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Law, Politics, and Morality: Dworkin's Jurisprudence in a Hegelian Perspective

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LOYOLA UNIVERSITY OF CHICAGO

LAW, POLITICS, AND MORALITY:
DWORKIN'S JURISPRUDENCE IN A HEGELIAN PERSPECTIVE

VOLUME I: CHAPTERS 1-2

A DISSERTATION SUBMITTED TO
THE FACULTY OF THE DIVISION OF THE ARTS AND SCIENCES
IN CANDIDACY FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

DEPARTMENT OF PHILOSOPHY

BY

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INTRODUCTION

The common and prosaic gloss on contemporary political theory states that Rawls' A Theory of Justice created a renaissance in the discipline when it was published in 1971. Rawls, in this story, revived a moribund tradition of political philosophy from a skepticism concerning the possibility of elucidating foundational principles of political theory¹, as well as using those principles as a rational judge of political behavior and political institutions. Rawls revived this older tradition by incorporating within a modern framework Kantian arguments concerning the freedom of the self and, by logical extension of that conception of the free self, the priority of a set of basic liberties or rights over any conception of a collective (or individual, for that matter) good. This Rawls did without incorporating Kant's metaphysical concepts -- he jettisoned any reliance on the noumenal world, the transcendental self, a philosophical anthropology or theory of human nature (all

1

As John Gray writes: "The climate of opinion in general philosophy -- as expressed in positivist accounts of meaning, emotivism in moral theory and the broader influence of the ordinary-language philosophies -- seemed to have rendered hopeless the projects of political philosophers working in a older and grander tradition that encompassed Aristotle and J.S. Mill." "Against the New Liberalism," Times Literary Supplement, 3 July 1992, 13.

factors essential to Kant's project).

This gloss is partially true, though Rawls' attempt to justify individual rights, or the logical necessity of the right over the good, can also be seen as having given theoretical expression to what was becoming the standard method of arbitration in political disputes: the jurisprudential, or legalistic, paradigm. Political conflicts, such as freedom of speech disputes, abortion, and pornography came to be seen as a matter of rights versus rights, a question which could only be solved in the court room (and ultimately only within the **sanctorum** of the Supreme Court). A resolution that might have been effected in the political arena (and which is, in fact, in most European countries a matter of compromise, open to revision, and never absolute) became here a zero-sum game to be decided by the court, and a zero-sum game that could be re-played only with the confluence of unlikely circumstances. The absolute nature of the clash of rights led also to an increasingly politicized court -- a branch of government once seen as an impartial upholder of the rule of law has now become the object of the political wrath of the various interested parties, subjected to the same political forces properly left to the other branches of government.

There are two ironies here. First, while Rawls has since modified his former views, tempering, at least to a certain degree, the universality of the set of basic liberties

and rights², there has been no diminishment or transformation concerning our reliance upon the legal infrastructure, in the name of rights, to solve our controversies. Just the opposite: vast resources and energies are spent in the attempt to influence the outcome of this winner-take-all forum precisely because it has become a winner-take-all forum.

Secondly, since the time of Rawls' book and despite his modifications, various other liberal theorists have attempted to articulate a coherent and foundational account of individualist and universal theories of justice, theories which are as absolute as Rawls' initial project -- though in many cases they are a reaction to the arguments put forward by Rawls himself. Each, it hardly needs to be said, emphasizes different concepts, such as equality, liberty, and rights, and offers different interpretations of the interrelationship between those foundational concepts. Perhaps the most prominent among these liberal theorists, at least in the United States and Great Britain, is Ronald Dworkin, who has produced a voluminous body of work within the past quarter century.

2

See John Rawls, Political Liberalism (New York: Columbia University Press, 1993), Lecture I, §2, 11, where he writes: "In particular, it [a political conception of justice] applies to what I shall call the 'basic structure' of society, which for our present purposes I take to be a modern constitutional democracy." So while it is true that Rawls has modified the universality of his position, the set of basic liberties and rights still applies to modern constitutional democracies.

