reasons for doing so, then he will have provided a denial of the second thesis of practical reason.

Nagel's argument for the transmissibility of practical reasons turns on his distinction between the objective/ impersonal self and the subjective/ personal self and their respective impersonal or personal viewpoints. From an objective point of view one can see how things are apart from one's own personal perspective.

Each of us begins with a set of concerns, desires, and interests of his own, and each of us can recognize that the same is true of others. We can then

remove ourselves in thought from our particular position in the world and think simply of all those people, without singling out as *I* the one we happen to be.

From that [impersonal] position, the content and character of the different individual standpoints one can survey remain unchanged: One has set aside only the fact that a particular standpoint is one's own, if any of them is. It isn't that one doesn't know; one just omits this fact from the description of the situation (Nagel 1991, 10).

Objectivity is traditionally thought to require this sort impersonal perspective and I take it that it is not terribly controversial. But in ethics, or matters of practical significance in general, it seems more contentious; for in taking a personal point of view one would consider certain states of affairs, say pleasure and pain, as valuable or not according to how they relate to oneself, or, Nagel argues, one could consider the pleasures or pains from the outside, or from the objective point of view. Here such a perspective looks at the pleasures and the pains in themselves; this perspective can affirm the pain as bad and pleasure as good without merely describing the motivation of an agent (Nagel 1986, 153). This is important Nagel argues since his own brand of normative realism requires that we must discover reasons for action “instead of deriving them from our preexisting motives” (Nagel 1986, 139).

You cannot sustain an impersonal indifference to the things in your life which matter to you personally: some of the most important have to be regarded as mattering, period, so that others besides yourself have reason to take them into account. But since the impersonal standpoint does not single you out from anyone else, the same must be true of values arising in other lives. If you matter impersonally so does everyone (Nagel 1991, 11).

But how does the impartial viewpoint see certain states of affairs as good or bad apart from one's personal relation to them? Why should we think that for "a given quantity of whatever it is that's good or bad—suffering or happiness or fulfillment or frustration—its intrinsic impersonal value doesn't depend on whose it is"(Nagel 1991, 11)? Nagel seems to have at least two different arguments for the agent-neutral badness of pain and the ability for impersonal practical reasons to transfer themselves.

The first argument or intuition for the agent-neutral badness of pain is based on the idea that if one does not recognize one's own pain, then one will have dissociated one's objective self from one's subjective self since the subjective self can see that one has reason to want the pain to stop but the objective self remains disinterested. The problem is according to Nagel that if we only have agent relative reasons to see that the suffering should stop then only the subjective self has reason to stop it, while the objective self has not reason and only sits dispassionately watching the suffering. The objective self can only say that the subjective self has reason to want the suffering to stop. But this seems to go against Nagel's requirement that a normative realist have reasons for acting not simply derived from one's preexisting motives. But such reasons, not describable in part by their

relation to an agent's motives, must be objective. The objective self then should not become dissociated from one's subjective self by not being able to see the practical significance of the pain for the subjective self. And this requires it seems that the pain be recognized by the objective self for what it is---bad.

One could argue that this goes in a nice circle: it seems that the practical significance of the pain's being bad for the subjective self who is motivated to end it is a reason to say that the objective self should see the pain as really bad in itself. But the objective badness of the suffering is derived from the motives of the subjective self, or else how is that the objective self comes to see the pain as bad? Nagel might grant this but argue that what really is at issue here is the problem of the dissociation of the selves which occurs when the objective self cannot understand the motivation of the subjective self in wanting the pain to stop. But the reply to dissociation is, 'so what?' The whole point of having two selves as construed by Nagel is for one self to get outside, attain a 'view from nowhere', in order for it to look at things existing apart from one's motives, or 'biases'. As Mack argues, Nagel's claim that there exist two selves with different standpoints "and a structure for value which allows those two selves to live in harmony may be a matter of wanting to have and to eat one's metaphysical cake" (Mack 1989a, 90).

Mack also notes that the bifurcation of selves may lead to a kind of axiological schizophrenia: one's subjective self may focus on alleviating one's own pain, while the objective self would not be able to say why one's own pain ought to be negated over anyone else's pain since it would only focus on the agent-neutral badness of pain in general. So the objective self will tell a person to reduce the suffering in the world while the subjective self tells one to reduce one's own suffering. But as Mack concludes, "[i]n

almost all circumstances, one of these practices will have to be sacrificed to the other” (Mack 1989, 90). Nagel himself argues that from the impersonal standpoint “*Everyone’s* life matters as much as [one’s own] does, and [one’s own] matters no more than anyone else’s” (Nagel 1991, 14). This leads to the natural conclusion, which Nagel does not accept, that from the impersonal standpoint we are left with making ourselves “instruments for the realization of those impartial values that appear from the impartial standpoint” (Nagel 1991, 15). So it is not clear that there is a real need for negating dissociation for such a division of perspectives is required for objectivity, even though it may lead to the objective and subjective selves at war with each other.

Nagel’s second claim more directly addresses the question of the transmissibility of practical reason. His argument is the idea that if we only have agent-relative reasons for acting then we will not be able to give a plausible account of why we would help another alleviate his suffering. If one is in a hospital and another patient is in pain and wishes to be given a painkiller (analgesic) we need to ask ourselves why it is that we would give him the painkiller (if we would at all). Nagel argues that if we are only permitted agent-relative or personal reasons for giving the patient an analgesic then the patient would have to say that “though he has reason to want an analgesic, there is no reason for him to have one, or for anyone else who happens to be around to give him one” (Nagel 186, 160). It would be true that there would not be an impersonal reason to give him a shot of painkiller, but this still doesn’t mean that there are no agent-relative reasons for him to get it or for others to give it to him (Mack 1989, 91). He may feel better and others around him in the hospital may feel better too. But the force of Nagel’s argument is the claim that from my own perspective as someone who is in pain I can understand why I would want an analgesic, but can I

understand why someone else would think it reasonable that I get one? Why would he, from an agent-relative perspective, want me to get a shot? Is it because he sees that pain is bad, or is it just that my groaning is bothering him (Nagel 1986, 160)?

The problem Nagel thinks is that from an agent-relative perspective the other's reasons for my getting a shot might not have anything to do with the badness of pain, but only rest on his desires or tastes---that is, he wants me to get a shot so that he can watch 'The X-Files' without being bothered. It seems that the agent-relative view of value can only interpret his reasons in terms of his own motives, and not in terms of the agent-neutrality of my badness; but the agent-neutrality is needed in order to conform to the normative realist view that the other patient's desire to end my pain fit with the moral facts about pain's objective badness (Mack 1989, 91-2). In what sense values can be thought to be objective or subjective will have to wait until the next section. But the claim Nagel is making, that practical significance requires some notion of the impersonal dreadfulness of pain, seems implausible because it rests on the idea that pain is something that can be viewed 'from the outside' as impersonally bad. Nagel's view of objectivity is that one abstracts oneself from a situation to view it without reference to oneself. But how does this work with things of practical significance? Nagel says that one's pain "though it comes attached to a person and his individual perspective, is just as clearly hateful to the objective self as to the subjective individual. The pain can be detached in thought from the fact that it is mine without it losing any of its dreadfulness. It has, so to speak, a life of its own" (Nagel 1986, 92). It is this thing with a life of its own that gives another a 'correct' motive to end my pain. But this is to just return to the claims about intrinsic value above. And I think little more needs to be said about the idea that something is good or bad intrinsically.

If there is no intrinsic practical significance in some state of affairs--which is to say that that state of affairs can be described as good or bad apart from any relation to an agent—then we have not yet been presented an argument how practical reasons, understood as reasons for some agent to promote some end, transfer themselves to others.

But there is another problem that needs to be discussed in the next section. Nagel hints at the Euthyphro problem in his claim that agent-relative reasons can only be subjective, or based on motives we might have for eliminating another's pain, but not reasons which are based on the actual disvalue of the pain for the agent. Does the agent-relative view of value turn into subjectivism, or in trying to escape subjectivity must it turn into a view like Nagel's, taking what one has motive to promote as deriving from some agent-neutral good that really ought to be promoted?

So far we have seen that the agent-relative definition of value requires as part of the description of value an essential reference to the agent whose value it is; and agent-neutral value does not require this reference. And it was also shown that the agent-neutral view seems to require the existence of external value. But such 'value' seems highly implausible since a value does not seem to be the kind of thing that can retain its practical significance apart from agents who relate to it in some way---viz., who wish for whatever reason to promote it. The importance of this claim was illustrated by examining how agent-neutral practical reasons might conceivably be said to transfer themselves from one agent to another based on their internal badness or goodness. I have rejected this view as less explanatorily adequate: a value is related to the agent who has it, and hence his reasons for holding it only give him (directly) reasons for promoting it. B's reasons for holding E_2 as an end do not simply transfer to A even though A understands them; but until now we have

not talked about what sorts of reasons he might have for promoting E_2 , and whether these reasons are best considered objective or subjective.

§2.3 *The Objectivity and Subjectivity of Value.* The topic of how to interpret the ontological and epistemological status of values and moral claims in general has a long and thorny history. Often ‘objective’ refers to something’s existing as mind independent, and ‘subjective’ as the thing’s existing dependent upon one’s perceiving it—so, an objective value is one which is intrinsic, or exists outside of one’s experience of it, and a subjective value exists only in a person’s experience of something as good. Or ‘objective’ might refer to the thing’s being inter-subjectively verifiable, and ‘subjective’ to the thing’s not being open to such verification. In ethics objectivity and subjectivity might be spelled out in terms of the scope a moral claim possesses: is it ‘universalizable’ and applies to all agents impartially, or whether it only applies to one agent, being indicative of his own personal preferences; so far the agent-relative theory has implied that there are no ‘universalizable’ claims about an agent’s values being suitable for any other agent. I will not be pursuing the idea that objectivity requires this sort of ‘universalizability’; but I am concerned with the first sort of ‘objectivity’ which implies independent existence from an agent---but I think that what exists independently are *reasons* for values, not values themselves. The requirement that objective values be agent-independent seems to conflict with this external idea of objectivity since part of the description of a value will be its relation to the agent who has it; so if agent-relative values are objective, their objectivity must allow for their relative nature.

A good place to start with the idea of objective values is Plato's famous question in the *Euthyphro* when Socrates asks Euthyphro whether something is pious (or good) because the Gods say it is, or whether they say it is good because they see that it is good? On the face of it, the question seems to demarcate subjectivists (those who see no problem with affirming the former) from objectivists (those who affirm the latter). I think that the agent-relativist can affirm the latter in a sense. To know exactly in what sense we need to distinguish two different senses of affirming that something is called good because we see that it is good. For Plato, an agent—even the Gods--would have reason to call something good because there is a corresponding Form of Goodness that some particular good thing mimics, or partakes of; but I think that this sort of intrinsic notion of goodness has been shown to be implausible given the arguments above. But that is not to say that one cannot make sense of the *Euthyphro* question as demanding that an agent give reasons for saying that something is good or bad. This is a constraint on our ability to value things, since it cannot be the case, as the subjectivist wants to hold, that valueless states of affairs come into existence simply by being the object of one's desires, preferences or commitments (Mack 1993, 221). Objectivity, if it is to have any meaning at all, requires we be able to judge whether our affections are appropriate or not depending on whether their objects are worthy of our affections (Mack 1993, 321).

To say that an object is subjectively valued is to say that it acquires value by being the object of one's affections. The classic statement of this is by Hobbes: "But whatsoever is the object of any mans Appetite or Desire; that it is, which for his part calleth *Good*; And the object of his Hate, and Aversion, Evill..." (Hobbes). Sometimes it is thought that subjectivists of value need to hold value to be reducible to some other psychological state,

say pleasure. Utilitarians thought that what people really valued could be explicable in terms of, and interpersonally measurable by, this psychological state; but this view has been pretty much abandoned. The reason is that subjectivists need only hold that “value is created or determined through preference. Values are the products of our affections” (Gauthier 1986, 47). There need not be the restriction that the object of preferences is only pleasure—rather, anything can be the object of one’s preference, from eating a good meal to planning one’s retirement 40 years from now.

This broadening of what can be an object of one’s preference has led the subjective theory of value to be adopted by economists and many in philosophy as a superior way of explaining human action and moral choice. It is thought that the subjective interpretation of value supports the non-neutrality of value. As we noted above the agent-relative idea of value makes the value relational to a particular so that one could not simply substitute another agent in his place and say that he is just as happy. The subjective idea of value supports this idea since a thing only has value if it is the object of someone’s preference; and this object need only have value for the individual who prefers it. As Mack puts it, on the subjective account, “my desire for S_1 may have the power to confer value on S_1 for me, [but] it is difficult to see my desire for S_1 having the power to bestow upon S_1 an agent-neutral value that summons all to its service” (Mack 1993, 222). This would limit the reasons for being able to argue that there is some overarching Good that we all must recognize and work towards. But there are also implausible implications of holding values to be explainable only in terms of being objects of one’s preferences.

The agent-relative theorist agrees with the subjectivist that values have some essential relation to an individual but there is also an important difference. The agent–

relativist need not hold that a thing is only valuable when it becomes an object of our preferences. The reason for not wanting to have to defend this claim is its implausibility in claiming that we need not judge whether our affections are appropriate or not. For instance, to use Mack's example, take a person who desires to grow the largest tomato in East Baton Rouge Parish (Mack 1989, 86). He could either extinguish this desire, or attempt to carry it out. If he does attempt to carry it out we could ask the subjectivist what the reason is beyond just saying that this state of affairs is the object of his affection. If the subjectivist were to say that he wants the accompanying 'felt satisfaction' that comes with growing the tomato, then it seems that what is valuable is this felt satisfaction---but this pleasure, or whatever, is not purely conferred upon the state of affairs by the agent. Indeed, what he cares about might actually be growing the prize-winning tomato: "Were he to discover that the prize had been awarded by mistake, the afterglow would be lost. But why? The revelation of the mistake would not show that he had not achieved the felt experience of growing the tomato and the felt satisfaction of winning" (Mack 1989, 96 n.34). The reason is, of course, that one can evaluate whether the state of affairs is worthy of our affections.

There is objectivity for agent-relative values because we can often specify when a state of affairs 'fits' with what we wanted to achieve. And the more we move from short term objects of our affections, such as pleasure, to long term ones, such as one's career we need a good explanation why one might attempt to carry out these 'objects' of one's affections rather than extinguishing them. A plausible claim is that these 'preferences' are based on our belief that these states of affairs are worth having—that they are worthy of our accomplishment. It is only the belief that such large goals are worthy that sustains our drive to get them. There may be few felt sensations that could accompany such long

projects; so the desire to actually do them, I think, resides in our belief that such things really are of value to us.

Of course in saying that some objects can be judged to be worthy of our affections is to presuppose some standard for judgement—we are not just looking for any reasons, but *good* reasons. But one must be careful about introducing generic goods into an agent-relative framework for, as Gauthier argues, “The seemingly relative goods of the several kinds are really facets of absolute good. The demands of objectivity thus force an apparently relative conception of value into an absolutist mould” (Gauthier 1986, 53). Gauthier’s claim is that any account of the objectivity of agent-relative goodness will have to rely upon some standard of general goodness. One might explain why one sees one’s being a social worker as worthy because it allows one to instantiate some good, say benevolence; and this characteristic is desirable, or worthy, because it exemplifies some agent-neutral goodness, or facet of absolute good. Hence, the agent-relative theory seems to need something that it denies—a goodness existing externally from agents. But need we accept that the objectivity of agent-relative values implies the agent-neutrality of value? Take the following claim regarding how to establish objective claims about values:

- 1 “X is not living well,” a truth claim that can be established objectively.
2. “In order to live well, X ought to do (only) Y (as one possibility),” which is also possibly true and can be established objectively.
- 3 “If X does Y, he or she will live better than by doing Z,” another truth claim that can be established objectively (Machan 1998, 63).

There are two levels of difficulty here: first establishing that there are generic goods based on human nature; and secondly, the claim that all of one's personal goals must be fit into this scheme and weighted according to how they relate to the generic goals.

The first problem is notoriously difficult and I am assuming here that there are some goods, such as health, wisdom, wealth, etc. which are thought to be worthy of pursuit for good reason. The problem with trying to glean a list of values and virtues from human nature is that the items on the list will be underdetermined by the facts which support them. The second problem, the attempt to fit one's personal ends into this model and relate those ends back to generic goods derived from human nature, may seem daunting. But it is the job of one's practical reason to figure out how one's inclinations fit with certain generic goods. As Den Uyl and Rasmussen argue:

We should not imagine the basic goods that comprise human flourishing as existing or having value apart from the individuals whose goods they are. Further, we should not imagine individuals as mere placeholders or loci in which these basic goods are instantiated. Individuals are not mere metaphysical 'pincushions' in which these basic goods are 'stuck,' and individuals do more than locate these basic goods in space. It is only through their practical choices that individuals make these goods, determinate, real, and valuable (Den Uyl and Rasmussen 51).

One will need to know what generic values his interests and values are reflective of and how exactly these will be weighted in relation to other so-called generic goals. How much value one should place on 'integrity' versus 'honesty'; how exactly are these goods to be weighted in one's life? An athlete might place more emphasis on 'health' than 'charity'--- why does he do this? It is not a case that charity is really more important from the point of view of the universe than looking after one's health; rather, given that he has adopted the project of being an athlete he will have a different set of values he will need to instantiate to achieve these goals. And these values are probably quite different from a Priest's; but they are not on the face of it worse, but good for him given his inclinations.

The following considerations should give us concern about adopting subjectivism as an explanation for the values we hold. We think that the values we have, for the most part, are *worthy* of being acquired. But this is only worthiness relative to our selves, to our own goals, desires and needs, etc. The question still remains how do our ends or values stand to others? Must another agent see my ends as worthy of pursuit because I consider them worthy? Or need another agent only be able to recognize the fact that I have ultimate ends, good *for me*, apart from his ends? I think the latter is more plausible given the agent-relative nature of value. To illustrate, it will be instructive to use the Lomasky example in the previous section. Lomasky had argued that A's understanding B's end as valuable for him was sufficient to give A reason to promote it. He concluded:

...it is being maintained that there are not two radically different ways of understanding reasons for action: understanding a reason as mine, which is

suffused with motivational force, and understanding it as thine, which is entirely bereft of motivational force (Lomasky 1987, 65).

But this attempt to argue that values transfer their motivation based on understanding the reasons for them did not seem plausible, because, as Mack argued, if “anything is suffused with motivational force, it is A’s reason; *not his understanding* of that reason. The reason, not his understanding of the reason, has motivational force for B” (Mack 1989b, 84).

In reply to this criticism, Lomasky argued that in saying the pains and pleasures of others are not among the motivationally inert facts of the world, he did not mean to argue that there exists any sort of external value (Lomasky 1989, 119). Lomasky claims that he was trying to argue for the more modest idea that the pains and projects of another are not to be classified among the motivationally inert facts of the world. For instance, if squealing chalk drives one up the wall then one would do well to extinguish this response by either staying away from chalkboards or by some sort of hypnosis, etc. Lomasky says that the extinguishment of the chalk response would not “render you oblivious to something that remains genuinely an evil. There is no ‘fact of the matter’ concerning the badness of chalk squealing independent of the subjective tinge of your experience” (Lomasky 1989, 119). Of course we have seen that an agent may have good reason for himself to not have to experience this sound and the reasons may not be just because of a subjective tinge. But why might one be apprehensive about adopting this strategy in the case of the patient who is in pain? One could just give him a shot and not be bothered by him anymore. Or one might just move to another room and this would have the same effect on one’s own experience. Lomasky argues that the reason why one would not do this is that it is

irrational: what matters to one is not primarily the state of “your consciousness but the way things are in the world. Similarly, the extinction strategy is irrational because it would take a capacity for apprehending what is valuable and disvalue in the world as if it were only a spotlight on one’s own psyche” (Lomasky 1989, 119).

The objection Lomasky makes seems directed more at subjectivism, than agent-relative value because the agent-relativist need not hold that badness is merely conferred on things by an agent. But what about the status of the other’s pain or disvalue? One knows that if one leaves the room the other agent’s pain does not just go away with the closing of the door; but does this mean that the badness of the situation remains even though we go away, *or* that the badness of the situation remains *for the sufferer* even though we depart? On the agent-relative view of value, or disvalue, it could only be the latter. But even though we affirm the latter and deny that the practical significance of the disvalue need transfer, we can come to see others as moral agents, not mere mechanisms “that can affect me for good or ill”(Lomasky 1989, 119).

One can come to understand that something is good for another without also having to promote that end oneself. The reason is that the recognition of values as objective and agent-relative is different from the claim that the other’s ends need to be promoted because they are valuable (or disvaluable) in themselves. As Henry Veatch argues:

If the good of X is indeed but the actuality of X’s potentialities [agent-relatively considered], then this is a fact that not just X needs to realize, but anyone and everyone else as well. And yet given the mere fact that a certain goods needs to be recognized, and recognized universally, to be the good of

X, it by no means follows that X's good must be taken to be Y's good as well, any more than the actuality or perfection or fulfillment of X needs to be recognized as being the actuality or perfection of Y as well (in Den Uyl and Rasmussen 1997, 33).

The denial of the universality of a value's applicability does not mean that we need deny the universality of the judgement that something is good or bad for another. As we saw in the second section to say that a value is agent-relative means that an agent, P_1 has a reason for ranking a world W_1 with G_1 over a world W_2 without G_1 . But this ranking need not be a reason for P_2 to also prefer W_1 , especially if his own good life requires the fulfillment of some good, G_2 , that cannot be combined with G_1 . So, this leads to a 'universalization' in the sense that just as G_1 gives P_1 a reason to act so as to promote W_1 , so too does G_2 give P_2 a reason to promote W_2 . As Den Uyl and Rasmussen continue: "...if one knows that attaining one's good provides one with a legitimate reason to act, *because it is one's good*, then one also knows that another person's attaining his or her good provides that other person with a legitimate reason to act; this claim is what is universalized" (Den Uyl and Rasmussen 54).

Finally, we should note that although values are agent-relative it is true that all good lives will require a certain set of values. The reason for this is that there are certain values that ought to compose a good life. It is arguable exactly which values ought to be on this list, but Den Uyl has suggested the following: Intellectual pursuits, artistic pursuits, justice, honor, friendship, wealth, beauty, health and intellectual ability (DenUyl 1991, 188). These are not listed in any hierarchy of importance and may best be seen as slices of a pie chart

that may differ in width depending on their importance to the agent's life. The life of a judge will require more of an emphasis on justice than will the life of a supermodel. Yet, it seems plausible to argue that a life that is absent *any* concern with justice is not much of a life at all. This consideration is important because it means that if justice and other goods ought to be part of one's life, then they ought to exist in one's life in some degree. So if justice ought to be a concern one has, then there may be concerns that one ought to be more cognizant of in order for one to be just. This concern, as we will see, may have interesting implications for deriving a theory of rights.

§2.4 *Conclusion.* So, the objectivity of other's values, given that those values are agent-relative, resides in the realization that one's own values are not the only values in the universe. This is to move beyond the idea that the only real values are one's own to the idea that there are other moral agents who are ends in themselves. This denial of axiological solipsism may seem pedestrian, but it will be seen to have more importance later when we get into arguing about rights. The objectivity of agent-relative values in the interpersonal sense is a pretty abstract understanding: it does not require that one come to promote all the various ends people have, but it does require that one come to see others agents as ends in themselves. What sorts of actions A can perform on B is the subject of the next few chapters when I examine the attempt to base constraints on consequentialist or value theories and why we must turn to a deontic theory to better explain such constraints. But suffice it to say, at this point, we do not have a reason why A cannot use B as an unwilling instrument towards his own ends.

Chapter Three:

Value Pluralism and the Value of Well-Being.

§3.0 Intro.

§3.1 Value Pluralism.

§3.2 The Value of Well-Being.

§3.3 Conclusion.

§3.0 *Intro.* The plurality of agent-relative value. Value pluralism (VP), or the belief that there are ways of life not just different from one another, but differently good, is a staple of liberal belief. Below I will briefly examine the idea of subjective VP and then look at its main contender, objective VP. I will show how VP, as viewed from an agent-relative perspective, provides a more attractive interpretation than its competitors. The principal reason for preferring the agent-relative basis of value incommensurability is that it allows us to keep the insight that different ways of life may be both good and incommensurable while rejecting the idea (associated with the traditional form of value pluralism) that incommensurability rests primarily in an agent's inability to make a rational decision between two equally good but incompatible values. The theory of objective value plural incommensurability will be shown to be implausible from the agent-relative perspective because it relies on agent-neutral values. The preferred interpretation of Value Pluralism based on agent-relative value will show how values are incommensurable in a sense, but not in the sense that has been offered by pluralist theorists before.

§3.1. *Value Pluralism*. In order for one to be called a liberal, a necessary, if not sufficient, condition would be that one holds some form of value pluralism. Liberals, qua value pluralists, do not claim to have some standard to decide which good life is the optimal one. Pluralism implies that individuals are able to choose what sort of good life they wish to make for themselves. Thus, pluralism stands in direct contrast to monism, the belief that all values can be ordered and ranked according to one standard or supreme value. Kekes explains that the modern rejection of ethical monism shows the appeal of value pluralism:

...pluralism is quite unlike monism. For what monists wish for us is that we should overcome the obstacles that prevent us from embracing the one true system of values through which we could achieve a good life. The pluralistic ideal is that we should *make* a good life for themselves. The monistic ideal is that we should *find* the life that is good for all of us.

...Both see living a good life as the goal. But for pluralists the goal is to achieve what we individually want to achieve, while for monists the goal is to achieve what all individuals alike ought to want to achieve (Kekes 1993, 14).

The need for individuals to choose exactly what sort of good life they want goes against what is a need of traditional morality: to provide some overarching standard of a good life for agents to strive towards. This need might not just be based on the monistic prejudice that there can only be one Good life, but seems to be a requirement of transitivity in

practical reasoning: If one prefers A to B and B to C, then it cannot be the case that one prefers C to A. This is a requirement of rationality; without some one end to compare other values to, we may end up preferring C to A which would be irrational, but also to prefer in moral terms the less valuable to the more valuable. Hence Aristotle's claim there must be some one end to every practical science and the end of all ethical striving is happiness.

But value pluralism, the belief that there are differing ultimate ends which are good, would seem to be a rejection of this condition of practical reason that there be a single value. The consequence of admitting an irreducible plurality of ends seems, as Stuart Hampshire states, "to admit a limit to practical reasoning, and to admit that some substantial decisions are not to be explained, and not to be justified as the right decisions, by any rational calculation. This is a possibility that cannot be conceptually excluded, even if it makes satisfying theoretical reconstruction of the different uses of 'good,' as a target setting term, impossible" (quoted in Den Uyl 1991, 163). The problem of the breakdown of transitivity in practical reasoning was raised here because it is often thought that ethics as a whole must provide some overarching standard by which everyone can come to make choices which are compossible and rankable by a standard of the Good. But given the argument for agent-relative value it should be apparent that while we cannot have incommensurability at the personal level, only at the interpersonal. So there need not be a break down in practical reasoning when agents are reasoning about their own values because they can judge what is most important in their lives given their more important values/ goals and act accordingly.