In his writings, Dworkin has given a justification for liberalism which is egalitarian in nature. He argues that equality is the only coherent foundational moral/political principle of justice, where equality, in its most abstract formulation, means that the state must show its citizens equal concern and respect (the "abstract egalitarian principle"). As a specific principle of distributional justice, equality, Dworkin argues, is best understood as equality of resources (and not, for example, equality of welfare in its various guises). His theory of equality assimilates a defense of liberty and the irrevocable rights of individuals ("rights as trumps" as phrased in his earlier work), both of which he argues flow from his "abstract egalitarian principle". What Dworkin means by liberalism -- what the concepts of liberty, equality, and community (or political community) entail -- will be the subject of the first chapter.

In addition to those three broad concepts, Dworkin also includes within his brand of liberalism the idea of integrity. The term integrity is particular to Dworkin, though the nexus of ideas which it expresses is not, generally speaking, unfamiliar either to the (philosophical) legal tradition or to certain modern liberal writers. This idea will also be explained within the context of Dworkin's jurisprudential theory; indeed, the first chapter will begin the analysis of Dworkin's writings with the idea of integrity.

But before we begin that examination it will be helpful to sketch out, in a general way, how Dworkin relates to others who are, either rightly or wrongly, labelled 'liberals'. In this manner, we can situate Dworkin within a tradition of other writers whose concerns are similar to those of Dworkin's.

Dworkin shares with those who are often called "classical liberals" several features: he has defended a conception of liberalism by relying on arguments concerning justice, equality, liberty, community, state neutrality towards citizens, and rights. He inherits from Hobbes, for example, the conviction that human beings are fundamentally equal and that the equality of humanity should be used as the foundation of a political society.³ Like Locke, he argues that government must exercise tolerance towards its members: the government must not impose upon individuals any particular moral code or practice and it must not insist that they practice any state religion.⁴ He agrees with Mill that "self-

3

For Hobbes' arguments that human beings are essentially equal (physically, mentally, and regarding their desire for power), see Leviathan, edited by C.B. Macpherson (Harmondsworth: Pelican Books, Ltd., 1968), chapters 11 and 13. Whether Hobbes' can be classified as a "true" liberal is the subject of much debate; without providing any sort of answer to that question, we can say that Hobbes is the first modern political philosopher. See Leo Strauss, Natural Right and History (Chicago: University of Chicago Press, 1950).

4

See John Locke, A Letter Concerning Toleration, (Indianapolis: Hackett Publishing Company, 1983), 39, where

regarding" actions, such as expression, assembly, and private conduct, are pre-eminently important and should not be infringed upon by the state.⁵ He argues, as Kant did well before him, that politics is fundamentally about the use of coercive force and that the aim of the social order is to integrate the liberty of the individual consonant with the freedom of others. Or, put another way, Dworkin, like Kant, attempts to give a theoretical justification for the legitimate use of coercive political power.⁶ Finally, he thinks a market necessary to a just society, and so shares with Smith a commitment to some form of a market economy.⁷

He of course differs from all of these philosophers: he does not justify his positions by recourse to their arguments; he does not place within his own theory what each of these

he writes that "the Magistrate has no Power to enforce by Law, either in his own Church, or much less in another, the use of any Rites or Ceremonies whatsoever in the Worship of God."

5

See John Stuart Mill's On Liberty, edited by Gertrude Himmelfarb (Oxford: Penguin Books, 1974), Chapter II, 75-118.

6

Kant's claims about the aims and limits of political life can be found in Kants gesammelte Schriften, Volume VIII (Berlin: Ausgabe der königlich preussischen Akademie der Wissenschaften, 1910--). The English translation of the political writings is entitled Kant's Political Writings, edited by Hans Reiss, translated by H.B. Nisbet (Cambridge: Cambridge University Press, 1970).