The first strand of VP we will examine is subjective value pluralism. This is the belief that things have value by being the objects of our preferences, and since there are as

many different and conflicting values as there are agents who confer value, values derive their plurality from these two considerations. Von Hayek defends this view of value pluralism when he is discussing the problems of socialist planning. He argues that those who would try to make plans for directing all of our affairs neglect to consider that “scales of value exist only in individual minds, nothing but partial scales of value exist, scales which are inevitably different and often inconsistent with one another” (in Crowder 2002, 227). At one time any socialist trying to plan what sorts of preferences ought to be satisfied will only have his own goals to go by; even if he wanted to satisfy as many others as he could, he will be limited in knowing what other’s values are since, all he will have are partial scales of what this person or that considers from his own point of view to be of value. There will be no way for the socialist to rank everyone’s values according to some impersonal standard because such a standard will only be a reflection of the socialist’s own preferences, which may or may not coincide with anyone else’s.

From this idea of subjective and plural values, Hayek argues that within limits people should be allowed to “follow their own values and preferences rather than somebody else’s” (in Crowder 2002, 227). Hayek wants to move from the idea that values are plural to the liberal idea that people should be left to pursue their own lives without interference from others. This is often defended in a utilitarian fashion, as Roger Scruton puts it: “when people are negatively free they are, *ceteris paribus*, unhindered from doing what they decide to do; and people are by and large the best judges of what is most likely to satisfy them; hence negative liberty freedom tends to maximize utility overall” (Scruton 1994, 584). Scruton remarks “the naivete of the second premise needs no comment”. But if values are subjective and plural, then this makes the second premise more plausible than

Scruton believes—values are conferred on things by persons, so why would people not be the best judges of what they want? But as Crowder points out, the problem from a pluralist view this argument is one from indeterminacy: the subjectivist claims that since (1) value pluralism means there is no way competing values/ goods can be measured or ranked objectively, we can infer (2) that such rankings ought to be left to individuals. But even supposing that (1) holds and the subjective theory of value is true, (2) does not follow since (2) would seem to be the claim that at least one state of affairs can be ranked objectively—namely, the one where we are left alone to make our own decisions. And we have observed other reasons above why (1) might not be the best explanation of value since individuals consider their values as worthy apart from being just the products of our affections. But the problem for value pluralism becomes how to interpret (1)—if values are not subjective, can they be objective but in some sense incommensurable by virtue of being incompatible?

John Gray has argued that values are objective, plural and often incommensurable. There are many kinds of good life. He has said that the idea of objective pluralism comes from Isaiah Berlin, who derived it from the study of Herder in whose work Berlin found the idea of pluralism: “the recognition of an indefinite variety of cultures and systems of values, all equally ultimate, and incommensurable with one another, so that the belief in a universally valid path to human fulfillment is rendered incoherent” (Hausheer 1998, xxx). But Gray has argued that Berlin’s own theory of value pluralism upon which he bases his liberalism “founders on the historic reality that many constellations of these [plural-objective] goods, and many forms of human flourishing, have non-liberal social and political structures as their matrices” (Gray 1995, 95). Gray gives the following ways objective and plural values arise through conventions that govern how moral goods can be

fit with one another given the value assigned to those goods within a culture—and also when different cultures apply different standards to the same good, we may end up with different interpretations of the good—and incommensurability can also be generated when different goods and virtues are honoured in different cultures: “What some praise as virtuous others may condemn as vice” (Gray 2002, 35). This is true incommensurability where two sides of a debate talk past one another because, as Kuhn claimed, “to call one idea right and another wrong implies the existence of a common framework for evaluating them, which is precisely what Kuhn denies” (Okasha 2002, 86). The notion that goods are incommensurable means they cannot be compared in overall value: “Some varieties of the good life are neither better nor worse than each other, nor the same in value, but incommensurable; they are differently valuable” (Gray 2000, 34). He gives the example of friendship:

...goods that are incommensurable cannot be compared in overall value. Consider friendship. Insofar as someone charges money for the time he spends with others, he is not a friend. It is part of friendship not to exchange the time one spends with friends for money. This does not mean that friendship must be ranked over any amount of money. To say that friendship and money are incomparable in value does not mean that having friends is incomparably better than having money. It means that friendship and money cannot be compared in value. As Joseph Raz has put it: ‘Only those who hold the view that friendship is neither better nor worse than money, but is simply not comparable to money or other commodities are *capable* of

having friends. Similarly only those who would not even consider exchanges of money for friendship are capable of having friends' (Gray 2000, 35-6).

The problem here according to Gray is that the value of friendship and the value of money are somehow incomparable because one cannot logically combine the two things--say, paying a person to be one's friend because a 'friend' by definition cannot be a commodity. This would be like trying to make a married bachelor. But it is not clear that being a friend cannot be combined with receiving some form of payment: Aristotle thought that there could be two kinds of inferior friendship based on the pleasure or financial benefit we receive from others; but in his superior form of friendship, which is what Gray probably means by friendship, the object of the friendship is not pleasure or financial gain, but another's virtuous qualities (*NE* bk. 8). This view of incommensurability has been termed the incompleteness version (Gauss 2003, 33). On the incompleteness view one cannot hold anyone of the following orderings to be true: ($V_1 < V_2$), ($V_2 < V_1$) or ($V_1 = V_2$). The reason why our preferences are incomplete is because at least one of these should hold true for an agent---either he prefers V_1 to V_2 , or V_2 to V_1 or he is somehow indifferent between them. An agent may see friendship and money as both good but he is unable to rank one over the other; but nor does he find them to be equally good since he must choose and cannot simply remain indifferent regarding their value. The problem here would seem to be that if the first two orderings do not hold true because V_1 and V_2 make 'incomparable demands' then the third may hold true since neither set is preferred to the other which entails that

they are equal in some respect. The question Gaus here raises is how do we distinguish incompleteness from inequality?

Gray seems to be arguing that the incommensurability of friendship and money rests not only in that they cannot be *compared* in value but that they are not *compatible*. What else would be the need of proclaiming that two values are incommensurable if that means only that they are incomparable? My love for spaghetti might be incommensurable compared to my love for Beethoven, but they are not incompatible. It seems that when he speaks of the value of money and friendship as incommensurable and incomparable, he means that they are incompatible somehow, not just different in value.

We can see this move in an argument from John Kekes also. In trying to say what incommensurability is he starts out by claiming that some values are incompatible. “The incompatibility is due to qualities intrinsic to the conflicting values” (Kekes 1993, 21). He gives us the example of having a restful sleep and trying to engage in interesting conversation as “entirely incompatible, while political activism and solitude are partly so” (Kekes *ibid.*). He continues:

The basic idea of incommensurability is that there are some things so unlike as to exclude any reasonable comparison among them. Square roots and insults, smells and canasta, migrating birds and X ray seem to exclude any common yardstick by which we could evaluate their respective merits or demerits. That this is so is not unusually troublesome because the need to compare them rarely arises. But it is otherwise with values. It often happens that we want to enjoy incompatible values, and so it becomes important to

compare them in order to be able to choose among them in a reasonable manner. If, however, incompatible values are also incommensurable, then reasonable comparisons among them become problematic (Kekes 1993, 21).

In terms of goods, is Kekes claiming that values are incompatible because they reside in objects that cannot be had at the same time—like the physical characteristics that makes the act of sleeping non-compossible with the act of speaking consciously—or that goods are incompatible because we have no way of comparing two good things to say which is best? Kekes' claim that values are incommensurable rests upon the plausibility that they first must be specifiable as incompatible—but not just incompatible in their physical properties so that doing them both at the same time is impossible, but that they are incompatible in terms of their moral properties.

But there is a problem here. If two things were incommensurable, or had no common measure, there would be no need to choose between them—or worry about combining them; 'incommensurability' between two goods would mean, as Gray acknowledges, that "no comparison is possible...They can be compared endlessly—but they cannot be compared with one another in overall value"(Gray 2000, 41-2). But the examples he uses suggest that 'incommensurable' means that two goods are *incompatible*—that they cannot or should not be combined—and that we must sometimes choose between them even though we have no standard for choosing. And Gray often claims that values and virtues are incompatible: "human nature being what it is, some virtues crowd out others. It is hard, if not altogether impossible, for a profoundly

compassionate person to be at the same time dispassionately just” (Gray 2000, 39). But if two values (or two paradigms) are truly incommensurable, or not open to comparison by the same standard, then it does not seem that they can be incompatible (Okasha 2002, 86). Without a common standard for interpreting the value of two things it does not make sense to say that they are incompatible, since how is it that they disagree, or fail to fit, with one another? But this is what Gray rejects: “If rational inquiry has failed to produce agreement on the best life, it is not because of any imperfection of human reason. It is because the idea of perfection has no sense in human life” (Gray 2000, 39). Two cultures that interpret the same value differently cannot really be said to hold incompatible or incomparable values if they are truly incommensurable—for this would require that there be some way (a standard of ‘perfection’) to compare the traditions in order to see why they cannot be compatible. So, for Gray, friendship and money are not just incommensurable—that is differently valued according to different paradigms—but also incompatibly good, which is say that do not fit together according to some notion of what is good. But even accepting that he means ‘incompatibility’ and ‘incomparability’ by incommensurability what are we to make of the claim that there can be goods that are equally good, but not comparable?

The claim that two goods are different, but each good, and that there is no way to rank them, seems to rely on the idea that the two goods are agent-neutrally good, but not comparable with one another in terms of their goodness so that an agent who had to choose between them would be at a loss to explain why he prefers one to the other. Even though Gray speaks of values as deriving from cultures and conventions, he claims that they are not just relative to these societies but are reflective of a moral reality:

Value-pluralism is closer to ethical theories which affirm the possibility of moral knowledge than it is to familiar kinds of ethical skepticism, subjectivism or relativism. It enables us to reject some judgements about the good as being in error. At the same time, it means giving up a traditional notion of truth in ethics. To affirm that the good is plural is to allow that it harbours conflicts for which there is no one solution that is right. It is not that there can be no right solution in such conflicts. Rather, there are many (Gray 2000, 6).

The good is independent of our perspectives on it, but it is not the same for all. It is not just that different ways of life honour different goods and virtues....Value pluralism is the claim that both might be right. ...It may be that the good cannot contain contradictions; but it shows itself in ways of life that are incompatible (Gray 2000, 6-7).

As I argued above there are good reasons for not accepting an agent-neutral theory of value; the claim that objectively plural (agent-neutral) values would lead to a breakdown in the transitivity of practical reasoning for an agent would be another reason. If an agent faced a decision between two goods but was unable to compare them, or able to rank them, but felt the pull of both of them (because they are agent-neutrally good) then he would face a problem in choosing which to do—but only it seems if they are incompatible. And Gray reinforces this as his own view: "...universal values do not fit together to compose an ideal life....There may be a best life for any individual; but not one that is without loss" (Gray 2000, 9). One could spend time making friends and making money—but not both at the

same time and in the same respect: “A kind of moral scarcity is built into the fabric of human life. It is because human needs are contradictory that no human life can be perfect” (Gray 2000, 10). But the problem that an individual might need to choose between two or more goods which cannot be compared is not really a problem if we reject the agent-neutral view of value that underlies it.

Gray’s examples are meant to show that there is a breakdown in practical reasoning because an individual must choose between goods in a situation where they are not open to comparison, but in which one is ‘forced’ by the pull of the goods to choose some over others. Hence, the claim that one cannot have a perfect life—we will always have to sacrifice some goods in order to choose others. One wonders if this is ever a problem for real individuals? People may be conflicted about ends and know that choosing one thing means foregoing other opportunities, but usually people (who are rational, non-akrasic) choose what they think will be best for them—even if it means foregoing the chance to get other goods. But one need only look at this as a loss if one must place as much value on the things one foregoes as on those one chooses—and this claim seems implausible given the agent-relative view of value. As Den Uyl and Rasmussen argue:

Indeed, if human flourishing involves an essential reference to the person for whom it is valuable as part of its description, and if the individual provides relevant content to the character of human flourishing, then pointing out that there are versions of human flourishing that are incomparable creates no problem. This is entailed by the claim that human flourishing is both agent-relative and individualized. There is no version of

human flourishing that is better or more valuable than some other version *period*; versions of human flourishing are only valuable *relative* to some person. This if we are careful not to confuse abstractions with realities, we see that one person's version of human flourishing is not strictly comparable with another's (Den Uyl and Rasmussen 1997, 46).

As we saw above in response to Gauthier even if values are reflective of some generic goods that we use to give our lives worth, this is not to say that these values hold some intrinsic worth that makes us choose between them. One can choose some goods and not pay much attention to others without much loss. Even if we thought that every life required a certain set of virtues, the degrees to which they would be realized, or weighted in each person's life will differ significantly given differing interests and goals. Does the athlete who weights heavily strength and endurance, ever miss the life of Mother Teresa, who weighted heavily charity and compassion? If the answer is 'yes', then the reply is 'why are you an athlete'?! It is the agent-relative interpretation of value that best makes sense of conflicting values; the overcompleteness type of incommensurability is the claim that "Values V_1 and V_2 are incommensurable if it is the case that *both* (a) V_1 is better than V_2 and (b) V_2 is better than V_1 " (Gauss 2003, 32). A choice between V_1 and V_2 would only lead to a conflict if the values somehow had the same measure of the same sort of property and that these properties were incomparable; but on the agent-relative account agents need not face such indecision when deciding on their own values because "the rational agent adjusts his commitment to the various [valuational] dimensions, at least to the extent that

he no longer claims that both dimensions automatically yield overall rankings” (Gauss, 2003, 39). It seems plain here that if the athlete would really rather be a saint then he has chosen unwisely. On the agent-relative view there is no necessary conflict for an individual on how he ranks or weights his own values.

Part of the problem then with traditional expositions of value pluralism rest on the conflation of the ideas of incomparability and incompatibility. Steven Lukes says that in interpreting incommensurability we never ought to look for incomparability in the abstract goods themselves, but only in the particular bearers of values (Lukes 2003, 64). In deciding about the goodness of places to live we are concerned with our real choices between a poor community with a nice landscape versus a more prosperous community filled with unsightly smokestacks; we do not also choose between the value of beauty versus that of prosperity. But such a choice does seem to be what Gray and Berlin claim must be made. Of course Lukes’ idea is that we can make sense of value incommensurability or incomparability in terms of the incompatibility of the extensional descriptions of subvenient properties. The two neighbourhoods are incompatible because one cannot (presumably) choose to live in both at the same time. If values are agent-relative, then the worry about values being incompatible and hence incommensurable is the worry that agents will have to choose between two values that have *for them* the same amount of agent-relative value. This argument makes incompatibility between values a private concern since agents are faced with making tradeoffs between their agent-relative values; yet these trade offs need not be tragic, but only a part of life for agents who live in a world of scarcity. For an agent who holds agent-relative values, his values are comparable enough that he can decide what to do about conflicts by finding out which weighting of values best serves his needs at the

time. But the pertinent aspect of incommensurability of values concerns that of the incomparability and incompatibility of interpersonal values.

§3.2 *The Value of Well-Being*. In order to proceed to discuss rights from within the value pluralist perspective it will be helpful to delineate the ways in which pluralist ideas of well-being could ground obligation towards others. Eric Mack has distinguished 3 such ways: Combinatory agent-neutralist, Anti-combinatory agent-neutralist and Agent-relative (Mack 2000, 78-84). The combinatory agent-neutralist view is that each persons well-being is agent neutrally good and that persons values are rankable and combinable in some way to determine which trade offs among them are agent-neutrally good. The anti-combinatory agent-neutralist view, which seems to be what Gray holds, asserts that each agent's well-being has agent-neutral value but the various well-being of distinct agents cannot be combined to determine which trade offs are best. The third view is that of agent-relative view of well-being which has been spelled out last chapter: it asserts that each agent's well-being has ultimate agent-relative value for him and that there is no way to rank or combine agent's values to see which trade offs are best between agents.

Only the third way shows us how values are incomparable because it shows how the incomparability between different agent's values lies in the fact that the values belong to different, distinct agents. Even if it were possible that two agents were to pursue the same value in the same magnitude what makes the values incommensurable is that they are agent-relative, not that they are incompatible. On the agent neutral view of VP, incommensurability of value resides in the idea that for an agent two values are both good but incompatible in their attainment; but this does not seem to give us the strong

requirement that a theory of incommensurability would have to meet—namely, that the two values themselves be incomparable qua different values. With the agent-relative idea applied between agents we can see how values are more than just incompatible in their obtainment, they are incomparable in their relative valuation. This means that values are not open to tradeoffs or interpersonal comparison in terms of value.²

§3.3 *Conclusion.* Gray's idea of value pluralism would make values incommensurable because each agent's well-being has ultimate agent-neutral value and that this ultimate agent-neutral value cannot be combined to determine which trade offs are optimal among individuals. The agent-relative view holds that each individual's well being has ultimate agent-relative value and that the ultimate agent-relative well-being of distinct individuals cannot be combined to determine which trade offs are optimal (Mack 2000). But Gray's view of the incommensurability of agent-neutral goods is not plausible because only the agent-relative idea of goodness makes sense of the idea our goods are not open to trade offs. As Mack argues, if two different persons' interests have value sameness, then they exemplify the same type of value. A staple of agent-neutral theory is that two goods can be incomparable in terms of their worth, but still give an agent the same amount of motivational reasons for desiring them both. This leads to a tragic sense of life because agents have equal reason to promote two values that require incompatible actions for their attainment. If the two agent's interests exemplify the same agent neutral value to the same extent then they have agent-neutral value sameness and magnitude sameness (Mack 2000,

² This does not mean that values are incomparable in terms of their meaning. As I argued last chapter, agent-relative value does not entail relativity of value. Under relativity of value we would not be able to compare values because their meaning would become fixed to the group or persons who hold them; under agent-relative value it is only the value's significance that becomes 'relativized' to an individual who is capable of having the value.

82). But if this occurs—and it seems plausible to say that it could on the agent-neutral account—then we have equality of worth, contrary to Gray’s belief that agent-neutral goods are incomparable in terms of worth.

The agent relative account makes values incommensurable by asserting that two interests can have the same value making property to the same degree and yet not have equal worth. This can occur if the two interests are judged by two incommensurable standards: The value of agent one’s interest for him versus the value of agent two’s interest for him (Mack 2000). It is the agent relative aspect of the interests that makes them incommensurable. As Mack states, “Equally extensive instantiations in the lives of different agents of the same interest can have incommensurable value only if the value of those instantiations are agent-relative” (Mack 2000, 82-3). The claim that values are agent relative and incommensurable in this way will be significant for the argument for rights, because if rights are to be grounded in the value of agent’s fundamental interests they will need to be grounded in their agent relative value.

In arguing that agent-relative values can be called plural we have shifted the focus of value pluralism. Values are not necessarily in conflict because we can compare them in terms of their meaning for different agents. Life need not be tragic because we will face situations where we will have to choose between values neither of which we can do without. Agent-relative value means we each have to choose a good life for ourselves, and also the means by which to acquire the values necessary to it. Because we do not feel the motivational pull of two values that we must have but cannot, we can make tradeoffs in our own lives as to which values we must have and which we can do without (to some degree). As argued last chapter, the athlete can do without many of the things the intellectual deems

necessary. The athlete can even weight less heavily those values, like justice, that the judge must have to a high degree without suffering a tragic loss. The problem for rights is that agent-relative value pluralism does not allow for interpersonal comparisons of value. So if rights are said to be value-based, then they will show who has the right and who the corresponding duty by showing which kind of value (perhaps the object of the right) outweighs which other kind of value.

As we will see in the next chapter, many believe that rights, or constraints, are based on the value of the objects they protect. But if rights, or constraints, are value-based in this way, then it would seem that P_1 has reason not to interfere with P_2 's promotion of W_2 (and G_2) only if either G_2 does not interfere with G_1 , or P_1 somehow comes to see the constraint against his interference, and the end it protects, as valuable for him. But it is precisely the latter claim that the two theses of practical reason seem to throw into doubt. If rights are value-based, then in order for P_2 's promotion of G_2 to give rise to a constraint against P_1 's interference with G_2 , one will need to show how P_1 not interfering with P_2 's well-being (G_2 (or the value of some condition, G_3 , which underlies it) is *based on the conduciveness of the constraint to promote either P_1 's own well-being or P_2 's well-being*, thereby giving a sufficient value-based reason for P_1 not to interfere with P_2 's promoting G_2 . We will see that the prospects for explaining the robustness of P_2 's constraints against P_1 's interference on the value *from P_1 's perspective* of constraints as conducive to P_1 's well-being (P_1 's abiding by constraints against P_2 is conducive to his own well-being), or to P_2 's (P_1 's abiding by the constraint is due to its conduciveness to P_2 's well-being) is bleak. The next chapter, Four, will examine problems with trying to ground rights on the nature of agent-relative value.

Chapter Four:

Agent-relative Value and the Value of Constraints.

§4.0 Intro.

§4.1 The Value of Constraints.

§4.2 Doing Without Rights-Talk?

§4.3. An Alternative: Converging Interests and Contract?

§4.4 Coordinate View of Rights.

§4.5. Conclusion.

§4.0. *Intro.* Part of the problem some theorists have with the idea of rights is the thought that they are primitive and mysterious. Nozick (1974) claims that rights obtain simply as a consequence of our separate moral existences. Dworkin (1978) thinks that basic rights to equality and respect are so fundamental as to be ‘axiomatic’—they cannot be demonstrated but just assumed. David Norton notes that there may have been a time in liberalism’s history, in the history of the conflict between individuals and the state or church, when such a ‘manifesto’ characterization of rights was warranted. But such a strategic take on rights will not suffice anymore since “political liberalism is situated in a world that knows it well, and some sectors of the world judge it wanting, whereas some sectors have serious questions that cannot be blunted by stipulative definitions” (Norton 1995, 107). There would seem to be a need to provide an explanation for rights that makes them less mysterious, more related to the value of what they protect. Norton quotes Joel Feinberg as

stating that having rights allows us to stand up like men, look others in the eye, and feel in some fundamental way the equal of everyone else (Norton 1995, 108). Feinberg argues that our status as rights-bearers means we have some form of minimal self-respect that is worthy of the love and esteem of others. But, as Norton continues, Feinberg “is mistaken to identify worth with rights. To be a rights-bearer says nothing about one’s worth—unless rights are so defined as to presuppose worth, and they are not thus defined by [classical] liberalism” (Norton 1995, 109).

Here we touch upon the seeming need to ground rights in their value to us, but we also touch upon the seemingly paradoxical nature of rights that reasons for abiding by rights, or even valuing rights, may not depend on the value of what they protect for a rights-holder, nor the value of the corresponding obligations for those subject to them. Rights have something to do with values, but as we will see, they are not dependent directly for their force upon certain things being valuable to us. Rights, if they are dependent upon values, would seem to be dependent upon very broad and abstract values—such as autonomy—so that they would seem to protect these sorts of values, rather than what these broad values are themselves used for. More pertinently, rights must be based upon the value of such broad values for us and for others—so that while others have reason not to interfere with our rights because of the existence of these broad value-based reasons, we also have reason not to violate other’s rights because of the same reasons.

To be sure when others harm us by not respecting our rights we know it is bad; and conversely when we violate the rights of others they know it is bad. What we want to know is why we have reason to refrain from violating their rights and they have reason to refrain from violating our rights. We want to know why violating someone else’s rights is so bad

that we ought to refrain from doing so. We will look at two value-based reasons for why we should not violate someone else's rights—the recipient view and the agent well-being view. Each claim that we ought not to violate someone else's rights because doing so is to seriously cause harm—but harm either to the person subject to rights or to the rights holder. I will argue that the well being view seems problematic because it claims that we ought not violate another's rights because to do so is to cause ourselves harm, which makes violating rights a harm to the duty holder and leaves out an explanation of why violating another's rights is not a harm to them. And the agent recipient view, which claims that we ought not violate another's rights because doing so is to cause harm to the well being of the rights holder, cannot account for why we have motivation to help the other agent achieve his good when practical reason is agent relative. A third alternative is that we need an explanation that somehow unites, or coordinates, deontic reasons for recognizing rights with agent-relative reasons for pursuing our own values. This chapter will outline the three ways of arguing why we have reason to concede another's rights. The most plausible explanations are the coordinate view and the well being view. Laying out these views will help us when we attempt to formulate an argument in Chapter Five for why we have reason to concede another's rights.

§4.1 *The Value of Constraints*. A right is a form of constraint; hence rights seem more closely tied to deontological theories than consequential ones. To see why there is this appearance we will examine the basic form of both theories and how they relate to rights as types of constraints that agents face regarding the pursuit of their ends. While there are reasons for seeing rights as equivalent to kinds of deontic rules, there are also reasons for

separating rights from deontic theories and consequential ones. The inability for either dominant theory of value to capture the nature of rights leads one to conclude that rights form a domain of their own and are not reducible to talk about values.

There are familiar paradoxes that seem to surround both consequentialist and deontological theories. The consequentialist theory considers an act or rule to be ‘good’ if it leads to good consequences for an agent or for a great number of agents. On a consequentialist view, one should not commit an act of murder (or one should follow the rule not to murder) because it leads to the best consequences for that agent or for society. The usual objection made to some generic theory of consequentialism is that in its fixation with maximizing a certain state of affairs it often requires that agents commit acts which seem intuitively wrong—say, killing one innocent person to save five other innocents. It is also claimed that the agent-neutral version of it may require agents to sacrifice too much of themselves, of their own integrity, in trying to achieve some impersonal good. As Shelly Kagan notes, the telling criticism against consequentialism is that there may be normative factors not adequately accounted for by its focus on consequences (Kagan 1998, 73).

The deontologist claims that in focusing on factors that may override the promotion of overall value his theory takes into consideration these factors. The deontological theory rests in part on the intuition that theories which make it permissible to do harm in order to do greater good are contradictory. As F. M. Kamm argues, “it would simply be contradictory for it to be morally permissible to minimize violations of the constraint itself for the sake of showing concern for *it* “ (Kamm 1992, 384). So in the case where we could save five innocent people by killing one innocent person, doing so would be wrong because the rule against harming innocents does not allow for looking at the situation in terms of

the value of one life versus five. For the deontologist the right has some content apart from specifications of the good (Kagan 1998, 74).

The usual criticism leveled against deontic theories is that in order for its intuitive plausibility in requiring no harm be inflicted upon innocents, it requires either an intuition about what is of harm, or a straightforward explication of ‘harm’ in value terms. Samuel Scheffler argues that the claim it is wrong to kill one innocent person if doing so will prevent five other innocents from being killed rests on there being an important characteristic/ property of a person in virtue of which it is undesirable for persons to be victimized (Scheffler 1982, 103). So in trying to explicate the appeal of the rule ‘do not kill innocents’ the deontologist will be pressed to conclude that the rule is plausible because of the underlying value of not violating certain properties of others—such as their innocence. The reason why we cannot kill innocent P_1 even if doing so will save innocents P_2 - P_6 is because we ought not to violate the allegedly significant valuable property that underlies the principle. But if the problem with harming one person is that it violates some agent-neutral value (innocence?), then the question becomes why not allow one violation of the property in order to prevent five other violations of it?