7

Adam Smith's defense of a free market, and capitalism, is of course laid out most fully in An Inquiry into the Causes of the Wealth of Nations (Oxford: Clarendon Press, 1976).

thinkers individually thought of paramount importance; nor does he accept in toto all of their positions. For example, he places a much greater emphasis on equality than any of them did. Despite Hobbes' liberal premise that all men are constituted by nature equally, Dworkin would find Hobbes' illiberal conclusion that the members of society must forfeit all rights but the right to life a mockery of the ideal of equality. His interpretation of state neutrality differs from that of Mill; he does not accept Mill's 'harm' principle or Mill's arguments against paternalism (Dworkin argues that the government has a duty to actively benefit the lives of its members when equality demands this). Indeed, in the most important matters, those of principle, Dworkin abjures utilitarianism altogether. He supports some sort of a market economy, but certainly not one that Smith would recognize or countenance.

While belonging to the kingdom of classical liberals, he must be classified under a different phylum. In this dissertation, I will examine his views on and arguments for integrity, equality, liberty, and community. These four main areas do not, of course, admit of easy division. They are interconnected and one of my aims will be to see how the place of one relates to the others. We must see the hierarchy between the ideas, which one takes priority (if any), and how Dworkin constructs his theory and argues for it. In the first chapter, this will be done internally to Dworkin's own

argument: we will take him on his own terms and see where each piece of the theory fits.

Coincident with the surge of interest in political theory since 1971 has been a renewed interest in the political philosophy of Hegel. In reaction to a long tradition of the dismissal of either certain aspects of Hegel's political philosophy or the whole of it, a reevaluation of Hegel's political philosophy has occurred. Hegel, in contrast to Dworkin, offers a moral/political theory founded on the idea of liberty, an analysis which is both imminent and historical in nature.

The second chapter of this work will consist, then, in an explication of Hegel's theory of right. This explication will also be imminent in nature: that is, we will follow the argument Hegel lays out as he lays it out. While the entire argument will be explained, the second chapter will focus on the key transitional moments within the Philosophie des Rechts, in an attempt to see how the concept of freedom has been re-determined and redefined as it develops in the several spheres of that work.

In the third chapter, Dworkin's moral/political theory will be examined in light of Hegel's political philosophy. To say that the two theories will be placed into a conversation puts it too strongly, for we are interested here in the viability and coherence of Dworkin's theory. In short, Dworkin's philosophy bears the brunt of criticism. Chapter 3

will examine, first, Dworkin's conception of the individual (or the self), society, and the relationship between the two. In both Dworkin's description of and normative theorizing on the relationship between individual and society we find the widest lacuna between Dworkin and Hegel. Secondly, we will analyze Dworkin's theory of equality in light of the pertinent Hegelian objections. In this section of the final chapter, we will examine Dworkin's justification for taking equality to be the foundational moral and political principle, the injunction that the state must show its citizens equal concern and respect, and the argument that this means an equality of resources. We will also, in this section, look at two side issues which have a practical bearing on Dworkin's egalitarianism: Hegel's thoughts on state intervention in the sphere of civil society and taxation. Finally, this chapter will also include a discussion of several objections to egalitarianism which are not Hegelian in nature but which nevertheless pose serious problems for Dworkin's (and perhaps any other) theory of liberal egalitarianism.

To summarize the conclusions: Hegel's philosophy of **recht** not only undercuts the arguments made by Dworkin on equality's (and liberty's behalf), but it also provides us with a richer account of freedom, the relationship between the individual and the state, the proper role of individual rights, and the community. My contention is that Dworkin's defense of "liberalism" fails on several Hegelian grounds.

First, equality can not be foundational for a moral or political theory; equality, while perhaps a wished for by-product of modern political theories, can not in itself serve as the ground of a political theory. Secondly, the version of equality Dworkin promotes misunderstands the nature of the political state and the individual's relationship to it. Thirdly, liberty, conceived by Dworkin in the classically liberal "negative" sense, misconstrues in what freedom consists, what a free personality is, and how liberty can be attained in the modern world. Hegel's philosophy of **recht** provides us with a conceptually and historically more comprehensive account of the nature of liberty, the relationship between the historical determinations of freedom and the law, and the way in which modern society allows for freedom. Hegel's account of liberty, modern society, and the law remains preferable to Dworkin's conception of those ideas.