But if the agent-relative theory of value outlined in the last chapter is correct and implies there is no such entity as agent-neutral value, the criticism Scheffler makes against deontology loses some of its force. The underlying property in question would have to be agent-neutrally good and have the required inbuilt transmissibility of practical reason in order to claim that what one needs to do is to work for the minimization of it. But the agent-neutral idea of value was shown to be implausible because agents only have agent-relative reasons for promoting their own good and these reasons need not be reasons for

anyone else. The property in question would have to be one that could appeal to agents in terms of being conducive to their well-being. From the agent-relative perspective what matters is the conduciveness of rights to protecting one's own well-being—either as the agent who is the recipient of what the constraint protects, or the agent subject to the constraint. If one could posit some property or reason that all agents find conducive to their well-being, then one will have shown why a theory of rights is rationally incumbent for agents since such a property/ reason will be something that everyone has an interest in promoting.

An interesting theory that attempts to connect the agent-relative or personal point of view with the agent-neutral or impersonal point of view is that of Thomas Nagel. Nagel claims that rights reflect the fact that when an agent harms another agent, the agent-neutrality of the harm is 'lit up' from the agent's point of view (Nagel 1986, 180). The pain that might be caused to a child is agent-neutrally understandable; yet, the fact that *I intentionally* cause it rather than someone else magnifies the disvalue from my perspective. This means that rights have an agent-relative component and an agent-neutral one—the intention and the harm caused, respectively. Nagel says that this blending allows us to see how the following case can be solved: Imagine that only by twisting an innocent child's arm can I prevent a somewhat greater evil to my stranded friends. Because the harm to the child is intended and the harm to one's friends merely foreseen one should not twist the child's arm because one would be causing that harm intentionally. The intentional perspective of one's causing the harm versus just foreseeing the to one's friends means that one cannot cause the child harm even though, he says, from the impersonal perspective things will be better overall if one's friends are not harmed.

But as Mack (1989) notes, this theory seems to make rights dependent upon some kind of calculus of value, because if one didn't twist the child's arm then things would be better off for oneself (since they are your friends) and just in general since fewer persons have been harmed. But because of the magnifying effect of one's intention, it is better that one's friends suffer and the child is not harmed. But if the latter situation is better overall then why does it not over rule the magnifications of one's intentions? The answer seems to be that the agent-relative disvalue for one of twisting the child's arm rules out his performing the twisting in order to save his friends from harm. But why exactly does one's intention magnify the disvalue, especially when preventing harm to one's friends would have a heavy agent-relative value? And it might also be asked what if a third party was going to harm the child in order to save my friends? I should protect the girl against the harm, but since I am not doing the harm, the harm cannot be lit up from my perspective.³

Both virtue ethics and consequentialist theories also have a hard time accounting for rights.

An act or rule consequentialist theory would tell an agent to do that act or rule which gives him the most pleasure. Practical reason would tell each agent to do what best promotes his own pleasure. But then how do we get rules that give us something equivalent to the deontological claim that stealing is wrong? The usual consequentialist move is to bring out the Golden rule: "the requirement that what we say we ought to do to others we have to be able to say ought to be done to ourselves were we precisely in their situation with their interests. And this leads to a way of moral reasoning (Utilitarianism) which treats

³ Mack (1999) notes that the problems with intentionally –based accounts of rights should make us think twice about trying to base constraints on double-effect type reasoning. The addition of intention to the explanation of why we ought not to violate someone's rights does not turn an action that was not condemnable into one that is condemnable. Intention may make the action *more* condemnable, but it is not sufficient to turn one that is not blameworthy into one that is blameworthy.

the equal interests of all as having equal weight”(Hare 1998, 165). The inference from each agent has reason to promote his own well-being (pleasure) to the claim that each has reason to promote the aggregate well-being (pleasure) is a notorious one. The reasoning relies upon the idea that if one has a reason to prefer a more pleasurable state than a less pleasurable one then one ought to be motivated to make sure that another have a more pleasurable state than a less pleasurable one. An example is that if I have reason to prefer a better quality restaurant over a lesser quality one in terms of the quality or quantity of pleasure I receive from the better one, then what matters here is the pleasurable states (Mack 1999, 92). If one has a choice between going to the lesser quality restaurant and allowing another to go the better quality one, then one should allow the other the experience of the better quality restaurant if he will receive greater overall pleasure from it. Smart argued that the reason one has for preferring the better quality restaurant in both cases is the same: the reason why one chooses the restaurant in both cases is the greater pleasure produced. It does not matter whose pleasure it is. The consequentialist then can move from reasons that an agent has to prefer his own pleasure to reasons why agents will prefer favouring that others also have greater states of pleasure. An agent will be willing to forego a state of lesser pleasure to enable another to enjoy a greater state of pleasure.

All one need do to get a theory of constraints is show how certain actions or rules lead to greater states of overall pleasure. We may adopt a rule against stealing not because it harms any particular agent but because it leads to an overall lessening of pleasure. The ‘deontic’ force of an obligation need not be accounted for in terms of harm to another, but in terms of obligations that are generally conducive to society’s well-being. As Kagan says:

...a suitably sophisticated value theory could be used to mimic the various other commonsense constraints as well. (Presumably it would do this by giving direct and significant weight to acts of harm doing, acts of lying, acts of promise breaking, and so forth...). Loosely speaking, we might say that sophisticated consequentialism successfully mimics constraints, without actually endorsing them, by incorporating constraint violations directly into its theory of the good (Kagan 1998, 216).

The usual criticism against this consequentialist attempt to mimic deontological constraints is that it fails to capture the harm done in situations where overall utility can be promoted by harming an agent. As Douglas Oderberg puts it: “The best the consequentialist...can come up with, then, are *prima facie* duties not to interfere with the actions of others, and to these duties correspond *prima facie* claims which he calls ‘rights,’ but they are no more than one ingredient in the melting pot of maximization, liable to sacrifice whenever the overall, impersonal and agent-neutral good demands it (Oderberg 2000, 73). But the point I want to make is that on the agent relative theory of value one cannot universalize the claim that one person’s pleasure gives him a reason to act thereby giving him reason to act to give away his pleasure/ good to another. Given the agent-relative theory of value we saw that what is universalized is the fact that just as one’s own good gives one a legitimate reason to act, so too does another’s good give him a legitimate reason to act. But this does not allow us to infer that the two sorts of goods have some underlying quality that allows one to conclude that an agent would be rational to give up his ‘lesser’ good in order for

another agent to have a 'greater' amount of it. So, the consequentialist account of rules is implausible because there is no common standard for assigning weight to acts of lying, theft, etc., so no way to say why and to what degree tradeoffs required by the value-based constraints are justified.

But the virtue ethicist qua agent-relativist fares little better in accounting for the obligations that other's moral lives may seem to impose on one. As Rosalind Hursthouse states: "According to virtue ethics...what is wrong with lying, when it is wrong, is not that it is unjust ('because it violates someone's 'right to the truth' or their 'right to be treated with respect') but that it is *dishonest*, and dishonesty is a vice. What is wrong with killing, when it is wrong, may not be so much that it is unjust, violating the right to life, but, frequently, that it is callous and contrary to the virtue of charity" (Hursthouse 1999, 6). It does seem plausible to argue that the problem with lying is that violates one's own sense of integrity—often the only person harmed when one lies is oneself. But what about wrongful killing? It seems that, contrary to Hursthouse, the problem is not so much that one has acted without displaying the right virtue (charity) but that one has killed another.⁴ Virtue ethics seems well suited to accommodating agent-relative value, but it also seems just as problematic in accounting for the harms done to others in a way not based simply on failings in one's own character. Any plausible account of rights must take into consideration the nature of rights as relational and the nature of harm done to others.

I should pause to note here that while the agent relative theory of value claims that we have reasons for not doing what will maximize overall good or for not doing acts that will be cases of universalizing some goal in a Kantian sense, this is not because agent-relative values only make it permissible to prefer our good to the general public's, or some

⁴ One has 'taken away all a man has, all he ever will have' as Eastwood says in *Unforgiven*.

stranger's; we can look after our own happiness, or tend to the needs of our selves or loved ones over those of a stranger not because it is permissible to do these things in the face of some rule that calls for them to be maximized or universalized, but because we really cannot find such impersonal rules. So saying that agent-relative value is an agent-relative concern that makes it permissible to prefer our values in the face of rules that would otherwise call for us to do something different is misleading. There are no such utilitarian or Kantian rules that would force us to do something different were we not able to act upon our agent-centered considerations. But this is not to say that we cannot refer to our agent-relative values as giving us agent-centered considerations that we want to have protected in the face of others' desires for us to do what they want. What we need to find is not why we have rights not to do what impersonal value tells us to do, but why we have rights protecting us against what others' agent-relative considerations tell them we ought to do.

It seems that two basic defenses are open to the theorist who wishes to account for the acceptability of rights or constraints in terms of agent-relative reasons⁵: One can defend the agent well-being view, in which the source of P₂'s rights against P₁ that P₁ abide by them is the conduciveness to P₁'s well-being in abiding by those constraints (Mack 1998a, 4); or one could argue that what really matters is the well-being of the recipient of the rights, or recipient of the constraints on P₁'s action: so the source of P₂'s rights against P₁ that P₁ abide by those constraints is rights conduciveness to P₂'s well-being (Mack 1998a, 4). Both theories attempt to show that rights are tied to the well-being of agents such that it seems rationally incumbent upon one to accept constraints since doing so is conducive either to one's own well-being, or to another's. Both views can be laid out as follows:

⁵ There is a third, coordinate view that may also be implied, but as will be explained later it escapes agent-relative analysis.

P_2 's having a right against P_1 = (Agent well-being view) P_1 is obligated and has reason to abide by a constraint C_1 (a correlative to P_2 's right) iff P_1 's obligating reason(s) for abiding by C_1 is explained in terms of what is conducive to P_1 's well-being.

P_2 's having a right against P_1 = (Recipient well-being view) P_1 is obligated and has reason to abide by a constraint C_1 (a correlative to P_2 's right) iff P_1 's obligating reason(s) for abiding by C_1 is explained in terms of what is conducive to P_2 's well-being.

The agent well-being account of rights will attempt to make P_1 's reasons for abiding by C_1 as something that obliges because abiding by C_1 is actually conducive to his well-being. This account seems plausible precisely because of its logic—it appeals to something that will motivate P_1 into accepting a doctrine of rights by making abiding by C_1 conducive to his well-being; while P_1 may not have reason to value the state of affairs that P_2 's right protects (because this need only be a state of affairs valuable for P_2), he may have reason to abide by C_1 if it can be argued that C_1 is really an obligation he has to his own well-being. The agent recipient well-being view seems plausible because it claims that the correlative obligation of P_2 's right (C_1) holds independently of, and need not be simply contingent upon, agent-relative reasons that P_1 may have for abiding by it. The recipient well-being view focuses on the idea that P_2 's rights may give rise to correlative duties that impose constraints on P_1 independently of what P_1 's well-being gives him reason to promote. I will

argue that both views fail to account for the nature of rights: the agent well-being view, like versions of Kantian constraints, makes obligations to oneself primary and hence cannot fully account for P_1 's abiding by C_1 as a recognition of the independent moral status of P_2 ; it is this status that gives rise to P_1 's obligation and not P_1 's obligation to his own well-being. The recipient view, like versions based on agent-neutral value and weightings, makes obligations to others as primary and perhaps holding independently of one's obligations to oneself, but in doing so makes it hard to account for why P_1 is motivated to abide by an obligation that is related to another agent's well-being, not his own.

§4.2 *Doing Without Rights Talk?* So far we have been talking about rights as if there is some need for them. But if we think that what is important is the value of the underlying property they protect, or the value of their correlative obligations to the person subject to them, then maybe rights talk is nothing more than a roundabout way of talking about the good. In his book *What's The Matter With Liberalism*, Ronald Beiner argues that “the substance of rights is drawn from the sphere of the good, [so that] we can dispense with the whole argument over rights and revert directly to the conceptions of the good that originally ground these otherwise mysterious rights” (Beiner 1995, 89). Rights function as claims not open to debate or compromise. He remarks that anyone who wants to be heard today in the political arena must locate—or invent—some right that protects what one thinks is one's due (Beiner 1995, 81). Beiner argues that posing one's claim in terms of rights (viz., not open to being trumped by someone else's claim) makes conflicts more intractable; rather, we ought to look at issues in terms of what is good, since such considerations admit of being open to weighting and compromise. So given the value-

based nature of rights, they may not be absolute claims after all since all can be weighted and compared endlessly in terms of value to see how they can be ranked and what tradeoffs are rational. There may even be cases where the right not to be tortured must be disallowed if some greater good is to be achieved.

Firstly, I think that the claim that turning to notions of the good as a way of solving social problems may not be less tractable than relying on rights. In arguing that rights talk is merely a strategic way to make sure one's own values will prevail without counterargument, Beiner might be said to face the same problem as rights theorists face: since rights are really a covert way of talking about one's values, one wonders why rights disagreements should be so intractable if what really underlies them are values that are open to reasonable discussion? Obviously the answer Beiner wants to consider is that rights talk erects barriers because of how rights claims are structured; but one might also argue that perhaps value talk is just as intractable, hence when switched to may erect the same sorts of barriers to conflict resolution. So if rights talk is really about value talk, then the whole problem of intractable conflict may re-enter depending on whether people stick to their values as unconditionally as Beiner thinks they stick to their rights. If rights talk is really talk about values, then people could be said to be sticking to their rights because they really weight the underlying values heavily—perhaps not open to debate. So values may or may not be as open to weighting as Beiner thinks—dissolving rights talk in favour of talk of the good may just move the whole problem of conflict back a step. The status of rights as absolute or not will be discussed later, and we may resist the inference that if rights are value-based then they lose their absolute nature, but what is important for this chapter is not his claim that talk about rights will lose its compelling (non-conditional) appeal if such

talk can always be transposed into the language of the good—but simply the idea that such a transposition is possible.

He claims “anything that can be legitimately couched in the language of rights can be transposed into the language of the good” (Beiner 1995, 82). Rights have no independent force of their own; rather they are just covert ways of talking about values that underlie them. If liberals claim that people have rights to autonomy, then this notion can be transposed into talk about the value of autonomy for agents. In trying to settle debates between the rights of a fetus to live versus the rights of a woman to ‘dispose’ of her body as she wishes we must settle the debate by appealing to more substantial questions: “What warrants rights in general? And this question carries us, willy-nilly, into the language of good” (Beiner 1995, 93). This is not to say that one does not need a theory of constraints, but any theory about why an agent is not to interfere with another’s right to autonomy or life will be explicable in terms of the respective value of autonomy to a woman, or the value of life to a fetus. It may be that if there is a need to explain and justify rights or moral constraints in terms of the value of what they protect then rights talk becomes otiose since what is important is the underlying question of value; therefore, contrary to what rights theorists wish to do in making rights bypass questions of value, it becomes necessary if one wants to solve rights disputes to talk about which substantive value is to trump the other. *This* latter idea is what Beiner claims follows when we dissolve rights talk into that of the good. The problem for liberals then is to explain why their preferred values (which underlie liberal rights) trump other values when rights are supposed to be a neutral, or non-value – based way, of solving disputes. The general idea to be advanced later is that if rights talk need not be reducible to talk of the value for an agent of that which they protect and,

therefore, that rights—even though they are normative—need not be justified in terms of the value of that which they protect, then one will have an answer to this seeming paradox. But for now we will examine his claim that rights-talk does nothing substantially different from value-talk.

As an illustration of the implausibility of Beiner's claim that rights talk is dispensable, we will look at a view that seems to assimilate the concept of having a right with that of doing what is right. Henry Veatch's view that rights are grounded in natural duties we owe ourselves assimilates reduces rights to cases of doing what is right. Veatch's view is meant to provide a way of connecting or coordinating one agent's good with another agent's duties to abide by rights. It will be shown that there are good reasons for not conflating the two—hence, also not thinking that rights talk is dispensable because the work that it does is different from talk of the good, or value.

Veatch's (1989) argument for rights runs like this: Since we have duties of self-perfection specified by our natural function, each of us is required by nature to fulfill these obligations. "To prevent or interfere with a person's efforts to fulfill his natural obligations deprives that person of what he and others recognize he ought to do. Therefore, our duty to self-perfection generates the right not to have the pursuit of our end impeded" (Den Uyl and Rasmussen 1991, 108). This view has the benefit it seems of asserting that no one has the right to interfere with our end. So it would seem that we have moved from the good construed as what values individuals have a duty to promote for themselves to a notion of why other agents must constrain their behaviour in relation to these duty-bound agents—the basic reason is that there is no real difference between P_2 's having a right to be left alone in, say, contemplating the good life and it being right that P_2 contemplate the good

life; and the reason why P_1 has a reason to abide by a constraint protecting P_2 's right is that P_1 can see that P_2 is doing something good with his time. Veatch's characterization of rights is an example of the coordinate view of rights since the reason why P_1 has reason to abide by P_2 's rights is not that it is only good for the rights holder or only the rights bearer, but that doing so is a means to both agent's good.

But as Den Uyl and Rasmussen point out there are several problems with trying to assimilate the concept of having rights with that of doing what is right. The first problem would seem to be that Veatch's argument commits what they call the moralist fallacy: this is the fallacy of moving from claims regarding what is right for someone to do, to the further claim that he has a right to do it. This is a fallacy because what one has a right to do may not be right for him; nor need it be true that what is right for him means he has a right to do it. What if P_2 is not pursuing the life of virtue and decides to live a life of hedonism? Why would P_1 not have the right to interfere with P_2 either to put him back on the path to virtue, or just to use him for his own means? Veatch does not claim that P_1 has the right to interfere, but if he does not it is not because he would be interfering with P_2 's rights. Since P_2 has decided not to pursue the good life, and even though he may not interfere in anyone else's life, he has forfeited his rights since it is only his pursuing what is right that generates a real obligation on the part of others not to interfere. The moralist fallacy is committed when one fails to see that having a right has a broader extension than doing or being in pursuit of what is right (Den Uyl & Rasmussen 1991, 109). Rights are not dependent upon an actual achievement of what is right, but only the potential for such achievement.

A second problem is the weakness inherent in the inference that P_2 's obligation to his own well-being is sufficient to generate constraints on the part of others. P_1 's recognizing that P_2 is doing something that he is obligated to do by his natural end need not give P_1 reason not to interfere with P_2 's promoting his own good. This is the main problem with the agent well-being claim that P_1 will have reason to abide by P_2 's rights since doing so is conducive to P_2 's well-being: P_2 's well-being may give rise to obligations that hinder P_1 from promoting his own well-being—so whose well-being is to take precedence? As we have seen with the transmissibility of practical reason, P_1 's obligations are agent-relative reasons for him to pursue his good; but the fact that his good gives him reason to act, need not also give anyone else reason not to interfere with him.

Also such an argument would lead to this strange result: if P_2 strays from the path of virtue then he has interfered with his own rights. His right to autonomy is based on autonomy's being right for him. As David Norton argues, the reason why we have a right to autonomy is that it is right that we exercise autonomy (Norton 1995, 110). But then if one fails in this obligation to cultivate a certain degree of autonomy it would seem that he has interfered with his own rights since his rights are derived from obligations he owes himself and need not specify to whom they are owed. This claim seems odd because it fails to account for the relational nature of rights—rights are specifically about obligations that others owe us or we them, not obligations we owe to ourselves.

As Den Uyl and Rasmussen conclude, the main problem with the assimilationist approach of Beiner, Norton and Veatch is their failure to recognize that the duty expressed by the concept of rights may not be similar to other moral duties one has (Den Uyl and Rasmussen 1991, 110). For Veatch and Norton's perfectionist account of rights, there are

only duties and obligations one owes oneself; and so persons do not have rights in any irreducible sense—as generating obligations on the part of others not to interfere with one’s life, whether it is a ‘flourishing’ life or not. According to Veatch if an agent engages in nonperfecting conduct then the actions “that he takes and the conduct that he pursues are then no longer right at all; nor can his natural rights to life, liberty, and property be said to entitle him so to live in the way he has foolishly and unwisely chosen to do” (Veatch 1989, 205). Similarly, Norton argues that one does not have the right to incommensurate goods—viz., more goods than one can use in the utilization of one’s potential worth. “To possess such goods is to live with a perpetual distraction from one’s true course in life. If one succumbs to this distraction, one’s actualization of one’s own potential worth is compromised” (Norton 1995, 128). But to argue in this way is to make the concept of rights redundant; all one needs is the concept of what is right and one’s duty to do what is right. The assimilationist argument speaks as if talk about rights can be reduced to two other ideas (Den Uyl and Rasmussen 1991, 110-11): 1. To say that P_2 has a right to X-ing is to say that it is right that P_2 Xs, or that X-ing is necessary to Y-ing, which is right for P_2 to do; and, 2.) It is in virtue of the rightness of P_2 ’s X-ing, or that X-ing is necessary to Y-ing which is right, that P_1 has the duty not to interfere with P_2 ’s X-ing.

So rights must not be too closely connected with any of the particular goods we think it is right for people to pursue, or else rights cannot account for the diversity of value pluralism; if my right to have freedom to do something depends upon my doing it, then my pursuing some other course of action would mean that I might be open to having my actions manipulated to put me back on the course to virtue. This flies in the face of the fact that there are many different kinds of reasonable good lives. In order for rights to protect

this fact they must be based upon some feature that is right for us—a feature whose rightness does not cancel out too many other good lives, or allow for paternalist manipulation of those who are not pursuing our own valued lives.

§4.3 *Converging Interests and Contract*. It might be thought that if we can assume that everyone has a reason to want his rights protected that he will also have a reason to abide by others' rights. But this on its own does not allow us to infer that each rational agent then has reason to value a world in which everyone is accorded rights. The reason why this is a bad argument for the acceptability of rights is that it commits the fallacy of composition. As Lomasky remarks it is equivalent to the following: Each runner in the race desires that he come in first; for every runner it is desired that that runner come in first; therefore, it is desired that every runner come in first (Lomasky 1987, 60). From the fact that every runner, or agent, wishes that he be accorded first place (or rights), it does not follow that there be a runner who wishes that every runner come in first place (or have rights). We cannot combine in the conclusion what is separate in the premises.

Yet, having pointed out that it would be hard for the agent well being view to show why we all have consistent reason to abide by others' rights, this does not mean that it is impossible to show that there might be some agent-relative reason we all have for conceding each others' rights. We need to argue that we have reason to want our own rights protected and that we also have reason to abide by others' rights. The next chapter will attempt to spell out how such an agent well being argument could work.

§4.4 *Coordinate View of Rights*. This chapter was meant to explore this idea and has found it problematic. If one were to assume some agent-neutral value that requires everyone to follow it, then we might have a norm that could explain why rights are valuable. But even though the agent-neutral theory was rejected in favour of the agent-relative theory, there is still the problem that an agent-neutral conception of value would seem to call for the value a right protects to be minimized in cases where one could infringe one person's right to prevent five more infringements. This is counter-intuitive because if one has a right because of some property F , then F cannot be infringed even to prevent further infringements of it. This goes against an agent's imperative to pursue his good life. Rights must recognize this imperative but, as we have seen, they also must recognize the imperatives of others, the moral separateness of others.

The solution might seem to require that a theory of rights both recognize the imperative to pursue one's own good and the moral separateness of others—a separateness that calls for recognition no matter how it affects the pursuit of one's values. The alternative to making rights dependent on the value of them to the recipient or subject of them is what Mack terms the co-ordinate account (Mack 1998a):

P_2 's having a right against P_1 = (Co-ordinate View) P_1 has reason and is obligated in relation to P_2 to abide by a constraint C_1 (a correlative of P_2 's right) iff P_1 's obligation to abide by C_1 is explained in terms of how abiding by C_1 is conducive to P_1 's good and also how abiding by C_1 is a way for P_1 to recognize the separate moral existence of P_2 .

One may have reason for thinking that rights can make use of both the agent and recipient perspectives if they can be reconciled somehow. This reconciliation would require a theory that showed how an agent has from his agent-relative perspective a right to pursue his own good, but also provide a theory that showed how others have rights because they have a separate moral existence. Ideally, this view would ‘coordinate’ both perspectives without subordinating one to the other (Mack 1998a, 5). In the next chapter we will see if there is something about the agent-relative perspective that makes it rationally incumbent upon one to accept rights that protect one’s own imperative to pursue one’s good, and also makes it rationally incumbent to recognize the moral separateness of others.

§4.5 *Conclusion.* This chapter has examined the value of rights from an agent-relative and agent-neutral perspective. We have been concerned to answer the question what reasons an agent might have to respect the rights of others. This problem has traditionally been spelt out in Kantian terms as a dilemma of practical reason. As Lomasky puts it:

If one’s motivations to cede moral space to others is understood as in any way a function of one’s *concern* for those others, that is, if it involves my taking what is a value-for-them as thereby being a value-for-me, then there is nothing distinctively *moral* about one’s response to them. Rather, one is...efficiently pursuing one’s ends. Or, as Kant would put it, this is an instance of the exercise of practical reason, but not of *pure* practical reason. On the other hand, if the purity of one’s practical reason is impeccable in the sense that the circumstances of one’s valuing or disvaluing an outcome is studiously excluded from one’s reason to act, the

difficulty becomes to understand how such reason can be practical. What reason do I have not to encroach on the moral space of others if such restraint neither directly nor indirectly is a product of what I find to be of personal value (Lomasky 1989, 121)?

We need a theory that can recognize both the agent's need for rights to pursue his own good and also reasons for recognizing the rights of others when doing so may not be part of what constitutes our good. We theorized that the coordinate view would both explain why others have reason to abide by our rights and why we have reason to abide by other's rights because of a reason or reasons for doing this. A theory of rights must show why we have reason to find rights beneficial and to demand that others accept them, but also why others have reason to demand that we accept their rights. *Prima facie*, this might seem like half of the co-ordinate view is concerned with practical reason, because it deals with our agent-relative reasons for wanting our rights protected, and the other half pure practical reason, because it deals with practical reasons that are somehow about why we ought to abide by other's rights but not because we have an interest in doing so. Yet, it remains to be seen whether we need to introduce a dualism into the co-ordinate view. Next chapter we will face this question regarding Mack's attempt to co-ordinate self-interested actions with one's that cannot be self-interested in order to explain why we have reason to abide by other's rights.

Also, we can see in a clearer way why rights are a domain of their own. What is significant about rights is that they protect the perspectives of the persons who can exercise them. Rights are the recognition of the fact that individuals are the agents who make and

choose lives of their own. For some theories of value, like consequentialism and Kantianism, the individual is not important for what kind of obligations he can have, since what obligations are important are decided by impersonal reasoning. But if we accept the agent relative view of value, then we can appreciate individuals become much more important for defining the nature of obligations. By 'important' we do not need to think of importance from the point of view of the universe. Importance refers to the fact that having one's ability to pursue a good life is important for everyone from their own perspective. Whether there is some common feature we all care about that underlies all the various good lives will be taken up next chapter. Such a feature, if it exists, may help to ground rights.

Chapter Five:

Deriving Rights.

§5.0 Intro.

§5.1 Rights, Coordination, and Agent-Relativity.

§5.2 Moral Defaults and First Possession.

§5.3 Conclusion.