An objection might be raised that Dworkin's theory receives unfair treatment due to the fact that his philosophy alone is criticized. Dworkin, it could be said, should have an equal opportunity to critique Hegel's political philosophy. There is some merit to this charge. However, Dworkin's theory in this work is taken on its own terms; in that sense, his treatment is, as far as I am capable, fair. Furthermore, I do consider several possible arguments Dworkin could make in response to the Hegelian criticism, though, of course, not in the more comprehensive way that Hegel's position here is used

as a critique of Dworkin. At least in that way I try to do justice to the complexity of Dworkin's position.

But most importantly, this charge would merit a reconsideration of the project if the aim of this work was solely to place the two writers into the forensic arena. But it is a consequence of what I take to be the Hegelian objections to Dworkin's liberalism that those objections have an equal pertinence to other versions of the reigning liberalisms of our day. What will be said on behalf of Hegel concerning Dworkin's theory in this work could, with requisite modifications, be applied to other liberal justifications and theorizings, such as those supplied by John Rawls, Bruce Ackerman, et al. In that sense, the larger consequence of what is offered here is a critique of the reigning intellectual current, an ideology which permeates not only the academic world but infuses questions of public policy. The importance of skewing the debate in favor of Hegel lies in the pertinence that his philosophy has in reprovng the predominate theoretical and practical temper of the times. Here it is presented in a wholly critical fashion; what specific positive programs and policies Hegel might have to offer us remain, in this work, unfulfilled.

CHAPTER 1

DWORKIN'S LIBERAL JURISPRUDENCE

There has been a tendency of late, when evaluating Dworkin's writings, to speak of two Dworkins,¹ much as scholars speak of Wittgenstein after the Tractatus or the so-called **kehre** in Heidegger's thought. This is so because Dworkin has, in distinction to his earlier work on jurisprudential problems, written much on more abstract, philosophical problems. Unlike Wittgenstein or Heidegger, however, the earlier Dworkin and the later Dworkin are not different; he has just donned a new set of clothes. The ideas implicit, and sometimes remarked on, in the earlier Dworkin are fleshed out in the latter; the moral foundations of his earlier work are given an abstract, theoretical expression in the later writings. Furthermore, he has written on concrete political issues, though in an attempt to apply his theory concerning equality to practice. The distinction between the "two" Dworkins is not, philosophically speaking, substantive.

However, a problem does arise because of the shift in focus of Dworkin's work, a complication that arises because of

¹ For the two Dworkin thesis see Joseph Raz, "Dworkin: A New Link in the Chain," California Law Review 74 (May 1986): 1103-1119.

the subject matter in Dworkin's earlier writing. Although he does discuss abstract questions, he does so in terms of the law -- i.e., in terms of specific statutes, court cases and decisions, constitutional interpretations, etc. In other words, his first main project consisted in the development of a jurisprudential theory (in part a response to the dominant legal theory of the fifties and sixties) which explains, primarily, "practical" questions. "Practical" designates those sorts of questions which pertain to the practice of law and constitutional interpretation. Among these are: how should judges judge? What criteria should judges look to in deciding cases? How have certain Supreme Court cases been decided, and how do these decisions fit Dworkin's theory of how the case should be decided? The "theoretical", or perhaps more accurately, the moral questions, were addressed, but in a way which placed the moral questions in service of the practical questions. The questions which link his jurisprudential theory to the stances he takes concerning the foundational principles of liberalism -- equality, liberty, and rights (all understood in a certain way), their interrelationships, and their priority when taken as a whole, served to answer those practical questions. So, an analysis of his jurisprudential theory or his philosophy of the law is required.

But as Dworkin has shown by the nature of his later writings, his jurisprudence cannot be divorced from his

positions on these fundamental questions. Indeed, as Dworkin himself argued, the way judges should judge specific cases must take into account some more general and abstract theory, a theory which relies on a moral justification. His recent work on the nature of equality is just this attempt to sketch out this broader political theory.