§5.0 *Intro.* So far the last few chapters have dealt with the conceptual issues surrounding a theory of rights. This chapter will seek to provide a justificatory explanation of rights that takes account of the conceptual constraints outlined in Chapter Four and the theory of value in Chapters Two and Three. There is a controversy whether respect for others' rights need to be based upon agent–relative reasons or whether we can have a coordination of reasons. As Mack argues, the affirmation of rights as robust constraints is,

undercut by the 'obligation to self' account of rights, according to which one's reason for acknowledging rights is entirely a matter of acknowledgment of and compliance with these moral claims being instrumental for and partially constitutive of one's own prescribed ends. The affirmation of rights as moral side- constraints

can only be grounded and preserved by an account of rights in which the existence of other agents as beings with a moral status one must recognize, plays a more fundamental role (Mack 1993, 96).

For Mack, any theory of robust rights—rights as a domain separate from value—cannot “affirm the side-constraint character of rights without affirming that these constraints fundamentally reflect, for each constrained agent, the moral status of other rational agents” (Mack *ibid.*). It seems that in order to recognize the moral status of others, a theory of rights will take into account the harm done to the rights-holder when rights are violated and not simply explain the harm that rights violations cause in terms of the harm done to the integrity or well being of the perpetrator.

The problem so far seems to be this: We can base respect for rights on agent-relative reasons, and thereby risk concluding that rights are nothing but duties to ourselves—which do not provide agents sufficient reason to abide by rights when doing so conflicts with their own good; or we can try to argue for a coordinate view of rights, which means that ‘deontic’ reasons for respecting rights have a different, stronger source of moral obligation than do our agent-relative reasons for promoting our own good. But in the following chapter I will argue that we have good reason to reject the coordinate view because its requirements would require us to have two sources of moral obligation; and having two sources of moral obligation makes it hard to understand how the two sources are coordinated with each other, and why one source can trump the other one when they prescribe conflicting actions. It was argued last chapter that the agent well being view is problematic, but it also fits best with the requirements that our main motivations will be

agent-relative in nature. If we can have an agent relative reason for why respecting others' rights will in general promote our good (agent well being), then this gives agents a *principled* reason for abiding by others' rights.

The argument for rights will be as follows. First, following Mack, we will see that agents have reasonable prerogatives to both having space to pursue their good lives and to having a second prerogative that protects the reasons for the first prerogative. But rather than following Mack in asserting that agents have a reason for abiding by other's rights because other agents have the status of ends in themselves apart from us, I will argue that agents are possessors of themselves and it is having a right to protection of this factor that gives us reason to abide by others' rights. Since we each have an agent-relative interest in making sure that we can continue to promote our own good, we will also have reason to abide by others' rights when doing so helps us promote our good. I will argue that we can find that it is a wise policy to adopt the general principle of abiding by rights because doing so is more likely to allow a person to promote his self-interest than is abiding by rights on a case-by-case basis. The rest of the chapter will defend the above argument by examining what self-possession is, why our right is based upon our being the first possessor of ourselves based on finders keepers, and how this right can survive Rawlsian criticisms that natural abilities ought to be divided between all agents. I will argue that we have reasons to think that a right to self-possession is based in a consideration of the moral default position of first come first served. Of course this and the next chapter do not attempt to present a full theory of rights, but rather attempt to show why agents have reason to concede others their rights, which fits with the scope of the task of this thesis.

§5.1 *Rights, Coordination, and Agent-relativity*. The explanation of value that is both agent-relative and plural forces us into thinking that each person's life possesses for him ultimate incommensurable value. Therefore, a theory of rights will need to take this aspect of human existence into account by accounting for the prerogative we have to pursue our own good lives (Mack 2000, 73). This means a theory of rights will need to explain and be based on agents' partiality for pursuing their own good. In this section, using Eric Mack's terminology, I will argue that this feature of human existence can be made sense of via the idea of prerogatives and restrictions. Restrictions will be those constraints that are called for to protect our or others' prerogatives; and prerogatives are those agent-centred reasons we have to pursue our own good and have the pursuit of that good protected by constraints on others.

We have seen in the preceding chapters that there is a presumption in favour of an agent being able to pursue his own good. The first thesis of practical reason and ARV are meant to show how values are connected to an agent in such a way that practical reason and value only make sense when conceived of as relative to an agent's desires, needs, etc. This gives us a reason to claim a prerogative (P1) in favour of the agent pursuing his own good in contrast to theories that claim he should devote himself to the pursuit of others' good, or overall good, etc.⁶ Agents will have reason then to want a further prerogative that allows them to pursue their own good unhindered by others (P2).

So assuming the plausibility of P1—the idea that we have freedom from always directing our actions to pursuing the good of others or society—we now must explain how we arrive at P2—the prerogative asserting that one cannot be used or forced by other

⁶ This is Eric Mack's argument (2005) for restrictions from prerogatives; of course the interpretation is my own.

agents to do what is in their, or the overall, good. The reason is that if one assumes the first prerogative asserting that an agent is rational and justified in assigning more weight to his own good, then in order for this prerogative to be carried out it is also rational and justified to claim that others may not use him in certain ways. If others can treat him always as a means to their ends, then his prerogative is meaningless. So in order for the first prerogative to be coherent—for an agent not to have to devote himself to the pursuit of other's good—the second prerogative is needed to make sure the first one obtains. In order for P1 to make sense then we also need to posit P2, which asserts his prerogative not to be used by others for their own ends.

If A has a prerogative both to pursue his own good and not to be used by others in the pursuit of their good, in order for these prerogatives to obtain others must face restrictions on their behaviour. The rationale for the prerogatives is the recognition of the presumption that the good is always an agent's own good. Without introducing restrictions we cannot be sure that the rationale for the prerogatives will be recognized (Mack 2005). So restrictions are necessary in order for the prerogatives to obtain; without restrictions that actually protect an agent against being forced to pursue the overall good, or others' good, or even being forced by others to do what produces the best overall consequences, an agent's prerogatives do not hold.

So Mack's argument seems plausible to the extent that it can show that P2 is necessary for realizing P1, and that both of these prerogatives need to be protected by restrictions against others.⁷ Of course just showing that one has these two prerogatives that follow from the first thesis of practical reason only gives us one side of the story—it seems

⁷ Jan Narveson notes that rather than there being two distinct prerogatives, the second prerogative is just another way of looking at the first one. So, it might be the case that what we have is just two ways of stating the same thing. But I do not think that it makes a large difference for Mack's argument if this is the case.

Mack has succeeded in showing that we have reasons to want restrictions for ourselves because they (in the form of rights) are protective of the pursuit of our own good. But these prerogatives do not yet show why any of us have reason to respect other's rights. He claims that the reason we have reason to be committed to respecting others' rights is that doing so is a way of recognizing the moral separateness of others. As a rational agent one is able to see that other agents like him are also moral agents, with separate ends of their own. Mack's recognition argument has two parts—firstly, just the bare ability for rational agents to see one another as ends in themselves must have *some* practical significance for how we treat others; and secondly, the *proper response* for rational agents is to treat others as ends in themselves.

The practical significance claim is basically the idea that we will be disposed to treat moral agents differently than we would treat nonmoral agents based on the fact that others are ends in themselves, not because of what they value. He argues, "For Anna to possess a *deontic* reason to contour her behavior toward Bella in certain ways, it must be the *fact* of Bella's existence as a being with ultimate purposes of her own and not the *value* of that existence or of what derives from it—whether that value be agent-neutral or agent-relative—that provides Anna with the reason in question" (Mack 1993, 111). So rather than appealing to a common value that we possess that might make us treat others as ends in themselves, he appeals to "some form of failure in rationality in an individual who acknowledges that others are each separate beings with rational ends of their own but insists that this has no practical significance for him, that it has no rational impact on how he ought to behave" (Mack 1993, *ibid.*). Of course the rational response might just be a strategic one, so that when one is faced with other rational agents one adjusts one's

behaviour accordingly to best acquire what one wants in this situation. But why is this an inappropriate response to other moral agents? Mack argues that the appropriate response in this situation is to adjust the way you pursue your own values in order to fully recognize the moral status of others. He claims, “The deontic dimension of practical reason constrains conduct, not by directing it to (or away from) certain outcomes, but rather by restricting the permissible routes to whatever outcomes are pursued.... Only by constraining your conduct towards others can you give expression to your otherwise inchoate affirmation of their existence as beings with ultimately valuable ends of their own” (Mack 1993, 115). When one recognizes that others are ends in themselves, one must come to the realization on penalty of failure of rationality that others are no longer available to service one’s own ends (Mack 1993, 116). In this way Mack tries to make the appropriate response to the existence of others that they are off limits to our machinations because we can identify them as beings like ourselves who are ends in themselves.

Mack’s argument is plausible and makes rights a variant of the coordinate view⁸, because agents are obligated to abide by restraints that are correlative to both agents’ well-being. Mack doesn’t want respect for rights to be based on what he calls an obligation to self argument⁹ because this will mean that we only respect the rights of others to the extent that doing so is conducive to one’s own well-being. Yet, it seems that Mack erects his own form of an obligation-to-self argument by claiming that when agents do not properly recognize the existence of others they are failing in a duty to themselves to be rational. For

⁸ Co-ordinate model of rights: A’s having a right against B = B has reason and is obligated in relation to A to abide by a constraint C1 (a correlative of A’s right) iff B’s obligation to abide by C1 is explained in terms of how abiding by C1 is conducive to B’s good and also how the act of abiding by C1 is a way of B’s recognizing the separate moral status of A.

⁹ Here I should note that by ‘obligation to self’, Mack just means one’s own desire to promote one’s values. To say one has an obligation to self means simply that one has an agent-relative reason or interest in doing something.

Mack we must have an obligation to ourselves to be rational. So it seems that we cannot escape some kind of obligation to self argument—either as a moral or rational obligation to oneself to abide by others’ rights. If the argument is an obligation to self argument, then we must also admit that the reason to be rational is an agent-relative one. It cannot be non-agent relative, for it has to be valuable, even implicitly, for an agent. This argument shows us that an obligation to self argument will underlie any claims about why it is we have reason to do something. This means we should not be afraid of utilizing an obligation to self argument, but must rather make it work to our advantage in showing why agents have reason to abide by others’ rights.

Mack’s recognition argument relies on there being a dualism between the right and the good. In order for Mack’s argument to work, he must hold that there are two distinct and separable kinds of obligations: Those obligations that one has to pursue one’s own good, and those obligations one has to respect others (Den Uyl & Rasmussen 1993, 124). The benefit of adopting such a dualism would seem to be that it allows us to say that obligations one owes to others can be stronger and trump those obligations one owes to oneself, hence paving the way for a theory of rights as strong side constraints. This means that there is not a single source of moral obligation, since at least two are needed: One to account for the first principle of practical reason and another to account for the obligation to treat others as moral ends in themselves. But the problem with this view is to account for which obligation takes precedence, especially when agents are said to be obligated to follow the first principle of practical reason that prescribes one’s own good comes first. He does not think that a shared value can do the job of showing why we have reason to recognize the rights of others because such a value-based reason would only be a way of

recognizing our own good, which may or may not be reason for abiding by other's rights. But we would do better to avoid such dualism because it brings up its own set of problems: Which level is to trump the other and why? How do the good and the right relate to each other? My own view is that we only need to find one factor that appeals to agents, and that is implicit in everyone's good, in order to ground a system of rights.

If Mack's view worked then it might give us robust rights because we would have reasons for constraining ourselves that trumped reasons we have for pursuing our own good. But since this view seems to require that we have two sources of moral obligation, it is not plausible as a reason for why we will constrain ourselves. Here we need to pause and see why agents have a reason to accept a system of rights in the first place. We can agree with Mack that rights will be principles that make sure that our second prerogative is protected. We cannot make sure that we can pursue our own good unhindered by others based either on our invincibility or the kindness of strangers. We are not invincible and so must protect ourselves from others; but also, we cannot rely on others not interfering with us based on their fondness for us, because often as experience teaches they won't be fond of us. We must see that rights are a need we all have in common. But we each want our own rights guaranteed because we each care about our own good more than we do others. So, people will accept other's rights imposing restrictions on their behaviour if the benefit to themselves of recognizing other's rights exceeds the cost of doing so.

What motivates people to abide by rights is a normative claim, not simply a factual one.¹⁰ I am not simply saying that agents desire to continue to promote their good, but that they think it's good that they continue to promote their good. This gives us a normative

¹⁰ For instance, Nozick asserts that since agents are separate moral agents we need to recognize they have moral rights. But it's not clear how far the factual idea of agents being separate moral ends will get us.

premise to begin with in order to understand why agents think that abiding by rights is something they will want to do. Agents cannot avoid seeing it as good and as something they each ought to accomplish if it leads to the promotion of their good. So I am not just holding that each agent desires to continue living, but that each agent can see that his being able to continue to live is good. Each agent must see it as good that he continue to live in order to promote his own values.

Furthermore, the claim that each agent thinks it's good that he continue to promote his good is an agent-relative good for that agent. I do not hold that my thinking it's good to continue to promote my ends gives others reasons for wishing to promote my ends too. Yet, while my good may not have practical significance for others, it has practical significance for me. And if we can plausibly hold that each of us will do better by abiding by each other's rights, then we have a case for thinking that all of us will choose to abide by a system of rights.

Of course there are reasons for thinking that we might not do better by abiding by others' rights. What about Hobbes' fool who thinks that he can do better in some cases by not abiding by rights, or not always abiding by covenants, because to "...not keep covenants, [is] not against reason, when it conduced to one's benefit" (*Leviathan* chap. XV)?¹¹ The fool has a point because there might be times when not respecting someone's right can be more beneficial than respecting it. So, the fool's challenge is to show him why

¹¹ Cf. Plato has Glaucon tell the story about the Ring of Gyges. Gyges the shepherd finds a magical ring that allows him the power to become invisible. With the ring he kills the king and marries the king's wife. The moral of the story, Glaucon says, is "that no one is just of his own will but only from constraint, in the belief that justice is not his personal good, inasmuch as every man, when he supposes himself to have the power to do wrong, does wrong. For that there is far more profit for him personally in injustice than in justice is what every man believes..." (*Republic* 360). I take it that Hobbes' Fool, The Ring of Gyges, Hume's knave, etc., all have the same point in challenging morality to show that it is always in one's best interest to be moral.

he should respect rights when it pays him not to. Why should he respect rights in a principled way?

One answer is to suggest that he should respect others' rights because, once we have an accounting of all the costs and benefits, doing so will always be in a person's overall benefit. It might appear that we can do better by ignoring someone's rights, but this is only an appearance that dissolves once we have taken into consideration the effects of doing so on our reputation and other's willingness to abide by our rights in the future. Yet, even though reputation and trust are important, it seems implausible to hold that abiding by rights will *always* promote an agent's good. "Surely there are some circumstances in which breaking a covenant [or right] would do insufficient harm to outweigh the benefits, even when all the costs are fully accounted for" (Darwall 1998, 105). So how can we show the fool that he ought to abide by others' rights in general, not just on a case-by-case basis?

Following Hobbes, we can admit that it may be in an agent's interest not to abide by rights sometimes because it would help to promote his good. But the reason why he should not is because it is never a *wise choice* to do so. According to Hobbes, even when it might seem beneficial not to abide by another's rights, we can never really know that it is beneficial. Since we can never really know that we will be able to get away with not abiding by another's right, we would do better to avoid the risks and costs of doing so by simply abiding by the other's right. As Darwall notes, Hobbes is arguing that the wisdom of the choice does not depend upon its actual outcome; Hobbes states: "...that when a man doth a thing, which notwithstanding any thing can be foreseen, and reckoned on, tendeth to his own destruction, howsoever some accident which he could not expect, arriving may turn it to his benefit; yet such events do not make it reasonable or wisely done" (*Leviathan*

chap. XV). The fact that someone can get away with ignoring another's right does not mean that it is wise to try to do so. He did not have reasonable information to conclude that he could have got what he wanted by ignoring rights, therefore it is best to act in accordance with one's reason and not take the chance. "The policy or rule of always keeping covenants is a better means, in general, to any human agent's self-interest and self-preservation than is the policy of determining whether to keep covenants on a case-by-case basis according to whether doing so is likeliest in that instance to have the best outcome" (Darwall 1998, 106). The reason the fool should abide by rights is that doing so will best enable him to continue to promote his own good. So, he (and each agent) will need to see that acting on a general principle or rule about respecting others' rights will be the best policy.

Yet, it might be wondered if our reason for adopting a principle to respect rights is based on the idea that since one can't really know that one could do better by adopting a case-by-case strategy, it can't really be claimed that one might not do better by using a case-by-case strategy. What the argument tries to show is that the probability of doing well is connected to keeping your promises or abiding by other's rights. Given that others can interfere with us and make it so we cannot get what we want, we would do better to abide by their rights so that they are more likely to abide by our rights. In the situation where we both abide by rights there is mutual benefit—at least there is more benefit than in the situation where we try to interfere with each other's lives. If one doesn't abide by another's right and he gets away with it, then he does better but it does not seem likely that he can say he *knew* he would do better. One might win a large sum of money by playing Russian

roulette. It might be true that the odds are in your favour since there is only one bullet in the gun's chamber. But as Darwall says,

Hobbes believed that breaking a covenant is like playing Russian roulette in that it is something that just doesn't make sense to do even if it is likeliest to have the best outcome in an individual case. The *policy* or *rule* of always keeping covenants is a better means, *in general*, to any human agent's self-interest and self-preservation than is the policy of determining whether to keep covenants on a case-by-case basis...(Darwall 1998, 106).

So, even though someone might be pretty sure that not abiding by rights in a certain situation will work out to his benefit, he cannot be absolutely sure that it will. The best policy to adopt is to abide by others' rights because this policy removes the risk that one might lose everything by trying to play Russian roulette with other people. If one picks the wrong person to mess with, then the bullet in the chamber might indeed have your name on it. Not abiding by rights is not the wise policy because one risks too much—one could lose one's life, and thereby any ability to promote any other goods.¹²

The view of why agents will concede others their rights is basically an agent relative or agent well being view. The reason why agents will respect others' rights is explained primarily in terms of the duties an agent may have to his own self-preservation. But does this also mean that we must fully explain (or reduce) the harm done to a rights-holder to the harm done to the agent who has the duty to respect his rights? If an agent's

¹² Of course, there might be emergency situations when abiding by rights does not make sense. We will look at the threshold of rights next chapter.

rights are violated, then must we say that the reason why this is wrong is that the violator has failed in some obligation to himself? If so, then this seems to make this account of rights less plausible because it explains harm in terms of the harm done to the violator, not the violated. It is true that taking the agent well being view will mean giving up our ambitions to have a coordinate view of rights that explains why we have reason to view others as ends in themselves and hence be able to explain when rights are violated it is the rights holder who is being harmed in the 'deontic' sense of violating rights being a case of not recognizing another as an end in himself.

When we do not abide by another's rights we can see that it is he who is being harmed. The situation can be plausibly described as a situation where the rights holder has been harmed because we can see that his interest or choice in being a self-possessor has been taken away from him by the person who violated his right. So, while it may be true that his choice or interest that is protected by the right is not the primary reason another has to abide by his right, we can still say that the violation of this choice or interest is a harm to him because violating one's choice or interest over one's being a self-possessor in situations where it is legitimate to harm an agent.

Of course in order for the system of rights to work people will need to take it upon them selves to act to reinforce rights-respecting behaviour. Everyone must have an investment in using criticism to induce others to have the disposition to abide by rights. This means that if they see someone else's rights being violated they will speak up about it in order to make sure that others know what is going on. Suffering disapprobation and having one's name sullied will have the effect of making sure that people are more likely to cooperate. The reason why we will do this when it does not directly pay us to watch out for

other's rights is that it will be in our long term benefit to make sure the system of rights survives. Since the system of rights is to our benefit, we will find it in our interest to make sure rights are being respected. This kind of disposition to look out for the rights of others is one that will be reasonable to adopt once the system has been adopted.

It might be asked whether my respecting your rights is necessary and/or sufficient for your respecting mine? At the level of individual action I cannot be sure that my abiding by your rights will lead to you abiding by my rights. I might respect your rights but you may not respect mine in return if you can get away with it. We do not always deal with others multiple times. So the expectation of future meetings may not induce one to be more cooperative. How are we to know when someone else is respecting our rights and when they are not? Even though we think it's a wise choice to abide by other's rights in general, since we cannot monitor other's actions all the time it might not seem rational to trust others if we do not know whether they are likely to cooperate. But this problem can only be dealt with by the idea of inducing others to cooperate by taking it upon ourselves that people have the disposition to cooperate. If getting others to abide by rights becomes a general policy, then we can rest more assured that people will be more likely to cooperate with us; even if we have little experience with them, we can assume that if they are still 'in business' that they have been cooperative with others. If they have been less likely to cooperate and abide by rights, then it's more likely under the system of reinforcement that we would have heard of them through others who have previously run into them. So, we can see that taking it upon ourselves to make sure that rights are respected means that we

can all rest more assured that a higher percentage of people we deal with are likely to be cooperative and respect our rights.¹³

Since this theory attempts to give agents principled reasons for respecting rights, it does go some way to making us act in a uniform way towards others even though the reason for acting this way is not dependent upon us having to see others as ends in themselves. We can be said to contour our behaviour to the requirements that the rights of others impose upon us; and this is done mainly because we seek our own betterment that can be realized by respecting rights in a principled way. Mack believed that the agent well being view would fail, in part, because we would never have a coincidence of wants/values that would be sufficient to make sure we abided by others' rights. But if agents all believe that it's good for them to promote their own good, and this can be done effectively by adopting a principle of abiding by others' rights even when it might pay not to, then we can claim to have given a reason for habitually respecting others' rights that is based upon self-interest.

Now we need to address what kind of basic right(s) will be suitable for all of us given our reasons for wanting to be moral and our willingness to abide by a system of rights. I argue that we will all have a basic right that recognizes our being the possessors of ourselves. This argument here is that everyone is a self-possessor, which means that they can all be described as possessing themselves. Furthermore, since everyone is a self-possessor, if we can argue that they are the *first possessors* of themselves, then they also

¹³ The reason for wanting to have a system where we take it upon ourselves to enforce rights-respecting conduct might have an analogy with the broken window theory of crime. "The broken window theory argues that minor nuisances, if left unchecked, turn into major nuisances: that is, if someone breaks a window and sees it isn't fixed immediately, he gets the signal that it's all right to break the rest of the windows and maybe set the building afire too" (Levitt and Dubner 2005, 128). Similarly, if people get some hint that it's OK to start violating rights, then it might cause a rise in the quantity and quality of such behaviour.

have a legitimate claim-right to exclusive use of themselves.¹⁴ The rest of this section will attempt to show how this argument works.

The idea of self-possession is not the same as self-ownership. Often self-ownership is said to be what our basic rights consist in. I am not arguing with this claim. Indeed, I will go on to argue that we have a right to continue to be self-possessors—to have moral rights over our own bodies, faculties, energies and talents (Mack 2002b). Sometimes it is just asserted that being a self-possessor is to have a right to self-ownership: “Each individual, as a natural fact, is the owner of *himself*, the ruler of his own person” (Murray Rothbard in Den Uyl & Rasmussen 2006, 206). But just describing oneself as a self-owner does not seem sufficient to assert we have a right to be a self-owner. As Den Uyl and Rasmussen argue:

It is evident that one has de facto possession and, to some extent, control over one’s body, faculties, talents and energies—that is to say, ‘one’s constitutive ontological properties’—and that these facts are presupposed by any account of what one ought or ought not to do. Yet, to say this is some distance from saying either that one ought to have exclusive control over what one does with these properties or that one has right to such control...(Den Uyl & Rasmussen 2005, 208).

Even though I am asserting that we are all self-possessors I will still argue that we have a legitimate right to control ourselves and utilize our talents. I will be arguing that we have a

¹⁴ Note: originally I had conflated the two ideas of first possession and self-possession. First possession seems to be a mixture of self-possession and the idea of first come first served. To better explain how the argument for rights to ourselves works, I am distinguishing between our basic self-possession and the normative idea that is meant to legitimate it, first come first served.

right to be self-possessors from the fact that we are self-possessors and the normative claims of finders keepers.

Before proceeding further we should pause here to consider what ‘self-possession’ means by examining what we mean by ‘self’. D.W. Hamlyn notes that “... the term ‘self’ reflects something about us, as human beings—namely that we are self-conscious and that many aspects of the forms of consciousness we have are reflexive” (Hamlyn 1984, 188). Our identities as selves is wrapped up in our being thinking beings, but also in the fact that we can come to see ourselves as thinking beings. I do not mean to suggest that all that we are is thinking beings, as if we are spirits—if we accept naturalism, then we must see that our substance must be describable in natural terms. What I want to assert is that we can come to see ourselves, through self-reflection, as beings who have certain abilities, characteristics, values, goals likes and dislikes; this ability to see ourselves as beings comes from our ability to see that all the experiences we have must belong to something. Hume thought that when he reflected on his consciousness he could not find some entity called a self that had the experiences, because all he ever experienced were his perceptions. Therefore, it might be possible that there is no such thing as a self and that particular perceptions might exist separately in such a way that they “have no need of anything to support their existence” (*Treatise* I.iv.6). But the Kantian counter charge is that there cannot be representations of things that are not ‘owned’ by someone. “The ‘I’ is therefore presupposed in the very having of a perception, so that consciousness with respect to perceptions is *ipso facto* self-consciousness with respect to the ‘I’” (Hamlyn 1984, 192). One discovers one’s self by reflecting on the fact that one has experiences and that these experiences must be the experiences of someone.

Having located the self, we can now see how it is possessed by us and what implications this has for the argument here. One comes to experience one's self as a thing that has certain experiences. And upon further reflection we can see that our self has a certain identity. We can say that our self is composed of certain characteristics, memories, desires, and that we have certain goals and values we wish to pursue. We can by reflection see that these desires, values, goals, etc are what we experience but they are also what compose us. So, we can say that we don't just have certain experiences of ourselves, but also that we can come to stand in a relation to ourselves through self-reflection. It is this ability of our consciousness to be self-reflexive that allows us to say we possess ourselves. It allows us to assert that we have experiences of ourselves as being a certain kind of thing, but also that we possess that thing.

It might be thought that if we are composed of memories and have personal experiences as part of our self's identity that there is no way that anyone could possibly take such things away from us—so what is the practical significance of saying we are self-possessors if no one can really affect our personal identity? Of course it might be true that no one can steal my memory of last summer and put it somewhere. But surely others can take away our memories from us because they can harm our identities. If one is hit over the head and loses one's memory, or becomes a vegetable, then we can appreciate how much others can affect our selves for ill. If they do us harm, they can take away our ability to promote our values. Our identities as selves must center around certain major characteristics and goals, such that if they were changed then we would no longer be who we are. We do not wish this to happen. No matter how much we might wish to be a bit better looking or smarter, we don't hear people say that they'd like to be totally different

people from who they are. We wish to keep our identities because we want to be able to continue to promote our values and our long-term goals—we wish to keep extending our selves into the future as the persons we are. So, our ability to possess our selves has great practical significance for us.

A right to self-possession means we have the ability to control ourselves, take actions to promote our good, and reap the rewards from our actions. Such a right is a right to be and to remain a self-possessor. This right seems a plausible starting point for what kind of rights we might have because of how it underlies all of our possible good lives and because of how it ties in with our desire to promote our own good. Firstly, self-possession is something we all need to have protected in order to pursue any sort of good life. If we did not have the ability to have control over ourselves and take certain actions to pursue our good, we would not be able to have any sort of good life for ourselves at all. Secondly, since what we care about is promoting our values, we can see that self-possession is something we will also have to value as a means to that end. We will find rights that protect our self-possession acceptable because they are means to furthering our ends. This does not mean that I need to value others' being first possessors, but we will need to come to see acceptance of their rights as a means to getting our own ends. If we didn't abide by their rights, then, as we noted before, they can be impediments to us promoting our own ends.