The relationship between the specific, practical legal questions and the foundational moral principles can also be seen in his discussion of the community (or in Dworkin's terms, the political community). This discussion usually takes place within the context of his attempt to analyze certain issues or aspects of the law and of the law within society (i.e., how the law itself is legitimate, how certain legal institutions, though non-democratic, do not conflict with democratic theory, when and how judges should weigh the interests of the community in their decisions, etc.). This is not a hard rule; he does discuss other, "non-legal" issues -- e.g., he explains what he means by a "liberal community" in an article by the same name as well as responding to various communitarian objections to liberalism. Again, although he does mention democracy and representative democracy, and discusses associative or communal obligations and morality, these are taken up within the context of his attempt to either justify liberalism or promote a certain jurisprudential theory.

It will therefore be necessary to attempt to see just what he means by integrity, equality, liberty, and community both in the abstract (i.e., divorced from their connections to specific legal cases and questions) as well as in the context of jurisprudential considerations. For example, in relation to his discussion of community, I will be asking these kinds of questions: what does Dworkin envisage when he speaks of a community? What is the nature of the individual who makes up Dworkin's community? And what sort of obligations does the individual have to other members of the community and to the community itself?

As we shall see, the political virtues embodied in an ideal community (justice, fairness, due process, integrity) are founded upon his conception of equality; his conception of equality is linked to his views on liberty; and that, in turn, leads him to make an argument for what he takes to be a "true" or "genuine" community.

Integrity

Law as Integrity

In Law's Empire², Dworkin presents a detailed theory of jurisprudence. In contrast to his two previous books, Dworkin here lays out a systematic defense and explication of a legal theory, coupled with a moral justification. Broadly speaking,

²

Dworkin, Law's Empire (Cambridge: Harvard University Press, 1986).

Dworkin's argument is that the most coherent and comprehensive interpretation of the law (the best interpretive theory) is one which accounts for the law in terms of integrity.³ What does he mean by "integrity?" And how does integrity give us the best interpretation of legal phenomena?

In Law's Empire, Dworkin first takes up the nature of integrity within the context of the problem of legitimation: any legal theory must satisfactorily explain how "law provides a general justification for the exercise of coercive power by the state, a justification that holds except in special cases when some competing argument is specially powerful."⁴ Dworkin's concern is the concern of Locke and Madison -- how, and to what degree, should the state or government have power over the individual members of society? As Dworkin notes, the problem of legitimacy goes hand in hand with another question: that of moral obligation. In Dworkin's words: "Do citizens have genuine moral obligations in virtue of law?"⁵ According to Dworkin, the two other main interpretative possibilities -- conventionalism and legal pragmatism -- are inadequate justifications for the coercive use of power. The

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That a theory of law should be interpretive is an entirely different argument; here I am only concerned with Dworkin's particular conception of law as integrity, and will therefore presuppose Dworkin's argument that it is so.

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Dworkin, Law's Empire, 190.

5

Ibid., 191.

conventionalist argues that political coercion is justified by those past political decisions which in fact justified coercion, and only if we find these justifications explicitly in those past decisions (or make them explicit using techniques conventionally used by the legal profession).⁶ The driving force behind conventionalism is the notion of protected expectations: the use of coercion is justified if the citizens are not surprised by governmental action.

Dworkin's general rejection of conventionalism as an adequate justification hinges on conventionalism's lack or inability to include any concept of political morality. For the conventionalist, if no right exists in past legal decisions, judges must look to some other criteria for the ground of their decisions. Such criteria employ some forward-looking instrumental standard.

Legal pragmatism, on the other hand, is a form of skepticism.⁷ The legal pragmatist rejects the idea that past

6

Ibid., 95.