The reason why a right to self-possession gives us legitimate control, or ownership, over ourselves (and what we produce) is because of the idea of finders keepers or first come first served. First come first served, while not a principle of justice, is more like a

moral default position.¹⁵ When there is no other principle to turn to, we can use it to show that someone has a legitimate claim to something. This social convention underlies why we think that it's OK to stand in line for things, why the first person to arrive has a claim that others do not. It helps us to resolve disputes by appealing to the fact of who came first. In the next section we will examine why it seems more plausible than its main competitor, equal shares, for solving disputes at this level.

Our basic right to first possession is a claim right. My right to promote my way of life, as long as it does not interfere with someone else's right, implies that others have duties not to interfere with me. Each of us will have claim-rights against others when others have duties to respect our being first possessors. This means that others will have duties not to interfere with us using our natural talents to make our lives better for ourselves. We will have basic rights to protect our selves and our holdings. Of course we are complex beings with many physical and mental components. So, we need to recognize that a right to continue to be a self-possessor is a right to control our bodies, our minds, our desires, etc. The basic right is one that protects our making the call on how we live our lives.

The right to make the call is best described as a negative claim-right we each hold against others. General claim-rights are "rights against interference; their correlates are never duties that such-and-such be the case, but are duties of noninterference" (Edmundson 2004, 163). Our basic rights only impose negative duties of noninterference on others. Duties that such-and-such be the case are correlates of special rights that arise from agents engaging in voluntary acts with one another. Since our rights are negative, we have rights to change ourselves if we wish. I might have a right to all of my features, even my

¹⁵ In this regard David Schmitz (Schmitz 2006, 157) says, "First possession may not be a principle of justice, but not every question is a question of what people are due. Sometimes the question is how to resolve disputes over what people are due. Sometimes we resolve disputes by settling who gets to make the call".

appendix, but this does not mean that I may not want to change some aspects of myself. My right to myself allows me to change myself because it gives me the call on how I can change myself.

I think that a system of equal rights will be the only one that we all will find acceptable. It's true that each of us would like to have more deference supplied to us than we would have to grant others. We will each prefer a world where we receive more deference than we have to grant others. Yet, as Lomasky argues, if this system where I need not defer to anyone else were to be brought into existence, it would be far from ideal if, correspondingly, no one need defer to me (Lomasky 1987, 79). This should give most agents reason to adopt a system where equal rights are made into rules for all to follow.

For each of us, then, there will be some minimal amount of deference that we will find acceptable as a cost for abiding by others' rights. This amount of deference need not be the same for everyone, but there will be a specifiable range of deference we will find acceptable to grant others in order to receive the same amount in return from them. The argument here is that all of us will find it acceptable to have a system of rights that protects our ability to continue to be self-possessors. The reason why this is acceptable is that it only requires that "*the amount of required deference be close to level of deference ideal for the least deferential members of the community*" (Lomasky 1987, 82). This system of rights will be stable because agents will find it in their interests because in being asked to supply the least amount of forbearance they are not being asked to supply too much deference to other agents.

So, in order to have a system of rights that works—that is, one that is mutually acceptable—we all should accept Hobbes' second law of nature: "...that a man...be

contented with so much liberty against other men, as he would allow other men against himself". This equality of deference will help to make the system of rights acceptable for all because it removes a potential bias of systems that benefit some at the expense of others. Secondly, the system will impose a minimal amount of deference on all agents. This makes the system more acceptable to almost everyone by making the costs of accepting it low. People will only need to respect others' negative rights to noninterference; so, duty-bearers have a high incentive to abide by others' rights because they do not have to bear the burdens of duties that required more interference would impose on them. This outcome also has the effect of allowing a greater system of pluralism because agents are allowed more freedom to pursue their own ends and are not burdened with duties that require them to act paternalistically towards others.

We might wonder if this system will impress the fanatic. It seems unlikely because for the fanatic the deference supplied to him will be insufficient to compensate him for the like amount of deference he must supply others. How can we deal with the fanatic? It's possible to change the amount of deference we must supply him in order to bring him into the community. This means that he will be willing to live with us if we can supply him more deference than he needs to supply us. But such an unequal system of rights is unlikely to be popular with the rest of us. Moreover, if we were to allow this kind of system that privileges fanatics, then there will be a tendency for people to identify themselves as fanatic, so that they will only have to supply a minimal amount of deference to others in order to receive more. The only way to deal with the fanatic is by means other than rational argument.

So, another reason to have an equal system is to make sure that the system is stable; and one way to do that, besides making sure that people only need to supply a minimal amount of deference, is to make sure that the system does not tend to reward fanaticism or those who seek to give a little and take a lot. A stable system of basic rights will be one which requires equal amounts of deference be traded between agents. The system will be stable and be deemed acceptable when it imposes the least costs on agents. This means that our basic rights will be ones protecting our ability to promote our own good, and basically to be left alone from interference by other agents. How exactly these rights can be spelled out is a question for another day. The narrower claim here is just that rights will be deemed respectable when they require the least amount of deference on our part, yet they give us the most moral space we can expect from other agents who think the same way we do. Our rights to continue to be first possessors and others' rights to do the same will entail that we are required to give each other the same amount of deference because the more some people are given special rights, the less stable the system of rights is likely to become.

Here we should pause to consider childrens' rights. Often rights theories are accused of paying little attention to the rights of infants. Although the point of my thesis was to show why adults have certain rights, I can point out the direction rights theory can take in order to more fully give moral recognition to children. Of course, a full account of why children have rights is outside the scope of this thesis since the burden here is to show why adults will have reason to abide by other adults' rights. The theory of rights presented here asserted that people have rights because of the fact that they are self- possessors. But it also makes rights partly dependent upon other agents conceding one rights. If a theory asserted that all those who have property F (self possession) also have property R (rights)

then it might be hard to explain why children have rights because they often do not yet have property F (cf. Lomasky 1987). But since rights are partly dependent upon others *conceding* people their rights, we can say that it is at least possible that beings without F can have R. In order to see whether children have rights, then, we need answers to two questions: Can B recognize A as a rights holder even though A can't see himself as one? And two, are there grounds for this kind of recognition? As for the first question, it seems like we do recognize the rights of children in society all the time. Children do not see themselves as promoting their own good, or doing things for their own survival, but we believe that they deserve rights. We are able to confer rights on infants that make it just as much murder to kill them as is killing any adult. Of course it might be true that we can act *as if* things have rights even though they may not. So is there a good reason for thinking that children ought to have rights because we are conceding that they do?

I think one of the best possible answers is to assert that since children will utilize the characteristic of self-possession someday, we ought to treat them as if they had rights. Their rights can be said to rest upon the fact that they have some need to have their self-possession protected because it *will be* a factor that they need for their future good lives. So, if children have rights it is because they have the potential to become adults who are full rights bearers. They do not quite have the full right to self- possession, not because they cannot realize they aren't self- possessors, but because they cannot need self possession to realize a good life yet. But this means their rights will come into force when they reach a certain age, but in the meantime we have certain duties to protect them and make sure that they can reach this age. And given that people in part have rights because

others have good reason to concede them rights, we can say that children have rights now because we are willing to concede them rights that they will have.

Of course saying they fall under our protection isn't to say that they get their rights by being the property of their parents—for while this might seem to protect them against society, it would not protect them against abusive parents because they are simply their parents' property. In order for children to have protection against their parents we must simply assert that we are holding most of their rights for them until they reach a certain age of maturity. But until then, they have a basic right against being killed or abused, although they do not have rights against paternalistic interventions (devoted to their betterment) because they are not yet capable of choosing a good life for themselves. We ought not to think of children as objects possessed by their parents because we think that when they are harmed they are wronged, not just damaged. As Lomasky argues:

If parents and interested onlookers take offense at the child's maltreatment, that fact is itself to be explained by their conviction that, in the first instance, a wrong has been committed *to the child*. The parent accounts the harm a misfortune to him or herself *because* it is a misfortune of the child. This constitutes, in part, the difference between regarding something as an *object* versus regarding it as a being with moral standing (Lomasky 1987 157).

Objects are not things that can be wronged, only damaged; so to better explain how we usually talk about children we need to see them as beings who have some moral standing and can be wronged by certain actions. If we burn the American flag we might be charged

with damaging an object, but we would not be wronging it. We do not need to take people as being ends in themselves to see that some kinds of entities can be wronged, while others can only be damaged. This recognition can lead us in the right direction about why we need to think about children as moral agents who are deserving of moral recognition in a way that other objects are not.¹⁶

In this way we can make sense of the fact that children are thought to have some basic rights against being killed by seeing why they can have rights because others are willing to concede them certain rights. While I do not have a full answer to the question why agents will be willing to concede children rights, we can see that if agents can have rights even though they cannot recognize themselves as having rights, then the door is open to argue that children can have rights even though they cannot recognize themselves as having a right to self-possession over themselves.

Another hard problem for rights is that of the mentally insane/ ill. If they are temporarily ill or insane then perhaps the case for childrens' rights applies to them also. So in such cases we just hold onto their rights until they are able to regain their sanity just as we hold onto most childrens' rights until they are older. In such cases we can also hold that

¹⁶ It should be noted that although adults have basic negative rights, it seems that what is important to children are basic positive rights—such a right to be protected, a right to be fed, etc. that must be provided by their parents. Why do they have these rights? Tibor Machan plausibly argues that children have these rights and parents the corresponding duties because parents have chosen the obligation of raising moral beings who will be future adults: "...[B]ecause children have been invited into the parents' lives, and since they are children (indeed, initially totally dependent infants), parents have committed themselves to provide for their children. May these be enforced by the government? Yes. Here is the reason why. When people have children, they enter into a compact with them—or, rather, with the adults children will be. This may be difficult to appreciate because it is a unique relationship, one that is only possible with human children. Parents have children as their offspring and not adults, and children are for the larger portion of their lives dependents—i.e., their parents can only be understood as making a promise or taking a kind of oath to supply for them something they need to grow up....Children, in turn, may be taken to have the (positive) right to being so treated that they will become sound and able adults. This right they have by virtue of their parents' choice to have them as the kind of beings who will as adults have the right to be able to choose to live" (Machan 1992, 20-1). Because parents choose to have children they also choose to have positive duties towards them until their children are old enough to take care of themselves.

a principle of paternalism applies: the amount of paternalism justified is inversely proportional to the degree of autonomy present. So, the less autonomy present, the more paternalism is justified. But what about cases where they will not be regaining their senses, or not be fully able to exercise the rights the rest of us can? (Perhaps the mentally retarded can also be put into this category for simplicity, although there are often large degrees of difference between being retarded and being insane). In such cases it seems that they could not have full rights. Indeed, we are able to lock them up and often make them accept treatment—ingesting drugs, having surgery, etc. This cannot be because we mean to make them better, but because we just wish to make them less dangerous to others and themselves. In such cases, where they cannot become better, it could be that they are at our mercy and, so, they really do not have rights. But it might also be that because they are persons, and we cannot be sure that a cure might not be found, that we wish to treat them as still potentially possessing rights that they could realize at a later date. It's possible that because we might find a cure, that the wise choice is to treat them now as having some moral standing. This would move them back into the category of potentially having rights and having more moral standing for us.

In conclusion, we have seen that Mack's way of showing why agents will abide by a system of rights works by connecting prerogatives and restrictions, rights based on the idea that in order to properly recognize others we must see them as ends in themselves full stop seems incorrect. Mack believes that only by granting others this status will they be able to get the proper recognition that a rights holding entity deserves. But since we are not able to grant others this status it seems that another reason must be sought that is able to

show why we have to accord others proper respect and also how others are related to our own well-being.¹⁷

A basic right is a claim agents have that imposes duties on others to leave rights holders alone. Each of us will find it rational to want such a principle to guard our first prerogative to pursue our own values. It is rational, as Mack argued, that if we want the first prerogative we will also need and want the second one in order to make sure that the first one obtains. But we found Mack's argument implausible for why we will also abide by others' rights. We found that we needed to appeal to our own agent relative values for why we will have reason to concede others their rights. Our basic right was a right to self-possession. And we also saw that the reason why this starting point was plausible was the idea of first come first served (or finders keepers). But finders keepers has been challenged by those who appeal to an opposite view—equal shares. So in order to better make the case for basic rights to self-possession, we will need to better examine the idea of finders keepers.

§5.2. *Moral Defaults and First Possession: Getting there first or just acquisition?* It might be objected that we could not have a theory of rights that protect us as self-possessors because our abilities and identity are a matter of chance, and when our abilities are a matter of chance they cannot be ours as a matter of desert, but must be distributed to everyone equally. The idea of distributing our abilities, or the products of our abilities equally, is

¹⁷ One might argue that in making rights dependent upon one source of moral obligation would I not have to say that the reason ultimately why we do not violate another's rights is that to do so would be something one would have to live with; yet in saying this, it explains the harm done to the other in terms of the consequences to oneself? But this is to focus too much only on the fact that there would be some bad consequences for oneself—the reasons why one would have a hard time living with oneself are due to the fact that one has harmed another by violating his rights.

based on the idea that equal shares is the moral default position. For instance, if we stumble into an orchard and find an apple tree full of apples, we would be offended if one person gobbled them all up instead of distributing them equally. The reason is that equal shares is the distribution rule we use when we cannot justify anything else (Schmidtz 2002, 246). So it might seem that if we come upon ourselves in a state of nature with certain inborn abilities that we did not 'earn', the just thing to do is to distribute those abilities equally amongst everyone. But as I will argue self-possession is justified by an appeal to finders keepers if we find that we do not arrive in the world at the same time but rather face a situation where people already have divided up the world amongst themselves.

What makes us rightful possessors of ourselves is the idea of finders, keepers. This is the idea that when one has found something that is unpossessed or unclaimed by others, that one has a just claim to that thing and can exclude others from its use. Here I claim that one's possession of one's body is open to this sort of defense. The mere fact that one possesses oneself is not sufficient to show that one legitimately possesses (owns) oneself. But if finders keepers holds for our natural abilities, and there is no reason to suppose that anyone else is harmed by our claim to ourselves, then there can be no legitimate complaint against our claim to own ourselves. Certainly if our abilities were in some common pool and we happened to snatch them up before negotiations began, then this might seem unfair because we ought to have distributed them according to equal shares. But since our abilities are already possessed by us, it is not anyone else's decision to decide how to use them. People do not come to some bargaining table all at the same time and decide to distribute our abilities as if they were common goods. In reality there are no unpossessed goods sitting on a table somewhere awaiting equal distribution—people have been born one by

one over different generations, so it seems that a different approach is needed than equal shares. As Schmitz argues,

Claims of justice must be fit for the world in which such claims purport to belong. In our World, this means acknowledging that, when any bargainer arrives on the scene, much of the world is already possessed by others in virtue of lifetimes of work (and workers do not find it 'arbitrary' that they are the ones who did the work). Theories tend to ignore where we actually are, because theorists want to avoid privileging the status quo, but a theory needs to privilege the status quo in some ways so as to be relevant to it (Schmitz 2006, 154).

The principle of first come first served might be a morally arbitrary way to distribute goods, but this does not mean that it is unjust. If we think that there is a reason to presume that we were the first to acquire our abilities and since they were already possessed their distribution were never up for discussion; we can also assert that unless someone can come up with a reason why we don't deserve ourselves, we have a just claim to ourselves on the basis of first come, first served; and since there is no pre-existing reason or right to the contrary, the way is open to argue that since we are first possessors of ourselves we have a reason to think we have a right over ourselves and others face restrictions towards us.

The theory of rights focuses on what sort of treatment we can demand from other agents when we have a case where agents arrive at their domains nonsimultaneously. We will see that first possession is acceptable in part because we do not all arrive in a garden at

the same time to find goods ready to be distributed. So equal shares seems less plausible as the moral default position when we see that agents arrive in a world that is already distributed and possessed by others. First possession is a norm that secures agent's rights in the face of the moral default position of equal shares. If equal shares isn't fundamental because nonsimultaneous arrival in a world already possessed better explains the nature of how to think about our moral situation, then the burden of proof falls upon the equal shares advocate to prove that our abilities belong to some common pool to be distributed. I will attempt to show that one of the most powerful arguments and intuitions in favour of equal shares, namely Rawls' transitivity of non-desert argument, fails to provide the strength needed to prejudice us against first possession. Now we will examine the strength of finders keepers, or first come first serve as a reason for asserting property rights to ourselves and things.

Randy Barnett attempts to defend first possession as a legitimating reason for property in terms of the reasonableness of three conditions. Ann finds minerals on the ocean floor; her possession of the minerals will be justified as a claim based on FP if (a) there is no prior owner; (b) her actions do not disturb others in society; and (c), it enables her to act on the basis of her knowledge (Barnett 1998, 69). This makes initial acquisition dependent not simply on one's being the finder of something, but upon the fulfilment of other conditions. It seems reasonable to hold that one cannot own something that is already owned by someone else. And it may be reasonable to assert (c) the goodness that having property can do for individuals. But what is more problematic is (b). For how are we to interpret disturbing others in society. If it means that we cannot violate others rights when we are attempting to own something, then I think this is agreeable to all.

The most notorious interpretation, though, is to assert that we can only acquire something, or be said to have title to it, if doing so does not make others worse off. For instance, David Conway says that someone can be said to have acquired something justly if his doing so does not make anyone else's lives worse than they were before it was acquired (Conway 1995, 11). Barnett's condition (b) seems to be this same idea. The most notorious condition for being able to acquire property would seem to be Locke's proviso stating that one can only acquire something if one leaves enough and as good for others. But why should we accept such a strong condition as Locke's? One reason for not accepting it is that finders keepers does not require it. As Anthony de Jasay argues:

In [rights] absence, it is hard to see why the justice of appropriation of one resource by one person should be dependent on other persons having comparable scope for appropriating other, equally good resources, though of course it would be nice if they did have it. The supposition that they must have it rests on the prior and tacit adoption of some egalitarian moral axiom (de Jasay 2002, 140-1).

So, without adopting a tacit egalitarian principle about how things should be distributed, we need not worry about whether others have as much and as good left over for them. Of course equal shares might be such a principle. We will examine support for it soon, but for now it is interesting to note that finders keepers does not impose so many conditions upon what counts as just initial acquisition.¹⁸

¹⁸ David Schmidtz argues that another reason for thinking that we need not worry about a Lockean proviso is that coming late in the game is actually better than coming early, and presumably getting an equal share. The reason is that when one comes late things have already been produced and prosperity is higher. Would one

Possession by finders keepers ought to be distinguished from the idea that one has power over—or owns—those things he has mixed his labour with (Locke). The latter idea is that in order to come to own something one must find something unowned, then mixed one's labour with it in order to make it truly fall under one's control. There are many hard cases associated with this view—such as what are reasonable boundaries one can erect over unowned things that entitles one to say he owns them? Also we might ask when are children who are the products of parents mixing their genes their own autonomous agents?

Still there is reason to devote more time to the discussion of first possession as it relates to the labour mixing theory of value because since Locke the latter is thought to underlie the former. The idea that in order to have title to something one must mix one's labour with it has a long history in philosophy and law (Epstein 1979). It seems that in order to make a case for our possessing something we need to be able to show that one has taken some actions to acquire the thing—mixed one's labour with the thing in question. This means that when one asserts title to something, even oneself, one must have performed some actions that warrant this claim. But in real life cases we see the limits of the labour mixing theory. For instance, in competitive cases of acquisition two agents may both invest their labour in acquiring an object yet only the 'winner' deserves to keep it (Epstein 1979, 1225). Also, it might be objected that labour mixing itself cannot create any right to a thing; the reason being that it rests in a circular way on the idea that each person *owns* himself. The idea that each person is the possessor of himself must be justified by appealing to the idea that each person is in possession of himself, either by choice or because of some natural necessity (Epstein 1979, 1227); but if this possession of oneself

wish to live in the middle ages and have an equal share, or be alive with today's prosperity even though one has a less than equal share?

can establish ownership of oneself, then why is not possession of external things sufficient to show ownership of them? “The labour theory is called upon to aid the theory that possession is the root of title; yet it depends for its own success upon the proposition that the possession of self is the root of title to self” (Epstein *ibid.*).

But there does seem to be something to the idea of labour mixing as a way of acquiring title to things when we conceive of it more broadly as a way of *using* something to get something else. Even when we possess ourselves via first come, first serve we can be said to be performing some actions that warrant our having title to ourselves. We got there first, so others who arrived latter do not get to have title to the things that compose us. This suggests that we need to perform some sort of action in order to acquire title to things. But this does not mean that we need to mix our labour with ourselves in order to have some title to possess ourselves. There may be cases where we do need to mix our labour to acquire external things in order to make them ours, but if the world is already pretty much owned, which it in fact is, then we do not need to account for ownership in terms of us mixing our labour with ourselves to acquire the title to ourselves.

This also suggests that basic rights to our selves and property rights are rights to take courses of action and to be protected against others’ actions. A property right to possess our selves or something else is not simply a “right which a person has with respect to a specific thing” (Gibbard 1976, 77). A right of property is a right one has to take a certain course of action, not just to possess a thing. The reason why this is so is because our basic right to possess ourselves that we derive from first come first serve is about our ability to secure and use a certain thing, which is basically taking a course of action. So the basic right is to take a course of action *in order to secure or use* one’s possession(s).

The premise that in some fundamental sense one is a self-possessor and therefore ought to have self-discretion may not be thought to lead very far if being a self-possessor is a normative dead end. For instance, Rawls has argued that since one is not responsible for one's natural abilities—or what one gets from the lottery of nature—one does not deserve praise or blame for whatever one acquires from these abilities, nor does one necessarily deserve what follows from those talents; hence, we ought to think of our talents as potential collective property, not as necessarily belonging to us. For Rawls the following is one of the 'fixed points of our considered moral judgement' that,

no one deserves his place in the distribution of natural endowments, any more than one deserves one's initial starting place in society. The assertion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is equally problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit. The notion of desert seems not to apply to these cases (Rawls 1971, 104).

This argument is called the transitivity of non-desert: (Narveson 2002, 145; Rawls 1971, 104). Rawls uses the idea of the transitivity of non-desert to shore up his idea that agents/contractors in the original position, from behind a veil of ignorance will, in attempting to secure the best deal they can for themselves, be led to conclude that since they could turn out to be the pauper rather than the billionaire they ought to adopt a principle giving equal consideration to all (Rowlands 1998, 57). Even though we ought to take an equal shares or equal consideration principle as an assertion regarding the common factor that grounds all

of our rights, it does not follow that we cannot have rights that protect our ability to utilize our unequal abilities to acquire unequal rewards.¹⁹ I will argue that Rawls' claim that we could not have a theory of rights that allows us a right to deserve something based on an innate characteristic is false.

Rawls' argument from the transitivity of nondesert rests upon the idea that in order to deserve something one's entitlement must follow from some prior entitlement. The strength of desert is only as strong as the basis from whence it comes; hence, if one does not deserve one's natural abilities then one cannot be said to deserve what follows from them. If one just ended up with a certain self, then one cannot be said to deserve that self either. We can now interpret the Rawlsian argument as follows:²⁰

1. If P1 deserves X it is also necessary that he deserve the cause of X (F).
2. Only properties that are not innate can transfer desert.
3. P1 doesn't deserve the cause of X because F is an innate ability.
4. Therefore, P1 doesn't necessarily deserve X (by transitivity of nondesert).
5. Only properties that are deserved can be rightfully possessed.
6. One does not deserve one's innate properties.
7. Therefore, one cannot rightfully possess one's innate properties.
8. (Therefore, the Equal Shares position applies to such properties).

¹⁹ Rawls has two basic reasons for denying the concept of desert as underlying justice—nondesert and also the further claim that no one really finds desert a plausible candidate for what counts as just distribution.

²⁰ Ignoring the possibility that having F1 may not be sufficient to acquire X, since we are assuming for argument's sake it is. I believe contrary to Rawls that there is not a simple causal link here between having F1 and getting X—don't we also say that so and so has worked hard to get X? And is this not also a reason for moral commendation? If so, then we may have another reason for rejecting Rawls' claim about the transitivity of nondesert.

This argument seems to capture more of the nature of Rawls' argument by explicitly stating how he sees the idea of nondesert affecting one's natural/ innate abilities.^{21 22} (1-4) is about the inability of desert to transfer from undeserved properties to other things that those properties have been used to make or acquire. (5-8) are about the normative implications of nondesert. In order to overcome the claim that our innate properties that compose ourselves—really ourselves—are open to the moral default position, I will argue that these properties that compose our identities can be said to be rightfully possessed even though they are innate and not deserved by some prior claim about desert. If one can rightfully possess oneself without deserving oneself (due to some prior transference of desert), then one bypasses the need to give an argument for rightful possession in terms that would be open to Rawls' charge. I will argue that there are good reasons for thinking that we are certainly self-possessors and that our identities are something we possess in a necessary way; but also I argue that when we think in terms of first possession we can see how we 'deserve' ourselves without having to claim that the 'desert' comes from something more than being the first to acquire our natural talents.

Of course, at the level of our selves, there can be no such prior transference of desert because one has done nothing to acquire the properties that make one's self up. It is true that after awhile one has done certain things to improve (or unimprove) oneself, but what we are talking about here is the biological basis that composes us—all of that which we come into this world with. These factors/ properties may be malleable to an extent but

²¹ Rawls claims that the natural distribution of things "is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts" (Rawls 1971, 81). Of course, then, it is debatable whether the natural order of things is really a moral problem at all. But it could still be if one formulates an argument that we commit an injustice if we fail to correct some state of affairs that is unjust (Schmidtz 2005, 166). But why is such a state of affairs unjust to begin with?

²² And the question for Rawls is: "How would we get from the premise that talents are undeserved to the conclusion that talents are community property [viz., open to distribution]?" (Schmidtz 2005, 164 n. 45).

they either exist as part of us or they do not. The properties that compose us are not open for debate, as if they could be imagined away or separated from who we are by an abstract use of the mind. Since they are a necessary basis for all the other things that have practical significance for us, they ought to be seen as being important for that reason. But beside their importance to us we can see their necessity: None of us *really could have* chosen to be different from who we in fact are. We may wish we were different, had different abilities, but none of this is sufficient to show that we do not have the identities as persons we in fact have. To paraphrase Kripke, it is a discovery to find that one's self is composed of certain qualities and a certain historical background. If we found a person who resembled me in every respect would we say that that person is me, or that I did not have to be the person that I am? No. We would instead say that there is someone who resembles me in many respects but is not me (Kripke 1980, 128). So, if we can hold that our identities are what make us who we are, we do not need to entertain claims to the contrary that since we could have been different we cannot be said to possess ourselves in any necessary sense²³.

Of course the counter charge could be that one has not yet shown that one's identity is something that *had* to be the way it is, hence isn't it premature to argue that anyone else needs to see one's abilities as something that could not just as much have been their own? But here one needs to distinguish between showing that one's identity could not have been different, and showing that one's identity just is composed of these certain attributes. In order for one to have the identity one does it is not necessary to show that one's identity

²³ In the original *Theory of Justice* Rawls did not seem to take self-ownership seriously, or at least it was not the reason why the separateness of agents was to be taken seriously. But his later works do have something to say about self-ownership—"What is regarded as a common asset is the distribution of native endowments and not our native endowments *per se*. It is not as if society owned individuals' endowments taken separately, looking at individuals one by one. To the contrary, the question of the ownership of endowments does not arise, and should it arise it is the persons themselves that own their endowments" (Rawls 2001).

could not have been different. If one takes the Principle of Sufficient Reason too literally, then one would have to show that each thing that exists has not just an efficient, causal reason for why it exists, but also a teleological reason for why it exists the way it does rather than as something else. For some people a purely causal explanation of why the universe exists the way it does is never sufficient since, if one accepts the principle of sufficient reason, one must give an explanation of why *this* universe exists rather than another one. Similarly, it seems that the desire for an explanation of why *I* had to exist this way and not some other way is due to a hangover from an outdated metaphysics. At this level it seems that we can just ask why this question makes sense. If I have explained why I have the identity I do, then it is up to someone else to show me why I am mistaken about this identity; but what is not acceptable is to ask me why I *had* to be the way I am, as if we can appeal to some grand design to tell us why I am this way and someone else that way.

But the telling point against the charge that we do not deserve ourselves can be found when we look at the idea of first come, first served and finders, keepers. Contrary to Rawls, we do not start out in a world where person's abilities are up for debate because we enter a world where we, and others, are already in possession of ourselves. Rather than the rule of equal shares being the moral default position, we ought to think of first come, first served as the moral default position in a world where agents already possess themselves. If this is true then we will be more sympathetic to the following kind of position: "If you walk into the cafeteria carrying 2 apples, we do not begin to discuss how to allocate them. If the apples are in your hand, their allocation normally is not our business" (Schmidtz 2002, 256). Similarly, when we find that we come into the world where people are already in possession of themselves, the allocation of their abilities is normally not any of our

business. The fact that they possess these abilities to begin with and are the first and only possessors of their abilities is sufficient to cast doubt on the idea that equal shares ought to be the moral default position. In order to make the counter argument against first possession one must not just appeal to the claim that one's natural talents are 'undeserved', but also that they are some how harmful to others hence one doesn't have reason to keep what one has found. If there is no good reason or right to the contrary, agents ought to keep possession of their natural abilities; and from first come, first served, we can see that finders, keepers implies that one has title to what one possesses.

The argument that agents must be made to share or give up their natural abilities seems to presuppose that one's having F excludes someone else's having F, or enjoying the benefits of F. Regarding the latter claim, the great thing about a society in which agents trade with one another is that others will not be excluded from the benefits of F. Agents may engage in trade with one another and share the innate abilities they were born with. As for the former claim, it is not true that my having F means that someone else has been excluded from having F. One agent's having the ability to be musical does not exclude anyone else's possessing this same ability. Sometimes the *exercise* of these innate abilities may be impossible in certain circumstances, but that is another point. What needs to be emphasized is that if there is no presumption that one's having F has meant to necessarily exclude anyone else's benefiting from F, and that having F is not to exclude anyone else's having F, then we ought to take the moral default position to be first come, first served when we assess how we are to treat other agents and their capabilities; this is because the claim for dividing by equal shares has not been met because agents ought to be seen as first

possessors of themselves, hence their abilities are directly under their own control not anyone else's.

The upshot of this counter-argument against Rawls is that we are now back in the position of dealing with the question why “the goods you want to distribute are yours to distribute”, not simply whether the distribution itself can be done in some *fair* way? (Schmidtz 2005, 164). The question of justice can still be framed in terms of whether the goods to be distributed are open to be distributed. First possession has been justified as a way that agents will see themselves morally—as beings who rightfully possess themselves prior to any one else's claims on them. This argument has not justified first possession because of the consequences of a person having a right to being a self-possessor—viz., that one must leave enough and as good for others. But this is not to say that First Possession does not have favourable moral effects.

First Possession also has the favourable effects of recognizing agents' senses of integrity and justice. Rawls' argument is problematic because the conclusion he draws from the transitivity of non-desert cuts against the integrity and justice objections that provide intuitive support for rights. While Rawls is known for his rejection of Utilitarianism, it is interesting to note that his transitivity argument upholds the agent-neutralism and consequentialist objections traditionally associated with the doctrine. As Mack argues, the integrity objection emphasizes the fact that individuals have a general interest in promoting their own good; being held back from pursuing/ promoting one's good tends to ruin one's sense of integrity (Mack 1993, 103-4). One must believe that there is some valid reason that he can devote himself to pursuing his own good contrary to being made an instrument for others' ends (Mack 1993, 106). Furthermore, moral individualism

states that each agent's good is equally ultimate because of its status as plural and objectively good. So, as Mack argues, an account of restraints must account for how an agent perceives the asymmetry between his perception of the rightness of pursuing his own good and other's use of him to promote their life plans (Mack *ibid.*). The idea is that a stable condition of allegiance to one's values means one must see one's own values as morally asymmetrical to values held by others. Each agent must, to have integrity, reject a view of his self as a means to other's ends.²⁴

But Rawls' argument would make an agent believe that he had no good reason to have allegiance to his values, or his integrity, because he could not truly claim that his values are in a significant way morally asymmetrical to others' values. If one is denied the idea that one's identity—the agent-relative aspect of one's values—may legitimately give one reason for having values that are in a significant way morally asymmetrical to others' then one also denies that one has reason to take one's values seriously—viz., to be dedicated to them (cf. Trigg 1973).

So Rawls' introduction of radical contingency into one's concept of identity also introduces skepticism into the idea that one's values are special to oneself and asymmetrical with others' because they are one's own. As argued, this idea of moral asymmetry gives an agent some idea of what conduct towards him is right and that his values are not open to tradeoffs based on some attempt to interpersonally weight or compare values. An agent must have some reason to believe that stable interpersonal principles protect his choices over himself versus the choices others would use him for. But

²⁴ Cf. Michael Walzer on the egalitarian tendency to deny desert: "But this is an odd argument, for while its purpose is to leave us with persons of equal entitlement, it is hard to see that it leaves us with *persons* at all. How are we to conceive of these men and women once we have come to view their capacities and achievements as accidental accessories, like hats and coats they just happen to be wearing? How, indeed, are they to conceive of themselves?" (Walzer 1983, 260).

Rawls' argument seems to reopen the door to such tradeoffs: An agent does not necessarily deserve the benefits that flow from his abilities because he does not necessarily deserve those abilities in the first place. So one's abilities are open for redistribution according to some notion of what is impersonally best. This means that one's abilities, one's very identity, is not under one's control and that one's integrity does not matter to others or oneself.

If first possession functions as a reason for accepting prerogatives—as a reason for rejecting claims that we must abandon our own good and pursue the good of others, or even some impersonal good—then restrictions are based in something that all agents have reason to pursue, or value implicitly. And the norms that are directly related to the characteristic of first possession are those of that allow one to exercise discretion over oneself—self-control and self-direction.

Finally, it might be thought that providing an answer to the question of how we possess ourselves is not also to provide an answer to how we can own external things. Often this question revolves around discussions of initial acquisition and provisos regarding leaving as much and as good for others. But here I want to suggest that the question of initial acquisition—how we come to own unowned things—is not truly all that informative. The reason being that we come into a world that is for the most part already possessed/ owned. I do not homestead on the land for my first house, keeping away thieves, rather I contract to buy it from someone who already owns it. Maybe the land has been in his family for generations. This suggests that the problem of initial acquisition might only have some import for how we come to possess ourselves. But even though we need not worry about the justice of original acquisition, I take it that Nozick's (1974, 150-3) sketch

of justice in transfer is still pertinent: so that anyone who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding.²⁵

So, since we have a theory here about how it is we come to possess things to begin with, we also have a reason for how we can come to possess things external to us. The basic reason is that since I have a right to control myself and take certain actions to make my life better, I also have the right to possess things that I can bargain for from others. Even if I had to show how it is that I can justifiably possess some external previously unowned thing, I could appeal to the fact that if I can come to own myself—a thing I didn't do anything to 'deserve'—then I can also justify owning external things by the fact that I was the first comer who happened to get the thing (Feser 2005, 66). The burden of proof seems not to be on the person who has first found and possessed the thing, but the latecomer who wishes to dispute the first's ownership. The latecomer, to make his case, could only appeal to his having actual possession of the thing in question at some point in the past.

Morality might not always require adherence to the moral default position of equal shares. When we find a piece of pie lying on the floor, morality seems to require that to be fair the pie be divided up equally. This distribution of the pie seems to capture the fact that we found it together and no one has a prior claim to it. It also might seem to some that if we just 'find' ourselves in possession of certain natural abilities, our natural abilities ought to be divided up equally. The arguments in this section were meant to show that the moral default of equal shares does not apply to possession of our selves, of our natural abilities,

²⁵ He says the principle of justice in transfer is as follows: "A transfer from A to – is just as long as A and – both consent to the transfer from A to – and neither is coerced" (Nozick 1974, 115).

because these abilities are connected to our being the moral agents we are. And the better rule to adopt in contexts where agents are already in possession of their abilities and no one else seems to have a valid claim of these abilities is finders, keepers. Possession of something gives rise to the presumption that one has a title to that thing. First come, first serve is used to show that others do not have good reason to lay claim to the abilities one possesses first. If we possess title to our abilities then this means that others face restriction on how they may use us to promote their versions of the good life.

§5.3 *Conclusion.* I have already noted how my theory differs from Mack's in the fact that it tries to avoid the dualism that Mack's entails. My theory attempts to base rights on a common agent-relative concern that underlies all of our values. This means my theory is not concerned with showing why agents will have reason to respect other's rights because they have an intuition of others as ends in themselves. My argument is that since we all wish to continue to promote our good, and it is a wise choice to do what will promote our good, agents will have reason to abide by rights. I also argued that agents will find it acceptable to respect others' right to be self-possessors because this is a factor we all need in order to make a good life for ourselves. By having this right protected, we will be better able to make good lives for ourselves and promote our own good. This is an argument for rights based upon agents' agent-relative good—or agent well being view of rights—that makes respecting rights dependent upon whether doing it is conducive to our own good; but I have argued that rights can still recognize the moral status of others because agents have principled reasons to change their behaviour towards others even in cases where they could do better by not abiding by them. It may sound paradoxical to say that agents will do

this when they could benefit by not doing so, but the oddness disappears when we see that agents have more reason to abide by rights because this strategy better serves their good than does one of picking and choosing when to abide by rights. How a theory of rights can be made to be coherent, and what is the threshold of rights in the face of counter moral concerns, is the subject of the next chapter.

Chapter Six:

Compossibility and Rights.

§ 6.0 Introduction.

§ 6.1 Specifying Rights and Thresholds.

§ 6.2 Conclusion.

§6.0 *Introduction.* The last chapter sought to show how agents have reason to abide by a system of rights that protected their first and second prerogatives. But even if this argument was successful if the moral basis of rights leads to rights that are inherently conflictual, or noncompossible, then the theory will fail to produce a coherent system of rights. Rights are derived from restrictions that agents want to have in order to protect and promote their own good; also agents will be willing to abide by others' rights to promote their own good because, since other people can interfere with our good, to secure from others our own benefit we are willing to abide by rights in a principled way that protect their ability to promote their own good. The derivation of basic rights based upon our own agent-relative good was the main task of this thesis. This chapter asks a different but related question: How do our rights fit together?

This chapter puts forward some reasonable but partial answers to the following questions: How we can specify rights so they are not obviously in conflict? What are the thresholds of rights? The idea of compossibility is this: “All rights are compossible just when all rights can be exercised at the same time, that is, that the action of one person exercising a right does not make impossible the exercise of rights by others” (Gorman 2003, 123). We will examine whether rights can be compossible, or if the various duties that rights imply might call for actions that conflict. I argue that while we would like it to be the case that rights are non-conflictual, we see that rights often entail duties that cannot be carried out at the same time. This means that rights conflict and so we need some way external to the system of rights to resolve these disputes.

Also we will look at whether rights have thresholds—“...possible countervailing considerations that, once they reach a certain threshold, overcome the right” (Edmundson 2004, 147). While rights may hold in everyday circumstances, it seems to be the case that when we could prevent a very large number of rights violations by violating one or a few rights, it is reasonable to do this. I argue that rights can be violated in some emergency situations if that situation poses a serious and grave threat to many rights holders. We can say that an emergency situation is when a threshold has been reached because we cannot save ourselves by following rights—either because many more people will be killed by respecting rights, or because all will be killed by respecting rights. The fact that a threshold may exist does not mean we can violate someone’s rights at any time to prevent a greater number of rights violations from happening. But the threshold’s existence does mean that when a great number of our rights that are in jeopardy, we are warranted in taking action to

prevent our rights being violated even if that means we need to violate/ infringe someone else's rights.

§6.2 *Specifying Rights and Thresholds*. To delve into the question of how we can specify compossible rights, first take Benn's example of the pebble-splitter who sits on the beach and splits pebbles until another person comes and tries to stop his actions:

Suppose Betty were to prevent Alan from splitting pebbles by handcuffing him or removing all the pebbles within reach. Alan could now quite properly demand a justification from Betty, and a *tu quoque* reply from her that he, on his side had not offered her a justification for splitting pebbles, would not meet the case, for Alan's pebble splitting had done nothing to interfere with Betty's actions. The burden of justification falls on the interferer, not on the person interfered with. So while Alan might properly resent Betty's interference, Betty has no ground for complaint against Alan (in Gaus 1999, 118).

Our intuition is that Betty is in the wrong since Alan was just minding his own business before being accosted. The burden of proof falls upon the person who has *acted* to interfere with another agent. Yet knowing when we are and are not wrongfully interfering with others will depend upon us knowing what our rights are. If Alan appeals to his rights as the reason why Betty is wrong, then he is appealing to the heavy artillery of moral discourse. If Alan has a right to certain treatment, then Betty *must* comply, as Lomasky says (Lomasky 1987, 82). An appeal to rights is meant to sort out the situation and tell us why she is

wrong. But solving disputes by appealing to rights does not always give us a clear answer—for instance, what if Betty claims that Allan is violating her rights because he is making noise on his part of the beach? Does Allan's, or Betty's right take precedence here? This question gets into the problem of seeing how rights are compossible and what thresholds rights have.

Imagine you are out hiking one night on a mountain when a blizzard hits. You know that if you stay outside you will surely die. Looking around you see a small cabin that has a 'do not enter sign' on it. You decide that even though the cabin belongs to someone else, you will break down the door and spend the night there weathering the storm. You survive the blizzard by eating the food inside the cabin and by using the furniture inside to light a small fire to keep warm. Before leaving the next day, you find that the cabin's owner has found out what you've been up to and demands an explanation. You believe that your survival was at stake and so you were justified and exercised a right to break into the cabin. The owner disagrees and believes that his property rights have been violated. Here it seems that we have a conflict of rights—the owner's property right to control the cabin versus your right to take actions to keep yourself alive.

One solution is to adopt specificationism: "The specificationist holds that each right is defined by an elaborate set of qualifications that specify when it does and does not apply: a set of qualifications that define rights' 'space'" (Wenar 2005). So in every case where there is a rights dispute, there is only one set of rights—belonging to a person or organization—that will take precedence. Russ Shafer-Landau's argues that we can create the following argument from the story (Shafer-Landau 1995, 209):

1. The cabin owner has an exclusive right to the use of the cabin.

2. Therefore all others have a duty not to use the cabin without the owner's permission.
3. Therefore it is impermissible for anyone else to use the cabin without the owner's permission.
4. But it is permissible for the hiker to use the cabin without permission.

On the face of it one cannot hold all of these claims to be true without also holding a contradiction. The problem here is that even if we do not think that the hiker has a right to break into the cabin, we also think that it is permissible for him to do so. And this means that the right one had to one's property (1) is not as absolute as one thought. This creates a problem for specifying the extent of one's property rights. Shafer-Landau notes that there are four ways one might respond to this argument: (a) deny that any rights exist, which is the utilitarian position. This is not an option here. Or (b) we might argue that the right is merely prima facie, so that the duty in (2) is also merely prima facie. This weakens rights unacceptably, it seems. Or (c) we might claim that the right is real but that in certain contexts it can be infringed—this is the infringement view, held by Thomson and Feinberg. Or (d) we might reject (4), so the hiker's actions were not morally permissible. Shafer-Landau argues that the latter claim is often thought to be what specificationism requires, since it holds that all moral infringements are really moral violations. But this view seems morally odious. He notes that even Nozick holds that our side-constraints may be overridden in certain emergency circumstances (Nozick 1974, 29-30).

Shafer-Landau argues that we do not need to abandon (4) or (1) if we make sure that (1) is specified properly. "On this view, there is no right to life *simpliciter*, but rather a right not to be killed except in circumstances A, B, C, etc" (Shafer-Landau 1995, 210). A

more concrete example might be the Lockean Proviso which states that one has a right to acquire what one wants, so long as one leaves as much and as good for others. This specifies a boundary to our right to acquire things. This does not mean that rights are not absolute because they are held with some exceptions. But if it is permissible to sometimes infringe or violate another's rights, then it does mean that the owner's right to the cabin exists with some specification of when it can be permissible to infringe it. This means that rights have some exceptions that are implicit in them—say, that it is OK to infringe another's right to save a child who is drowning on his property. The need to save oneself or another would seem to be reasonable exceptions to infringe other's property rights.

It is not clear to me whether specificationism can remove rights disputes, or whether rights disputes will remain. For instance, is the above case a real case of rights conflict or is it a case in which the conflict can be removed by more clearly specifying the domain of rights? The case might be a real case of intractable conflicting rights if there is reason for you to apologize or pay compensation to the cabin owner for the damage you caused his cabin. If you really had the right to do what you did to save yourself, then there shouldn't be any reason to say that you owe him an apology or compensation because your right trumped, or cancelled out, his. Yet, in such a case your right to save yourself makes it permissible to 'infringe' the cabin owner's right, but this does not mean that you violate the owner's right. But infringement doesn't mean that you do not have to pay him some form of compensation for having damaged his cabin. If one can infringe a right, but still owe compensation, then it does seem like there are conflicts of rights that cannot be clearly specified out of existence.

So, it seems that the specificationist has a hard job ahead of him because he must somehow show us how rights can be fully specified. Without such a case, it seems that rights may still conflict. But since we do not yet know all the ways we can interact with each other, this task seems impossible. It seems most plausible to claim that rights can sometimes conflict with each other when the actions needed to carry them out are non-compossible. This would make rights non-compossible in certain cases. This means that we will need an arbitrator to settle disputes over rights. The fact that we cannot have a system of rights that can be fully specified should not scare us; it just means that in the real world we run into many problems that cannot be settled before looking at all the facts of the case.

So, what implications does this theory have for the claim that we all have robust rights to continue to be self-possessors? It was argued last chapter that we have strong rights to take actions that allows us to continue to be self-possessors. It was claimed that we all have these rights based on our being the first possessors of ourselves, and that we need not appeal to a rule like the Lockean proviso for reason why we have the rights we do. Our right to be self-possessors is not based on our having to leave as much and as good of our qualities for others. This seems to prescribe pretty strong rights to self-possession.

Yet we can see the need for the ability to specify when rights hold and when they do not. The right to take actions to continue to be a self-possessor entails others have duties not to interfere with us, except in circumstances when our actions will interfere with their ability to be self-possessors. My point here is not really to show how rights solve disputes, but to show whether the way in which they address disputes is value-based or not.

Mack holds that rights must be a dimension of morality separate from agent's interests and values in order for them to settle disputes in a fair and impartial manner. This

is not surprising for Mack given his defense of the coordinate view of rights that made rights based upon a separate moral obligation agents have. Mack states that an explanation of how rights divide up moral space must be as follows: “P’s right that S perform as she has promised is not grounded on the value for P or for S or for the World at large of S’s so acting or of P’s requiring S to act” (Mack 2001, 92). Reasons for respecting rights must be distinct and different from value-based reasons for acting. We have a dispute when more than one agent has a reason for wanting an agent to do certain things with himself, or with things that he considers his. So, if agent P favours the use of his index finger to scratch his nose, Q wants him to use it to flavour the pudding he is cooking, and R wants him to use it to help produce medicine for needy people, then we have a dispute over what P should do with his finger (Mack 2001, 93). For Mack there is no way to solve this dispute by turning to some interpersonally valid ordering of such actions. “There is no privileged impersonal measure of value by which the ‘moral quality’ of these competing actions can be compared and ranked” (Mack 2001, 94). Mack claims that rights tell us not which action is ranked morally higher, but simply who has the *authority* to dispose of the action in question. So, for Mack, P’s use of his finger is always ‘favoured’ by morality because P is the person who has the power to decide what happens to his finger.

While I certainly agree with the conclusion that P is the one who has jurisdiction over the use of his finger, it does not seem plausible to hold that rights are not value-based if we have based rights on agent-relative values. Mack was worried that agent-relative reasons will not be able to provide a basis for rights as moral side constraints. We have seen last chapter why the theory of side constraints based on dual sources of moral obligation seems implausible. But we also can see that the argument that rights are not

based on some kind of value-based reasons is implausible too. It might be true that we do not check the moral status of what P, Q and R wish to do with P's finger in order to decide who has a right over its use. The reason for this is that once we have derived and specified P's right to his finger as a right that P has, we are also saying that P does not need to explain or justify his use of it to others—unless, of course, he intends to interfere with others' rights. Because P's right to his finger is tied to his needing it for his own life, this means that others do not have a say in how he uses it. This holds even though other's use of it might seem to have a higher moral quality.

Yet, having based rights on agent-relative reasons, we do not have to claim like Mack that rights are not based on any kind of agent-relative value consideration. Since agents want their rights because it helps them achieve their own good, we can say that they have a value-based reason for respecting rights. So, when Mack states that P's rights that S perform as she has promised isn't grounded on the value for P or for S of S's having to act that way, we must disagree. As we saw in chapter four, S might have the duty to abide by P's right, but he won't do it because he values what P's right protects. Rather we saw that the motivating reason why S will abide by P's right is that doing so will be in S's best interest.

This might seem to make rights too dependent upon the duty-holder's desires as Mack thinks. But basing rights upon a characteristic like self-possession gives us pretty strong individual rights. The reason is that we all have reason to see why we need a right to have our being a first possessor protected. We need a protection over the actions required to keep ourselves able to promote our good. This kind of right is needed by all of us. It is the kind of equal basic right that we will all agree to accept. And, it must be remembered,

people have reason to adopt a policy or rule to abide by others rights, and not just abide by rights on a case-by-case basis. Given this argument, then everyone needs to change their actions so that they abide by others' rights. The fact that people will act in a principled way, then, guarantees the existence of a system of rights. Because people are willing to abide by others' rights in a principled way, the system of rights can be instituted. This means the system will take on a life of its own, with enforcement making sure everyone abides by rights. But even though enforcement is there to make sure people abide by rights, we should not forget the fact that people choose to abide by rights in a principled way.

Part of the problem with solving rights disputes is that rights are complicated entities. As Waldron argues, there might be many different duties that an interest can generate because there are many different ways an interest can be served or disserved (Waldron 1998, 212).²⁶ This means that a right might give rise to many different duties. A right to free speech might generate a duty not to impose censorship, a duty to protect those who speak in public from others who disagree, a duty to establish rules for public speaking that eliminate conflict from different speakers, etc. And if this is the case, then we should not be surprised that all these different duties that a right might generate could conflict. Waldron says that once we see this as being the case then talk about trade offs might seem less problematic, more a necessity. Since all of our possible duties cannot be compossible, we will have to face the fact that rights might not form a compossible system and, so, might require some external method of resolving rights disputes when they occur.

But how are we to resolve conflicts amongst rights holders by looking at trade offs?

Waldron argues that we need to be able to establish priorities amongst rights. Take the

²⁶ Waldron talks only about interest-based rights. I would add that this point also seems to hold for choice rights. We might have interest rights that are basically choices, and also it might be the case that our choices are also interests. So, it's not clear that we can always separate choices from interests.

Nazis who want to make hateful speeches against another group, the communists (Waldron 1998, 222-3). The Nazis, it seems, want to incite people to invade the communist's meetings and prevent the communists from meeting freely. We seem to have a conflict between the Nazi's right to freedom of speech and the Communist's right to freedom of speech. Waldron says one way to solve this dispute, that does not turn to a utilitarian calculation of who receives the most pleasure, is to look "in terms of each person's interest in participating on equal terms in a form of public life in which all may speak their minds" (Waldron 1998, 223). Waldron says that on this view, the dispute between rights is more easily resolved:

To count as a genuine exercise of free speech, a person's contribution must be related to that of his opponent in a way that makes room for them both. Though they claim to be exercising that right, the Nazi's speeches do not have this character. The speeches they claim the right to make are calculated to bring an end to the form of life in relation to which the idea of free speech is conceived. We may ban their speeches, therefore, not because we can necessarily safeguard more rights by doing so, but because in their content and tendency the Nazis' speeches are incompatible with the very idea of the right they are asserting (Waldron *ibid*).

This is a way of sometimes establishing which right is to have lexical priority in a situation where rights seem to conflict. Waldron says that it may not always work, so we may sometimes just have to weight the values in question and act on those duties that are correlated with the higher valued right. Then we act on the duties that are most likely to

protect the interests we think are most important. But he thinks that the lexical priority argument, or qualitative argument, often is better to use than a quantitative approach because it helps to show why rights have priorities over lesser moral concerns. The lexical priority argument shows why rights are resistant to trade offs while the quantitative argument would hold that if the Nazis were greater in number then, because more of their rights are affected, their rights should take precedence over the Communists’.

Waldron’s essay neatly emphasizes that we can have two ways of resolving disputes. While we cannot fully decide between the lexical priority argument and the weighting of values or rights argument, we can see that both have their merits and problems. The lexical argument assumes that we can have some way of weighting rights by weighting the values that underlie them. But if value is agent-relative then such an impersonal standard that would be acceptable to all doesn’t seem feasible. The fact that P wants to use his finger to do something that everyone else thinks is trivial doesn’t mean that P shouldn’t have the right to do it. We have a right to do what’s ‘wrong’, and so the Nazis also have such a right to promote a way of life that others object to. While it’s not clear that the Nazis are caught in a performative contradiction by doing something they implicitly deny should be done, what they are doing is inciting their followers to cause bodily harm to others. This seems to be the real problem here, because it is the Communists’ right to promote their own good that is in jeopardy. So, if we need to say that there is a ‘lexical priority’ of rights, it is the security and safety of everyone that precedes others’ ability to express themselves. It might have seemed like we had a conflict between two groups’ rights to freedom of speech; but the actual conflict is when one group attempts to suppress the other group using force.

I think we can often rely on possession to show whose rights should take precedence. In the case of the Nazis and the Communists we can see that if we think in terms of rights to self-possession that the Communists will have their right to bodily protection violated by the Nazis. The appeal to the right to continue to be a self-possessor and the duty not to do what will interfere with others' exercising this right means that the Nazi's right to freedom of speech should be overridden when they use it to violate other's rights. Usually, then, one's right to continue to be a self-possessor has lexical priority over other kinds of rights. Possession has a heavy weighting—maybe 9/10 of the law—because of how greatly it is needed by us to live our own good lives. But there are times when possession is not the only consideration that matters.