7

I am only giving the outlines of Dworkin's rejection of pragmatism in a legal context, as I am concerned here with his theory of law as integrity. Dworkin has been engaged in a discussion with (perhaps attacked might be better) pragmatists on this and more general issues such as skepticism, the most strident of whom is Stanley Fish. Fish's three highly critical essays of Dworkin are collected in Doing What Comes Naturally (North Carolina: Duke University Press, 1990). For a response to Fish by Dworkin, see "Pragmatism, Right Answers, and True Banality," in Pragmatism in Law and Society, edited by Michael Brint and William Weaver (New York: Westview Press, 1991), 359-388.

political decisions justify present coercion. "Judges do and should make whatever decisions seem to them best for the community's future, not counting any form of consistency with the past as valuable for its own sake."⁸ In the pragmatist's conceptual scheme, persons do not have legal rights (although judges may decide cases as if they did); the decision is based upon what will be best for the community in the long run. Accordingly, the pragmatist does not judge between competing values about what is best for the community; each judge must decide for him or herself what is in the community's interest. A pragmatist judge may indeed recognize prior rights or precedent, but this is a strategic move, done for tactical purposes: he believes that in justifying his conception of the community's interest in terms of precedent, the community will accept and abide by his decision.

Dworkin's rejection of pragmatism follows from his acceptance of integrity. In other words, Dworkin takes seriously the skeptical challenge that there are no such things as rights, but only pragmatic solutions which further the community's future. Judges may speak as if there are rights, but they do so only to secure that better future. They do not believe, at heart, that there are rights as such. For Dworkin, integrity serves as a better interpretation of the law because, in general terms, it takes into account not

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Dworkin, Law's Empire, 95.

simply predictability or the future of the community, but morality. The law as integrity secures "equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does."⁹ Law as integrity also takes into account the precedent and past judicial decisions in so far as these past decisions embody, explicitly or implicitly, a coherent moral principle.

Integrity applies both to judicial and legislative principles. As such, it is both a legal and a political theory. Against conventionalist and pragmatic approaches to the law, integrity, as the overarching political virtue, serves as the best interpretation of the law because it provides a coherent standard for present political and judicial decisions in accord with the best moral principles. Dworkin's argument for accepting the virtue of integrity as the best interpretation of the law comes from his discussion of "checkerboard" cases or laws. If politics is the art of compromise, there would seem to be no problem in accepting decisions which treat the same or like classes of people differently. As Dworkin points out, this is done frequently in matters of zoning, parking, etc.¹⁰ Would we accept a checkerboard solution concerning abortion (i.e., women born on

⁹ Ibid., 96.

¹⁰ Ibid., 179.

even days would be allowed to have abortions, women born on odd days would not)? Dworkin thinks not. In matters of principle (i.e., when a moral issue is at stake), which zoning and parking are certainly not, we feel an intuitive or instinctual repulsion to checkerboard compromises; such solutions, although perhaps fair and just, do not meet the requirement of integrity -- the demand that in matters of principle we should arrive at a coherent principle and not a compromise.

Integrity as Equality

Ultimately, Dworkin's rejection of checkerboard solutions and his acceptance of the virtue of integrity rely upon the concept of equality. Equality serves as the best moral/political principle under which legislatures and judges should determine, in accord with past decisions (insofar as possible), a coherent, principled decision. As he points out, the ideal of integrity (which, he claims, is part of our collective morality) is now a matter of constitutional law given to us by the equal protection clause of the Fourteenth Amendment. The equal protection clause outlaws internal compromises on matters of principle; its importance lies not in the fact that the law should apply equally to all (Dworkin says that both integrity and the Fourteenth Amendment would "deny what is often called 'equality before the law' and

sometimes 'formal equality' "¹¹), but that the equal protection clause is a moral principle. Equal protection cases do not only enforce rules equally, but rather, and this is their importance for Dworkin, they presuppose integrity, the faithfulness to a moral principle. In other words, Dworkin see the problem with formal equality (namely, that one could just as well have formal equality under a totalitarian or fascist regime as in a democracy) and therefore thinks that the best interpretation of formal equality consists in linking it substantively to integrity and not just taking it as the equal enforcement of legislative decisions.

What is the substance of Dworkin's conception of equality? Why should equality be the most important value? Dworkin is well aware of the problems which arise when formal equality is taken as the overriding principle. For example, if, in Nazi Germany, the Nazi legal system (unjustly) benefitted Aryans in the past, the principle of formal equality would seem to give the regime a legitimate reason to benefit Aryans in the present.¹² Dworkin, of course, knows how strange it seems to argue that a Nazi judge ought to extend Nazi principles. Dworkin's response to this problem is two-fold. First, if the principles upon which a legal system are

¹¹

Ibid., 185.