There might be times when equal shares is the preferred moral default position, and so this might generate a *prima facie* right to an equal share. If we were all travelling together and found some large resource, we would think it inappropriate if someone tried to claim this resource all for himself. Bruce Ackerman uses the thought experiment about a spaceship orbiting a newly discovered planet containing the desirable resource manna (in Schmitz 2006, 152). Here we can agree that people should have a right to an equal share of the resource because they all arrive at the resource at the same time. But even though such a right is possible under such circumstances, we need to emphasize that we come into the world all at different times and so the default position we will appeal to is first come first served. The reason is that in the real world “there are no unowned goods sitting on a table awaiting fair division. The goods have already been claimed by others, and are at least partly the products of lifetimes of work” (Schmitz 2006, 153). The fact that first come first served is the moral default position we usually appeal to means that when we are

settling rights disputes we need to make sure that we are weighting our decisions in favour of this default position. The real world does not usually contain manna, or situations where we all come to the table at the same time to divide things up, so we must make sure that how we decide rights disputes is reflective of the fact that our past histories matter to us.

It seems that law courts often do turn to possession to settle disputes or to lay criminal charges. Common law courts recognize actual and constructive possession of things. If someone has actual, or factual, possession of an item he does so because he is actually in physical contact with the item. If you are wearing a coat then you possess your coat because of its physical proximity to you. If your wallet is in your coat, then you possess it too. But one need not only be in physical contact with something to possess it. A set of facts might clearly indicate that you possess something even though you have no physical contact with it. Constructive possession, or possession in law, takes into account that when a person has knowledge of something and the ability to control it, then he can be said to possess it even though he is not in physical contact with it (*United States v. Deroose*, 74 F. 3d 1177 [11th Cir. 1996]). For instance, if one puts papers into a safety deposit box, because one has knowledge over them and can exercise control over them, then one can be said to be the possessor of them. Courts also recognize this sort of possession in cases of criminal possession. Possession of drugs has been made criminal. The law recognizes that even though you may give your drugs to someone else to hold, since you have knowledge of them and also control over what happens to them, you have possession of them even though they are not in your custody.

Often common law courts decide cases by looking at who has possession of something. If someone has actual or constructive possession of an item in dispute, then the

case must be made against him that he possesses that item illegally. Usually just saying that he ought not to have it because someone else could do something better with it is not sufficient to overcome his right to possess it. There may be some cases where this happens—such as in ‘takings’ cases where the government appropriates someone else’s property (and compensates him enough) because the property is needed for some public use. If the government can do this, then it does not seem that possession is 10/10 of the law. For instance, it has been argued that taxation that might be needed to support the enforcement of the system of rights. If rights are necessary to our promoting our good, and the only way to effectively support a system of rights is via taxation, then people ought to be willing to pay taxes. Some may not want to pay taxes, but since they receive the benefits of the system of enforcement, they can be forcibly taxed. If this kind of argument works—and it’s disputable that it does—then forcibly taking away some funds from people would be justified. This means that their possessions are liable to be used to support the government and the system of rights and so their right to possess what they have is not without limits.

Also, we need to recognize that what we are looking at here is moral philosophy, not legal theory. So, even if courts do not look at possession to solve cases this may not matter if what we are arguing over here is the moral basis of rights. We cannot appeal to the law itself to justify why we have basic rights, or why violating them is illegal; rather we must look to moral theory to show us why we have basic rights and why certain courses of action are illegal because they are immoral. This is not to say that looking at why the law makes the distinctions it does cannot inform us about why our rights are the way they are. Since the law deals with many real world cases, it may have over time developed a much

more fine tuned analysis of possession than philosophers have. But this does not mean that there is not a moral basis for possession that can only be explained by moral philosophy. Moral philosophy can be used to explain how the law does work, but it can also try to explain why we ought to have certain rights and why the law ought to recognize those rights. Surely the moral basis for rights will tell us what sort of rights we have, and what sort of ways of settling disputes is morally justified.

In terms of thresholds we might wonder how strong our rights are and if they protect us against people being made the means to others' ends. We have seen that we will have principled reasons to abide by rights because of the idea that it is a wise choice to act on a principle protecting others' right to continue to be self-possessors. This guarantees people will have their rights protected in most ordinary circumstances. These rights can be thought to be robust because of the duty bearers' willingness to abide by them. Yet, if our willingness to abide by rights is based upon their being conducive to our own good, especially our survival, what happens when our survival is clearly in doubt? Is it reasonable to expect that we do not have to abide by the right?

One case that is usually brought up as an example of an emergency situation is a lifeboat situation. What if you were in a lifeboat and could only survive by making sure the lifeboat did not overflow with people. Would it be OK to throw someone overboard, or to keep people from coming on board, in order to make sure the lifeboat stayed afloat. We should make a distinction here between cases where one does not own the boat but has bought a right to sit on one of the lifeboats as part of one's ticket, and those cases where one owns the boat itself. I think in both cases one's rights to possess either the boat or

one's seat in the boat protect one from being thrown out by others. Let's discuss the case where the boat is not owned by anyone first.

We can only violate the rights of those who try to get into the lifeboat because they are the ones who are a threat to us. This puts some limitations on what we can do to people in this situation. If others are not trying to get into the lifeboat it seems reasonable to say that we still have duties not to harm them. But those who try to get into the lifeboat will forfeit their rights because they are trying to do something that will take away our life. Usually, we cannot do something that will kill others unless we are defending ourselves against them. In this case it is not entirely clear whether we are defending ourselves against them because they are trying to harm us, or if we just find that we have no other choice open to us but to kill those who are merely trying to survive. Some of them might be trying to kill us to take our spot, or some might simply be trying to climb aboard without knowing they will cause harm. In either case, the outcome will be the same since they will cause the boat to sink. But given that the situation is described as us having absolute knowledge of how many people can fit into the boat, the necessity of the situation makes it permissible to violate the rights of those who put our lives in peril.

It is interesting to note that what gives the people in the boat moral legitimacy for keeping others out is the idea of first come, first served. In the lifeboat case, first come first served states that those who find themselves in the boat first may keep others out. Of course anyone might jump out and offer his place to a child, but once he finds himself on board first come first served says he need not do so. First come first served will also give their actions legitimacy if there is a hearing after the incident. I think that someone will not be morally responsible for keeping others out of the lifeboat (i.e., allowing them to die) if

he is just protecting his place in the boat. He might not be excused if it's found out that he pulled someone else out and allowed him to drown just to take his place. The reason is that even though basic rights to life were in dispute, it still seems that first come first served holds as a moral default that can be used to assign moral responsibility for what he did in such a situation.

Assuming those left in the water are doomed to die, it is an interesting question here whether the people in the boat who keep out late comers are allowing those in the water to die, or whether they are directly killing them. Part of the plausibility for why it is OK to stop those in the water from boarding is that those in the lifeboat are not really killing them, but are just letting them die. Allowing people to die seems morally better than directly killing them, it seems, because one is not directly causing their deaths. If a doctor pulls the plug on a patient on life support it is said he is not breaking his Hippocratic oath to do no harm because he is not directly killing the patient, at most he just letting nature take its course. The people in the lifeboat are like the doctor in that when they just prevent people from getting into the boat they are not directly killing those in the water—the coldness of the water will be what kills them.

This might make some people feel better about having to let those in the water die, but the claim here is stronger—it's that even when you have to kill someone directly to save your seat you are not morally culpable for doing so. The double effect idea holds that one is not responsible for the killing if one did not intend it, and the killing cannot be a means to the good effect.²⁷ But the stronger claim here is that one is not guilty for defending one's position in the boat even if one *intends* the killing. Surely the killing is

²⁷ Here I am leaving out the idea that the good effect to be achieved must also outweigh bad effects. Here the good effect is not some overall measure of the good, but can only be agent-relative good for the person in question.

intended and it is a means to one's good. The reason why this is legitimate in this case is because one is acting in self-defense. The person trying to board the boat is attempting to kill you, so the only option is to kill him. And what makes legitimate your place in the boat in the first place is first come first served. First come first served gives you the right to keep your place in the boat and it puts a terrible duty on others to respect this right.

In general then we can state the following about this kind of case. One can be excused for allowing others to die, or having to kill them, if the life or death necessity of 'me or them' is apparent. The necessity gives one the moral authority to defend oneself against those who are directly trying to do one harm. Obviously rights have limitations when it comes to self-defense—if someone tries to kill you then you have the right to defend yourself. But if you have taken a place in the lifeboat then you have the right to defend yourself against others and they should have the corresponding duty not to try to take your place. If they do try to take your place, then they are the ones who are trying to violate your claim. If the necessity of the situation is not high—that is, if there is not a 'me or them' situation—then you might be responsible for harm you cause because others' rights still hold against you.

Whether the boat is common property or owned by someone will make a difference to who can get in the boat. We have seen that if the boat is not owned by anyone is particular then whoever gets to it first has a claim to its use. But it seems reasonable to say that he can only take up a seat in the boat and does not get to decide who else can come into the boat, except when newcomers threaten the safety of those already there. But if the boat is owned by someone who has paid for it before the cruise, then this person would be able to decide who can get on board. His ownership rights take precedence over the rights

of others to get on board because he has first possession of the boat. He has the right to ask people who have taken his seat to leave, even if doing so means that those people may die in the water. The fact that others will die is not a countervailing consideration strong enough to override one's rights because of the importance of respecting the system of rights, and the fact that he is not directly responsible for the harm that they will suffer. His exercising his right does not directly cause people to be in the predicament that they are in, so his right ought to hold even though it does not help other get out of their predicament. Also, first possession is not a principle that we should give up or break easily—the reason, of course, is that it protects our lives and our ability to promote our good. In this situation we can see how it protects our lives by stopping others from taking a thing necessary to one's survival.

Of course we should note that just because one has the right to the boat does not mean that one will exclude anyone else from boarding it. In this situation if one did not allow people on board, even though it would be in his right to do so, we would think that he is lacking something that all decent persons need. As Hegel said in this regard: "To have no interest except in one's formal right may be pure obstinacy, often a fitting accompaniment of a cold heart and restricted sympathies. It is uncultured people who insist most on their rights, while noble minds look on other aspects of the thing" (in Waldron 1993, 373). While we may disagree that one is uncultured if one insists upon one's rights, we can agree that people who only care about their rights may be lacking certain human sympathies and virtues they ought to cultivate.

But we might wonder if there are still cases where the consequences of respecting rights were so catastrophic that it might be permissible to violate them in order to produce a

better state of affairs. Of course the first question might be: better for whom? If I can only save a trolley full of people by sacrificing another person's life it is certainly good for the people on the trolley but not the person who has died. On the agent relative view of value one would not be improving the overall good by sacrificing the one person, one would just be making a choice to save a few by killing one. This does not mean that one would be held responsible if the necessity were such that one had to steer the trolley either in such a way that one would be killed or all on board would be killed. But if you were a doctor who chose to sacrifice a patient's life to harvest his organs in order to save 5 other patient's lives, then there does not seem to be the same kind of necessity. The consequences of not violating the rights of the patients with the healthy organs is that 5 other patient's will die; but the one patient does not lose his right to life because there is no real necessity in this situation—one does not have to make a choice like one did in the trolley case.²⁸

The fact that the trolley case is so odd points to the fact that there may not be many real cases where the consequences of respecting rights are so catastrophic that we would do better to violate rights than respect them. The doctor-patient case is not really one of moral necessity because there is still a reasonable choice open to the doctor that allows him not to violate any rights and still be respecting everyone's rights. There is no way to calculate the social good in a utilitarian sense that would allow him to kill one person to save 5 others. Rights protect other people against being used as the means to someone else's end without their consent. Unless we truly have a catastrophic event, we do not have good reason to

²⁸ It might be argued that the doctor *does* need to choose—so if he does nothing, he chooses that the one patient continues to live and the others die. It is true of course that not choosing is still a choice. But here what matters is the fact that he will not be causing the harm to the five patients if he chooses to not kill the one patient and harvest his organs. He would be causing harm and be morally responsible for killing the one patient because he has acted to kill this person. But he cannot really be said to have acted to kill the five patients because he has not directly caused their deaths (cf. Burke, *No Harm*).

violate anyone's rights. Ordinary cases like the doctor and his patients are not cases where the doctor should even think about violating anyone's rights. On the agent-relative theory we just don't have a moral theory that allows us to calculate how much better off we would all be if we killed five to save one.

Some have argued that rights are claims it would be wrong for a government to deny any individual even though it would be in the general interest to do so.²⁹ This way of making rights sound like permissions to do less than what the overall social good calls on us to do gives credence to trolley claims because it gives credence to the idea that there is an overall social good. At best we might say that there are only cases of aggregate interests. It is not really possible to rank and compare agent-relative interests, but it might be possible to say that interests are similar enough to say that it's possible to say that most people have an interest in X. This was the claim for saying that everyone would have a similar interest in having their being a self-possessor protected. But to say that rights are permissions against being made to promote some overall good seems to make rights more susceptible to trolley claims. For why would we think that we have the right not to do what the overall good calls us to do? If it really is what we should do, then why do we have a right not to do it? Luckily, we do not have to answer these problems from the agent-relative perspective, since they are questions for those who want to hold that rights are permissions not to have to promote the agent neutral overall good.

I have argued that in general people's rights survive being overridden by other's welfare. But is it always the case that our rights survive in the face of the numbers of others

²⁹ Dworkin says: "Individual rights are...trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not sufficient justification for denying them what they wish, as individuals, to have or to do, or not sufficient justification for imposing some loss or injury on them" (Dworkin 1978, xi).

who could be affected for the better if our rights could be permissibly overridden? Take the following story:

Imagine that aliens from outer space have forced you to choose between the following two outcomes: (a) one innocent person (of your gender) and yourself survive, the remainder of the human race perishes, and (b) that one innocent person dies, the remainder of the human race survives. You are to indicate your choice by manipulating a switch, which is in position (a). If you do not flip the switch from (a) to (b), six billion people die; if you do flip the switch, one person dies. It is implausible to say that it would be wrong to save the human race at the cost of a single human life. The right of the one not to be killed is not violated but, to borrow an expression, ‘infringed’ by sacrificing him (Edmundson 2004, 147-8).

It might seem that in the trolley case we let ourselves off easy—because it seems wrong to kill one to save 6. But what about to save 6 thousand? 6 billion? At some point the numbers count, so that we must admit that rights have some thresholds, or that “there are possible countervailing considerations that, once they are reach a certain threshold, overcome the right” (Edmundson 2004, 147).

Perhaps it might seem that we will only reach these circumstances in rare cases, like the science fiction one above. But Edmundson suggests that we need to see that most of our rights have thresholds under certain circumstances. This means that rights are ‘defeasible’ because they are open to being defeated under certain conditions. The first amendment of the U.S. constitution guarantees that government won’t make laws that abridge its citizens’

freedom of speech. But this doesn't mean that government cannot make laws that prohibit people from utilizing their right at 3 am to yell poetry from a bullhorn. The U.S. Supreme Court has interpreted the amendment so that states can make sure that free speech happens during a reasonable time, manner and place (Edmundson 2004, 149). This suggests that our right to free speech has a threshold of time, manner, and place that may act as a countervailing consideration to our general right. When the reasons for thinking that our speech is not used at an appropriate time, manner, or place, we have reasons that are sufficiently weighty enough to curtail our right.

This view has the implication that all of our rights are open to being overridden at certain times—say when they interfere with someone else's interests, say the use and enjoyment of his own property to get some sleep. But one wonders whether it might not be better to describe one's right to freedom of speech being curtailed because it conflicts with someone else's right to control what happens to his property. So, it's not that your right to control your property permissibly infringes his right to freedom of speech, but just that he does not have a right to freedom of speech that overrides your property rights. Perhaps this can still be called a weightier reason that limits, or curtails another's right to freedom of speech. The reason why we might want to say that rights are limited by another's rights is that if rights are permissibly infringed, then the person whose right is infringed might be owed compensation, or owed some form of acknowledgement that he was harmed. But in the case of limiting the person's freedom of speech, it seems that his right is limited because if he were to exercise his right, he would be causing harm to another person.

Finally, we must turn to the hard question regarding why it might be reasonable to override an innocent person's right to life to benefit a great number of people or preserve

the system of rights for the rest of us. Some do not even think that this kind of reasoning makes sense. As F.M. Kamm argued, “it would simply be contradictory for it to be morally permissible to minimize violations of the constraint itself for the sake of showing concern for *it*” (Kamm 1992, 384). So, if we are not to kill innocent people, we cannot turn around and say that it would be OK to kill one innocent person in order to save a million other innocents. This would be contradictory and contradictions are to be avoided. This has a certain moral appeal and because it makes one a consistent rights upholder, it is what we should strive for in most cases. But there is something strange about claiming that one will abide by others rights even though the heavens may fall. If I could steal your laser and blow up an asteroid heading for the Earth, thereby saving myself and everyone else, doesn't it seem more reasonable to say that stealing it, maybe even killing you if necessary, is justified. It sounds crazy not to do it because if we don't then there won't be any more anything for any of us. This might not mean that we are contradicting ourselves, because this kind of an emergency situation is one that overrides our regular concern for rights. The concern for the constraint has some limitations, beyond which we do not contradict ourselves when we violate it in order to better preserve it.

In contrast, consequentialists argue that if we do not violate the principle in question, we will make it so that there are further violations of it later. The appeal of consequentialism lies “in a form of rationality (“maximizing rationality”) that we employ ordinarily in many diverse contexts and which in consequentialism is employed in ethics. The core of maximizing rationality is that given a desirable goal and more than one option to achieve it, it would be irrational to choose an option which gave us less of the goal” (Den Uyl 1991, 47). As argued, under agent-relative value, we do not have an agent neutral

way of deciding whether the greater or lesser amounts of violations are more or less valuable to any of us. We ought to just abide by rights because doing so is a way of making sure that we are better able to promote our own ends. But at some point it does seem reasonable to say that if all or most of us were to be severely affected by someone unless we violate his rights, that we would have reason to violate his rights. This is not the claim that we are doing so because the overall outcome would be better if we violate his rights because the value of our rights outweighs his rights. Rather, it is just the claim that at some point when the existence of the system of rights depends upon violating it, it might be reasonable for us to do so because we will be saving ourselves from great harm, especially by making sure that the system of rights continues to function in order to protect our futures.

What makes it reasonable to do it is not so much that we can somehow calculate when many rights outweigh a few rights, so that it becomes permissible to kill the innocent one to save millions. But it does seem true that at some point a threshold is reached when it is permissible to override someone's rights, even kill him, in order to prevent the deaths of many others. This threshold arises, I argue, because of the fact that what is at stake is the system of rights itself, or humanity itself. We would be justified in taking the life of an innocent if doing so meant that we would be preserving a large number of lives, or even the system of rights itself.

Some might think that allowing this kind of threshold means that rights can be overridden whenever the rights of others will be served by it. But this kind of situation must be one of life and death. There have to be a great many lives on the line—like in Edmundson's example, it must be almost the whole planet on the line, or the possibility

that the system of rights will break down and not be able to serve our needs—so that we are justified in taking someone’s life. Of course if saving the planet means having to kill a large portion of its people, then the choice to kill such a large number no longer seems reasonable. Part of the problem here is that there is no real way to calculate how to make such a decision. Killing one to save a billion seems more reasonable than killing 300 million to save a billion. Maybe this is due to the fact that the reason for killing the one is to save a great number of us and also to preserve the system of rights. But if you have to kill 300 million to save a billion, it may no longer seem as reasonable if the system of rights will not survive the killing of hundreds of millions. So, for some the system of rights cannot survive in principle if one must violate it occasionally in order to preserve it. But the argument here has been that sometimes the numbers must matter. This means that in a time of great crisis it might be reasonable to kill one person to save most others. Luckily we do not seem faced with such choices between violating one person’s rights and saving the rest of humanity. This means that we have reason to abide by rights not to kill others, even though we could gain from it.

§ 6.2 *Conclusion.* We have seen that rights may not always be compossible and so we may need to turn to an adjudicator to settle disputes. We can often rely on possession to see whose rights take precedence in situation where rights are in dispute. A person’s right to his own bodily protection overrides others’ rights to freedom of speech. So, the Nazi’s right to freedom of speech can be override if it threatens the Communist’s right to be free from physical harm. The right to continue to be a self-possessor trumps other rights, like rights to free expression. Possession is the moral default position that we ought to turn to in order

to settle disputes. But possession may not be the only consideration that we look at. As argued, there may be times when equal shares is the preferred moral default because it recognizes the fact that everyone has arrived on the scene at the same time—and so everyone deserves an equal share of the item in dispute. But in most cases first possession will be the moral default because it is the recognition that everyone does not arrive on the scene at the same time. So, when trying to resolve disputes over rights, arbitrators ought to solve disputes so that recognition is given to first possession as much as is possible.

We have also seen that rights may have thresholds beyond which they do not hold. But this is not to say that under most everyday circumstances rights do not hold. Rights are principles that ought to hold under normal circumstances because they are principles that protect us against others. They are not principles that we would want to do without, nor are they principles we can break when it suits us to do so. So it seems reasonable to say that when we have a situation where we could do better by overriding someone's rights, we only ought to do so if it's an emergency situation. Using agent-relative value we cannot perform a calculation to find out whether harming one agent can be outweighed by the harm that that could prevent to five other agents. If this is true at the level of 1 vs. 5 then it's true at the level of 1 vs. 1 billion. But the fact that so many of us will be affected by a catastrophic event gives us reason to act. The reason why we can violate rights in an extreme emergency is mainly to keep the system of rights intact—that is, so that there will be fewer future violations of people's rights and safety. This is not to say that we are justified and do not violate someone's right when we take action in such an emergency; but it is to recognize that we might have to make a tragic choice to save the majority of our lives when it's all or nothing.

Chapter Seven:

Conclusion.

§7.0 Introduction.

§7.1 Rights Issues.

§7.2 Conclusion.

§7.0 *Introduction.* Rights were derived from the idea that agents will have agent-relative reasons to want their prerogatives protected. Agents will be willing to concede others' rights to promote their own good if doing so will allow them to promote their own good as much as possible. We saw that the kind of rights that would be acceptable would be ones that allow for the greatest amount of freedom possible. In the following chapter I will examine various problems and implications that affect theories of right such as whether children have rights and what sort of state this theory of rights would imply. I do not claim to offer a complete solution to problems, nor to fully spell out implications, but only to point out a way it could be done. In the final section I will sum up the argument for rights.

§7.1 *Rights Issues.* One question that arises within the context of rights presented in this thesis is what sort of polity would these rights support? The clear answer is a liberal

polity.³⁰ But not ‘liberal’ in its common usage, as someone who stands as a foil to ‘conservatives’, but liberal in its more philosophical sense—“namely that political power is not something due anyone by natural right, that progress is possible, that the individual is the basic social unit, that people should have the freedom to pursue their own conceptions of the good life, and that the state should be limited to protecting people in their pursuit of their good life” (Den Uyl and Rasmussen 1997, 1-2). Most mainstream political parties would support the above ideals reflecting the importance of individuals to some degree, so it is debatable whether we are all philosophical liberals now. The rights and agent-centered values advocated here would be suitable to a liberal theorist—at least it gives us something extensionally equivalent to a liberal regime.³¹

Furthermore, it might make the argument that liberal regimes cannot be made coherent because they rely on what they deny irrelevant. Some have made the claim that liberalism is a theory that is ultimately incoherent because in arguing for the idea that liberalism is the best form of life, it must deny its acceptance of pluralism: “...if liberalism is to avoid the charge of vacuity, it must be committed to holding that in cases of conflict the particular values liberals favor do take justifiable precedence over other values. How, then, could liberalism and pluralism be compatible?” (Kekes 1993, 199). While I cannot give a definitive answer here, the short answer would seem to be that if the theory of rights that I have defended here is one that liberals would accept because they are based at bottom on a norm that is central to liberalism, and these rights constitute a way of solving disputes

³⁰ It would be interesting to also assess actual governments in terms of how well they reflect the system of rights set out here. A continuum of adherence could be created with the United States at the better end and regimes like China and North Korea at the end which includes violators of rights.

³¹ Even were we to enter an era that meant the end of scarcity in which we could produce goods in abundance in a Star Trek manner, we would still need the rights that protected our favoured goods and our ability to do with them what we wished.

of plural values, then these rights show that liberalism and pluralism are compatible. Liberals would need to argue that the system of rights is extensionally equivalent with a system that liberals would advocate based upon their preferred values; but to say this is not necessarily to say that liberals need to advocate a certain set of values that take precedence over the good lives of others because the central value is something that underlies all of our good lives (cf. Den Uyl & Rasmussen 1997).

This theory of rights could be able to help to explain why universal human rights are open to all peoples, and are not just the ideology of the West. The idea that rights are principles that all ought to accept has been questioned by those who see themselves as having different values. So the foreign minister of Singapore claimed that “universal recognition of the ideal of human rights can be harmful if universalism is used to deny or mask the reality of diversity” (in Sen 1999, 38). But assuming that this is a real worry, and not a means of diverting attention from the lack of will to implement rights that could diminish state power, we can relieve the force of such criticism by point out that the theory of rights rests upon a theory of value that takes into consideration many generic human goods; and that these goods are not Western- or Asian-relative but good for any human persons. Since rights are derived from recognition of these basic values, we can assert that the claim that these rights mask ‘diversity’ is not true. These rights take into account much more diversity than most other regimes. Yet, these rights do not allow for certain ways of life to flourish—such as those regimes that would diminish rights in favour of some form of paternalism, like the idea that China likes to attribute to its citizens, that “individuals must put the state’s rights before their own” (in Sen 1999, *ibid.*). But in ruling out certain forms of life—like the paternalist one—it actually increases diversity. So, this theory

increases the potential for diverse forms of life to flourish and does not have the opposite effect of diminishing diversity.

We might wonder what we are to make of our general rights to freedom—to speech, to worship, to happiness, etc. Can we have a general constitutional statement of such rights under a specificationist theory of claim-rights? It seems that we can accept such general, almost liberty/privilege rights if they are helpful in expressing how our domains are used by us. But rights to freedom of speech ought to be recognized for what they are—the rights of adults to freely trade information with each other that do not impose positive duties to make sure that people are provided with chances to speak freely. So it is useful to express a right everyone has to free speech, even though in practice this right needs to be specified in terms of who controls the domain where the speech will be expressed. If expressing one's views requires using another's newspaper, then it will be up to the newspaper's owner to decide what views are expressed in his paper. But if the views are to be expressed in a publicly owned forum, then maybe some criteria like equal shares ought to be adopted in order that the forum can best accommodate the greatest number of its members' views. But if a right to free speech is left unspecified, as a general right to free speech, then we might think that we have a liberty right to freedom of speech which trumps someone else's property right, so that when I want to express myself someone else must give me a platform to do it—either a building to give a speech or means of conveyance, like a newspaper.

Regarding religious freedom, it would seem that these freedoms fall under the specification of domains too. If a mosque has its daily call to prayers blasted across the local neighborhood then those who are affected by this sound may have cause to have it

stopped. This might be said to be an interference with religious freedom because it does not allow people to exercise their ability to carry out their religion's dictates. But the rights in question are not ones regarding religious freedom so much as they are about specified domains and who has the freedom to limit other's actions when these domains conflict. If there were some vague right to religious freedom, then it might be that people have the duty to put up with this sound in order to respect that right. The theory of rights solves such disputes by appealing to domains that arise from first possession that each agent has control over. So, the mosque would be able to broadcast its call if no one found it interfered with them, it did not interfere with anyone, or people were reasonably compensated for any interference.

Yet, one might object that the appeal to domains misses the point of such criticisms because religious adherent is being made to curb his actions not on the basis of some impartial domain of rights, but because of the substantive basis of rights that prejudices it towards a certain kind of good life—one that values the life of tolerance over the life of religious virtue. Peter Byrne argues that theories of liberal rights seem to be impartial among different conceptions of the worthwhile life but that in order to solve disputes they appeal to substantive ideas of the good (Byrne 1999, 94-6). In order to say that we need to respect persons is to appeal to some substantive notion of what respect for persons requires. He claims:

The critic can surely argue whether this is the right way to measure respect for persons, or whether the assertion of the value in liberty to pursue an individual preference is correct, cannot be made true by definition. We can imagine moral

outlooks which have different ideas of respect for persons and which do not place such a high value on liberty as conceived by the [rights-theorist]. Consider the strict sabbatarian who argues that disrespect for the Lord's Day is so serious a harm for individuals and society that all should be obliged to refrain from work and public pleasure on a Sunday. This person values persons in so far as they are prospective candidates for salvation. Securing their liberty to act as they please is of comparatively little value if that liberty is exercised in ways that are detrimental to their basic good, as he sees it (Byrne 1999, 95).

Firstly, the problem with such an assertion is that there are constraints on what can count as a good life. We should not think that because values are agent-relative that there are not objective constraints on what can count as good. Is it clear that being a strict sabbatarian is subsumable under the various things that can be thought to be good? The answer from the naturalistic position of ethics is no, not unless being a strict sabbatarian is something that is really a way of exercising some naturalized value or virtue. But even if the sabbatarian is misguided or if he is pursuing a genuine value, he has the right to do so as long as he respects other's rights. But it seems that as soon as we have admitted this we are also saying that he has the right because of some higher value (personal liberty) that the rights theorist holds that makes his actions right. Why does respect for persons rest upon such a conception of liberty, rather than some other value like respect for the sabbath?

The answer to this question requires that we see how valuing rights is not the same as valuing what they protect. They may protect our liberty or our ability to pursue our own good, but rights themselves are not valued as we value our liberty or good lives. Rights are

not based on some general value of liberty or freedom that trumps other values, but are based on the idea that there is some feature common to all of our good lives that we all must (implicitly) value. So if domains are based on first possession, when we say that the agent is not allowed to force others not to work on the Sabbath, we are not putting one form of the good over another. The reason is that the form of the good we are protecting is one that all agents need to have in order to live a good life. Of course this requires accepting a naturalistic account of value, but to accept supernaturalistic accounts of what is good, where the good does not supervene upon some natural properties, would allow for values that could never be interpersonally understandable (cf. Wielenberg 2005). So the acceptance of rights does not necessarily imply that the reason for abiding by them is that the general value of liberty that trumps other values.

The scope of the thesis is limited to showing how a system of negative rights can be derived from value pluralism. It might be objected that this too quickly excludes a theory of positive rights; hence the thesis is too ideologically motivated because it seeks to justify a certain view of the good—namely, market oriented property rights. But the logic of rights is such that if there are any rights that we begin with they will be negative in nature. Only on the basis of negative rights can one justify positive rights. But this view has been challenged by Henry Shue (1996), who argues that negative rights require the existence of positive duties (and rights) in order for them to be implemented. Positive rights are ones that hold that duty bearers have a positive duty towards the rights holder. Shue's argument is that a right provides for the actual enjoyment of some good—typically a basic right to security, subsistence, and certain other liberties (Shue 1996, 19). The right to physical security underlies the right to free assembly since it must obtain in order for the less basic

right to assembly to obtain. But Shue claims that mere forbearance is never sufficient to make sure that basic rights obtain; in order to make sure that the right obtains, we need to make sure that social structures are in place to make sure that positive duties are carried out so that agents can will have actual enjoyment of the object of their rights. And these social structures are positive duties that fall on others to make sure that social structures exist.

The response to this objection is to ask whether basic rights must entail positive duties as a logical necessity, or whether they only entail positive duties because such assistance is based upon a substantive theory of justice? As Cohen argues, it is not true that we need to have a right to subsistence in order to enjoy the right to free assembly (Cohen 2004, 266). A subsistence right includes rights to be provided with all those things one needs to have a reasonable healthy life (Shue 23). The reason why one could not enjoy any other rights without the right to subsistence is that one could not be secure in his right not to be tortured (to physical security) without others first making sure that he could subsist—say by other's having the duty to make sure that he has food in order to subsist and thereby have the chance to free assembly. But this does not mean that the agent could not enjoy his right not to be tortured because even if the agent cannot acquire food he can still enjoy his right not to be tortured (Cohen 2004, 267). What is required for him to enjoy his freedom from torture are rights against being tortured—individuals forbear torturing him, individuals protect him from being tortured, and individuals assist him when he is tortured (Cohen 2004, 268). If these considerations hold then one enjoys the right not to be tortured even though there is no right and corresponding positive duty to provide him with food for subsistence. Shue might object that one cannot have a right simply to physical security

because such security “is not normally a demand simply to be left alone, but a demand to be protected against harm. It is a demand for positive action...for social guarantees against at least the standard threats” (Shue 1996, 38-9; Cohen 2004, 269). But the reason why Shue says that this must be so is that a right-to-be protected against assault is something that any reasonable person would demand from society. Yet, this is only to say that people would demand it as reasonable, not that it is a demand made necessary by the structure of basic rights itself. Basic rights need not include within their specification that their purpose is to make sure that people are able to enjoy certain goods, or a certain good life. Negative rights that do not include this idea that the job of rights is to make sure that people are able to enjoy a good life of a certain sort do not entail positive duties on others to make sure those goods obtain.

It might be thought that this claim is not sufficient to rebut Shue’s idea that in order to have a right we need to be able to enjoy the right. Is it not true that in order to have the right to be free from torture or abuse we need to be able to enjoy this right? I think at bottom that the idea that in order to enjoy the right conflates having the rights as something that other’s must respect with the actual enforcement of the right by some third party. It only needs to be true, normatively speaking, that one has a right if the argument can be made out that you do have this kind of moral right. Others then have the duty to refrain from violating it. If they do not refrain from violating the right, then it is factually true that you lack the right, but this is not to say that you morally lack the right. The duty not to violate your right is one that the person who is violating your right has, not a duty some other party has to make sure that your right is not violated. If it is a negative right, then the only way that others would have a duty to protect it—make sure you can enjoy it—is if you

have some prior agreement that imposes a duty on them to enforce it. It is true that in modern societies the government has said that it has a positive duty to protect negative rights, so it makes sure that people can enjoy their negative rights by enforcement. But this does not prove that others have positive duties to make sure negative rights can be enjoyed—all it shows is that that is what is happening. If the government did not promise this, we would still have enforceable negative duties against others not to violate negative rights. Negative rights and the duties they entail are prior to agreement to enforce them—it is only because people violate them that we need to find a way to enforce them.

The theory of rights is meant to help show where one person's life begins and another's ends. Regimes that do not recognize rights typically do not and cannot recognize the importance of this distinction. In China for instance, people who are practitioners of certain religions are sent to re-education camps. Also, the Internet is censored by the government because if "it's not supposed to be seen, then it's not supposed to be seen" (Thompson 2006, 69; cf. Dann and Haddow 2007). Even if it is in a person's best interest that he should not belong to such a religion, or that he should not really spend his time online looking at political websites (or porn), we would need a stronger argument for paternalism than simply claiming that he should be forced to do what is in his best interest. Of course the reason why we think we need a stronger argument is that people have rights that protect them against paternalist interferences. But by basing rights on a norm of justice we need to be careful we are not allowing for paternalism to enter the system, thereby muddying the distinction between our good and other's. Justice tells us why we ought to abide by other's rights in terms of being a just person who recognizes the moral separateness of others; but in doing so it does not tell us to *make* others better off because it

is our duty to look after others in order to make them better people. Justifying rights in the context of pluralist values requires that we be sensitive to making sure that the feature that justifies them does not rule out other good types of lives. Recognizing first possession as a form of being just is about allowing others the choice to create and implement lives of their own. Rights become a domain of their own that demarcates a line that other persons, groups, and organizations cannot cross without the agent's consent. To cross such a boundary without the agent's consent is potentially to harm that person in a way that cannot be repaired by simple value substitution—simply giving something in return to try to replace that which has been taken. And so, respecting other's rights is a way of recognizing the fact that there are some things we can do to others that cannot be made right by offering them something in return.

§7.2 *Conclusion.* The purpose of this thesis was to show how a theory of right could be reconciled with the plural values we find in the world today. In the 'real' world we do not find that everyone creates a life based on the categorical imperative, nor do they sum up the utilities and disutilities of actions before acting. Part of the reason for this is that people do not have a way of making comparisons between their good and someone else's in order to make such utility calculations; and nor do they make rules for themselves that based on reasons conforming to pure practical reason. People value things based upon how these things further their lives. Yet, while this is perfectly reasonable to do, it seems to make the goal of a theory of rights harder to attain because rights seems to require a way of judging when someone's good should be subjugated to another's—which is the goal of most theories of ethics that create a hierarchy of goods in order to solve disputes. Since rights are

a way of showing whose good is to take precedence over another's in conflict situations, reconciling rights with plural values will require that we show how values exist and are plural, what a theory of rights requires and what sort of arguments can meet these requirements, and finally, how rights are coherent. This thesis has attempted to answer these questions.

Chapter Two attempted to explain how values exist and why it is reasonable to think that agents' most pressing concern is to further their own interests. We saw how values are best thought of as agent-relative because showing how values are related to agents better explains their existence as things that are valuable *for* agents. Agent-relative value also has the implication that reasons for valuing something will be transmissible only for those who also share the same value. So, only if I have the goal of protecting the environment will I also have the reason to help you further your end of protecting the environment. This means there are no agent-neutral values that transmit their desirability or reasonableness to all no matter what ends you might wish instead to pursue. From this Chapter we derived the first and second theses of practical reason—respectively, that one has reason to pursue one's own good, but not the same reasons to help another person pursue his own good.

Chapter Three showed how this theory of value can be a form of value pluralism when we think of plurality as consisting in the idea that some things may not be valuable for everyone in the same degree. This Chapter shows how pluralism need not be thought to consist of agent-neutral values, like John Gray and Isaiah Berlin hold. But also how the agent-relative theory of pluralism is simpler because it makes plurality dependent upon the fact that there are as many plural values as there are persons who can be related to values in

different degrees. This position does not imply moral relativism because it holds that not everything can be of value to persons because some goods must be had by persons in some degree, but can be had in many degrees.

Chapter Four examined arguments used to justify a system of rights. We noted that rights can be based upon the view that they are of benefit to the recipient of the correlative duties or the well being of the agent who must abide by the duties. We examined the strengths and weaknesses of these views and found that a full explanation of rights requires that harm to the rights holder be explained in terms of harm that is done to him qua rights holder, and not the harm done to the person who is duty-bound to abide by his rights; but also we found that in order to explain why anyone wishes to have rights, rights must be tied to how well they protect his well-being. Since the reasons why I want my rights protected and the reasons why I might have to abide by another's rights diverge, this set up the problem that rights might seem to require two separate sources of moral obligation, so that one would need a source of moral obligation to fully account for rights that is unavailable under the first thesis of practical reason.

Chapter Five attempts to show that we need not accept a theory like Eric Mack's that gives us two separate reasons for wanting rights that protect our good and also having reasons for treating others as moral ends in themselves. We saw that we will want rights for ourselves because those rights further our own good. First possession is posited as the feature that seems to underlie all good lives because without it no one could live a good life. But even though our need for justice is agent-relative, it is not true that the requirements for being just are made agent-relative. Being just requires abiding by rules such as first come, first served and finders keepers, not equal shares, because these

principles better reflect the fact that we are the first to possess ourselves. Because we are beings who are the first possessors of ourselves we think that it is just that others recognize this fact by abiding by rights that make it off limits for them to utilize our bodies and resources without our consent. We also saw that the reason why we will concede others their rights they ours is that doing so will be conducive to each of our well being. It might be true that we could do better sometimes by violating someone's rights, but there are two reasons for not making this a general principle: (1) we cannot always know that we will be able to get away with violating rights, so the best policy is to abide by rights; and (2) we saw that we need to develop a system of social enforcement whereby it pays us to say something when someone's rights have been violated. Making rights violations have a social cost in terms of open disapprobation makes it more likely that people will abide by rights. The basic rights that we will have are rights to property in ourselves and in things we have acquired, which means the right to take certain courses of action to control ourselves and acquire things.

Chapter Six discussed the compossibility of rights. Since rights are rights to control ourselves and our property, we need to see if the system of rights forms a coherent system, or if rights will very often give rise to actions that bring us into conflict. This means making sure that our domains over ourselves do not unjustly conflict with each other. Because in order to see if rights conflict we would need to know all the possible ways that we could interact with each other, it might be possible that our rights could give rise to actions that conflict. I think that because our rights often just ask others to refrain from doing something to us, they do not lead to as much conflict as a theory that told others to actively do things to us. But if there is a conflict we ought to appeal to first come first

served and first possession to try to show whose rights take precedence. In most cases, we should be able to reduce the problem back to a claim about possession, and thereby show who had the right to possess the thing or take the action in question. Maybe in some cases we would find that no one deserved to possess something first because he and others happened upon it at the same time. In this case equal shares would be the moral default position and everyone should get an equal share.

The present Chapter, Seven, attempted to sum up the arguments for rights and also to show what sort of implications the theory had for liberalism and positive rights.

Of course, rights do not give us some answer to the question 'what is right?' Often what matters most to the living of our lives is what we find good, not right. But we might wonder in the last analysis are rights just another way of saying *what is* right? We each need our first possession protected, so it is *good or right* that it is protected? These assertions sound like ways of trying to infer rights from what is right. Yet, if this thesis has been correct we need not hold that rights are directly derived from any particular form of the good life. Rights can be held at arm's length from the good by making sure that the basis for rights is general. But we must also face the fact that rights-talk is talk about the good to some degree. While it is true that my right to smoke need not be derived from some claim that smoking is the right thing for me to do, it still makes sense to say that it is right that I have a right to smoke. The rightness consists in the fact that it is good for agents to have their ability to live their lives protected. Rights then do tell us something about what is good. But this does not mean that rights do not have a different function from statements about what is good. As I have tried to argue, rights are not principles about how one should live one's life. They do not tell us directly what is really good for us to have.

They perform the needed function of setting boundaries for how agents can promote their good lives in a social setting.

This thesis has attempted to show how persons with plural values could come to find the same system of rights reasonable. In this attempt it has also touched upon several problems regarding the nature of rights—the need to explain how harm to a rights holder is explicable in terms of harm to him, not the duty-bearer, and the distinction between ‘right’ as a noun and its adjectival form. I think that the reconciliation of a theory of rights with value pluralism tells us much about the function of rights because it forces the theorist to take the existence of other forms of good life seriously and not simply claim that all forms of the good life can be ordered according to some final end of his choosing. If globalization and the immigration that results from a smaller world continue, we will need to be able to answer criticisms from other parts of the world who do not accept ‘Western’ values and think that rights are mere ideology. The meta-normative answer to the question of how persons with quite different backgrounds can live together and have reason to respect other forms of life they disagree with is a necessary part of that answer.

BIBLIOGRAPHY

- Badhwar, N. (2003) "Moral Worth and the Worth of Rights" in *Individual Rights Reconsidered*. ed. T. Machan. Stanford: Hoover Institute Press.
- Bambrough, R. (1979) *Moral Scepticism and Moral Knowledge*. Atlantic Highlands, N.J: Humanities Press.
- Barnett, R (1998) *The Structure of Liberty*. New York: Oxford University Press.
- Barry, B. (1990) "How not to defend liberal institutions" in Richardson, et al. ed. *Liberalism and the Good*. New York: Routledge.
- Beiner, R. (1992) *What's the Matter with Liberalism?* Berkeley and Los Angeles: University of California Press.
- Berlin, I. (1997) *The Proper Study of Mankind*. New York: Farrar, Straus, Giroux.
- Brecher, B. (1995) *Getting What You Want*. London: Routledge.
- Brighouse, H. (2004) *Justice*. London: Polity Press.
- Byrne, P. (1999) *The Philosophical and Theological Foundations of Ethics*. London: MacMillan.
- Campbell, T. (2001) *Justice*. 2nd ed. New York: Prentice Hall.
- . (2006) *Rights*. New York: Routledge.
- Carter, W. (1990) *The Elements of Metaphysics*. Philadelphia: Temple University Press.
- Cohen, A. (2004) "Must Rights Impose Enforceable Positive Duties?" *Journal of Social Philosophy*. Vol. 35, No. 2, 264-276.
- Conway, D. (1995) *Classical Liberalism*. New York: St. Martin's Press.

- Crowder, G. (2001) *Liberalism and Value Pluralism*. London: Polity Press.
- Dagger, R. (1997) *Civic Virtues*. New York: Oxford University. Press.
- Dann, G. E. and N. Haddow (2007) “Just doing business or doing just business: Google, Microsoft, Yahoo! and the business of censoring China’s Internet” *Journal of Business Ethics* (forthcoming).
- Darwall, S. (1998) *Philosophical Ethics*. Boulder: Westview Press.
- De Jasay, A. (1991) *Choice, Contract and Consent*. London: IEA.
- (2002) *Justice and Its Surroundings*. Indianapolis: Liberty Fund.
- Den Uyl, D. (1991) *The Virtue of Prudence*. New York: Peter Lang.
- Den Uyl, D. and D. Rasmussen. (1991) *Liberty and Nature*. La Salle, Illinois: Open Court.
- (1993) “Reply to Critics” *Reason Papers*. No. 18, 115-132.
- (1997) *Liberalism Defended*. Cheltenham: Edward Elgar.
- (2005) *Norms of Liberty*. University Park: Penn State University Press.
- Dershowitz, A. (2004) *Rights From Wrongs*. New York: Basic Books.
- Dworkin, R. (1977) *Taking Rights Seriously*. London: Duckworth.
- Epstein, R. (1979) “Possession as the Root of Title” *Georgia Law Review*. Vol. 13, 1221-1243.
- (2003) *Skepticism and Freedom*. Chicago: University. Chicago Press.
- Edmundson, W. (2004) *An Introduction to Rights*. Cambridge: Cambridge University Press.
- Feser, E. (2005) “There is no such thing as an unjust initial acquisition” *Social Philosophy and Policy*. 56-80.

- Freeden, M. (1991) *Rights*. Minneapolis: University of Minnesota Press.
- Galston, W. (1991) *Liberal Purposes*. Cambridge: Cambridge University Press.
- Gaus, G. (1999) *Social Philosophy*. New York: M.E. Sharpe.
- (2003) *Contemporary Theories of Liberalism*. Thousand Oaks, Calif.: Sage.
- Gauthier, D. (1986) *Morals By Agreement*. New York: Oxford University Press.
- Gibbard, A. (1976) "Natural Property Rights" *Nous* 10, 77.
- Glendon, (1991) *Rights Talk*. New York: The Free Press.
- Gorman, J. (2003) *Rights and Reason*. Ottawa: McGill-Queen's University. Press.
- Gray, J. (1995) *Liberalism* 2nd ed. Minneapolis: University of Minnesota Press.
- (2000) *The Two Faces of Liberalism*. New York: The New Press.
- (2003) *Al Qaeda and What it Means to be Modern*. London: Faber and Faber.
- Griffin, J. (1996) *Value Judgement*. New York: Oxford University Press.
- D. W. Hamlyn. (1984) *Metaphysics*. Cambridge: Cambridge University Press.
- Hampton, J. (1997) *Political Philosophy*. Boulder: Westview.
- Heath, J. (2001) *The Efficient Society*. Toronto: Viking.
- Henderson, D. (2001) *Anti-Liberalism 2000*. London: Institute Economic Affairs.
- Hare, R. M. (1998) *Essays On Political Morality*. Oxford: Oxford University Press.
- Hursthouse, R. (2002) *On Virtue Ethics*. New York: Oxford University Press.
- Kagan, S. (1998) *Normative Ethics*. Boulder: Westview.
- Kalin, J. (1975) "Two Kinds of Moral Reasoning: Ethical Egoism As A Moral Theory"
Canadian Journal of Philosophy. Vol. V, No. 3. 323-356.
- Kamm, F.M. (2001) "Conflicts of Rights" *Legal Theory*. 7, 239-255.
- Kekes, J. (1993) *The Morality of Pluralism*. Princeton: Princeton University Press.

- Kelly, P. (2005) *Liberalism*. London: Polity.
- Kramer, M.H. et al (1998) *A Debate Over Rights*. New York: Oxford University. Press.
- Kripke, S. (1980) *Naming and Necessity*. Harvard University Press.
- Lebar, M. (2004) "Good for you" *Pacific Philosophical Quarterly*. 85, 195-217.
- Levitt, S. & S. J. Dubner (2005) *Freakonomics*. New York: William Morrow.
- Lomasky, L. (1987) *Persons, Rights, and the Moral Community*. New York: Oxford University Press.
- (1989) "Response to Four Critics" *Reason Papers*. No. 14, 110-129.
- Long, R. (2000) *Reason and Value*. New York: IOS Institute.
- Lukes, S. (2003) *Liberals and Cannibals*. London: Verso.
- Lyons, D. (1967) "The Correlativity of Rights and Duties" *Nous*.
- Machan, T. (1992) "Between Parents and Children" *Journal of Social Philosophy*. 23.
- (1998) *Classical Individualism*. New York: Routledge.
- Mack, E. (1989a) "Moral Individualism" *Social Philosophy and Policy*. Vol. 7, No.1, 81-111.
- (1989b) "Against Agent-Neutral Value" *Reason Papers*. No. 14, 76-85.
- (1993a) "Rasmussen and Den Uyl on Natural Rights" *Reason Papers*. No. 18, 89-99.
- (1993b) "Agent-Relativity of Value, Deontic restraints and Self-ownership" in R.G Frey & C.W. Morris eds. *Value, Welfare and Morality*. Cambridge: Cambridge University Press.
- (1993c) "Personal Integrity, Practical Recognition and Rights" *The Monist* 101-118.

- . (1998a) "The Fit Between Egoism and Rights" *Reason Papers*. No. 23, 3-21.
- . (1998b) "Deontic Restrictions are Not Agent-Relative Restrictions" *Social Philosophy and Policy*. 61-83.
- . (1999) "In Defense of Individualism" *Ethical Theory and Moral Practice*. 2, 87-115.
- . (2001) "The Jurisdiction Theory of Rights" *The Journal of Ethics*. No. 4, 71-98.
- . (2002a) "Equality, Benevolence and Responsiveness to Agent-Relative Value" *Social Philosophy and Policy*. 314-341.
- . (2002b) "Self-ownership, Marxism, and egalitarianism" *Politics, Philosophy and Economics*. Vol. 1.
- . (2005) "Prerogatives, Restrictions, Rights" *Social Philosophy and Policy*. 357-393.
- Moore, A. (2004) "Values, Objectivity, and Relationalism" *The Journal of Value Inquiry*. 38. 75-90.
- Moore, G. E. (1960) *Principia Ethica*. Cambridge: Cambridge University. Press.
- Nagel, T. (1986) *The View From Nowhere*. Oxford: Oxford University. Press.
- . (1991) *Equality and Partiality*. New York: Oxford University. Press.
- Narveson, J. (2002) *Respecting Persons In Theory and Practice*. New York: Rowman & Littlefield.
- Norton, D. (1995) *Democracy and Moral Development*. Berkeley: University of California Press.
- Nozick, R. (1974) *Anarchy, State and Utopia*. New York: Basic Books.
- Oderberg, D. (2000) *Moral Theory: A non-consequentialist Approach*. New York:

Blackwell.

Okasha, S. (2002) *A Very Short Introduction to Philosophy of Science*. New York: Oxford University Press.

Olson, M. (2000) *Power and Prosperity*. New York: Basic Books.

Orend, B. (2002) *Human Rights*. Peterborough, ON.: Broadview Press.

Rand, A. (1971) *The Virtue of Selfishness*. New York: Signet Books.

Rawls, J. (1971) *Theory of Justice*. Cambridge: Harvard University Press.

----- (2001) *Justice as Fairness: A Restatement*. Cambridge: Harvard University Press.

Raz, J. (1984) "On the nature of rights" *Mind* XCIII.

Rescher, N. (1997) *Objectivity*. Notre Dame: University of Notre Dame Press.

Richardson, H. et al. (eds.) (1990) *Liberalism and the Good*. London: Routledge.

Rosen, A. (1991) *Kant's Theory of Justice*. Ithaca, N.Y.: Cornell University Press.

Rowlands, M. (1998) *Animal Rights*. New York: Palgrave.

Sen, A. (1999) "Human Rights and Asian Values" in T. Machan. (ed.) *Business Ethics in the Global Market*. Stanford: Hoover Institute Press.

Shafer-Landau, R. (1995) "Specifying Absolute Rights" *Arizona Law Review*. 37: 209-24

Scheffler, S. (1982) *The Rejection of Consequentialism*. Oxford. Oxford University Press.

Schmidtz, D. (1998) "Finders, Keepers" *Advances in Austrian Economics*. Vol. 5

----- (2002) "Equal Respect and Equal Shares" *Social Philosophy & Policy*. 244-274

----- (2005) "History and Pattern" *Social Philosophy and Policy*. 148-177.

- . (2006) *The Elements of Justice*. Cambridge: Cambridge University Press.
- Scruton, R. (1990) *Modern Philosophy*. New York: Penguin.
- Shue, H. (1996) *Basic Rights*. 2nd ed. Princeton: Princeton University Press.
- Smith, T. (1995) *Moral Rights and Political Freedom*. New York: Rowman & Littlefield.
- .(2000) *Viable Values*. New York: Rowman & Littlefield.
- Steiner, H. (1994) *An Essay on Rights*. London: Blackwell.
- . (1998) “Working Rights” in Kramer et al.
- Sumner, L.W. (2004) *The Hateful and the Obscene*. Toronto: University of Toronto Press.
- Talbott, W. (2005) *Which Rights Should be Universal?* New York: Oxford University Press.
- Thompson, C. (2006) “Google’s China Problem (And China’s Google Problem)” *The New York Times Magazine*. Sunday, April 23.
- Thomson, J.J. (1990) *The Realm of Rights*. Cambridge: Harvard University Press.
- Trigg, R. (1973) *Reason and Commitment*. London: Cambridge University Press.
- Veatch, H. (1989) *Human Rights*. Baton Rouge: Louisiana University Press.
- Waldron, J. (1998) *Liberal Rights*. Cambridge: Cambridge University Press.
- Walzer, M. (1984) *Spheres of Justice*. New York: Basic Books.
- Wenar, L. (2005a) “Rights” *Stanford Online Encyclopedia of Philosophy*.
- . (2005b) “The Nature of Rights” *Philosophy & Public Affairs*. Vol. 33, No. 3, 223-252.
- Wielenberg, E. (2005) *Value and Virtue in a Godless Universe*. New York: Cambridge University Press.
- Zupan, D.S. (2004) *War, Morality, and Autonomy*. Burlington, VT: Ashgate Press.