¹²

This example come from "Striking Back At The Empire: A Brief Survey of Problems in Dworkin's Theory of Law," by Larry Alexander, Law And Philosophy 6 (1987): 419-438.

based are wicked, if they are not sufficiently moral, the system is not a "legal" one -- there is no law per se. It is possible that legal rights and moral rights are different, but if they are too wicked they are no longer legal rights. Secondly, the judge may decide that the legal rights do not have the requisite moral force to warrant recognition. In both cases, the effect is the same: where there exists insufficient moral force, the "judge may have to disregard the law [or he may decide] that there is no genuine law for him to disregard."¹³

Most of us would not quibble with Dworkin's assertion that legal rights in the Nazi regime rest upon insufficient moral grounds. However, what if there are two compelling and competing conceptions of equality? By what standard should we chose Dworkin's conception? Dworkin gives an answer to this question in an earlier essay, where he contrasts two different views of equality, that of the liberal and that of the conservative. In his interpretation, the liberal view of equality supposes that political decisions must be made independently of any particular conception of the good life, because if they were not, citizens would not be treated equally; the political decision dependent upon a conception of the good life would be tantamount to a preference of one way of life over another. The conservative, on the other hand,

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Dworkin, Law's Empire, 108.

thinks that the government should have in mind a distinct conception of the good life, and should therefore treat citizens as equals as if they were desirous of leading that life.¹⁴ Given these two competing conceptions of equality, Dworkin decides in favor of the liberal notion of equality based on its neutrality towards any view of the good. Dworkin prefers the liberal view of equality because it treats individuals as worthy of respect -- i.e., as human beings who are capable of deciding for themselves what is best for them. Hence the liberal view considers individuals as mature, competent, and autonomous. The conservative view, according to Dworkin, does not treat individuals with the same kind of respect, since, on the conservative view, there is a conception of the good life that individuals should pursue. It does not act towards those individuals as if they are autonomous beings, capable of determining their lives as they see fit. Furthermore, the liberal conception of equality is linked to individual rights, for rights serve as the foundational guarantor of equality: "The ultimate justification of these rights is that they are necessary to protect equal concern and respect."¹⁵ In the conservative view, rights do not function in the same way, for the simple

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The essay is 'Liberalism,' in A Matter of Principle (Cambridge: Harvard University Press, 1985).

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Dworkin, Matter of Principle, 198.

reason that if one thinks a particular way of life good, rights would have to give way when they came into conflict with that vision of the good life.

Equality

The stature that the idea of equality has in Dworkin's theory goes beyond its importance for his strictly jurisprudential theory; Dworkin wants equality to serve a foundational role within a broader moral theory, and in this respect his concern with equality is dominant and primary.

In a series of essays¹⁶ written between 1981 and 1987, Dworkin has conceived and elaborated a substantial theory of equality. Clearly, as the title of the four articles show, equality plays a foundational role in the development and justification of both his theory of jurisprudence and the more abstract considerations of justice, rights, and liberty. As we have seen in discussing his notion of integrity, equality buttresses his claim that the law as a whole, as well as judgements in specific Constitutional cases, should be explicated in terms of integrity. By using the standard of integrity, and ipso facto the criterion of equality, he can

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These essays are: "What is Equality? Part 1: Equality of Welfare," Philosophy and Public Affairs 10, no. 185 (1981); "What is Equality? Part 2: Equality of Resources," Philosophy and Public Affairs 10, no. 283 (1981); "What is Equality? Part 3: The Place of Liberty," Iowa Law Review 73, no. 1 (1987); and "What is Equality? Part 4: Political Equality," University of San Francisco Law Review 22, no. 1 (1987).

attempt to supply a coherent theory which serves as the best interpretation of the law.

Secondly, from his theory of equality he will attempt to derive a plausible account of liberty (what liberties a society should protect and enhance, when they may be sacrificed, and what the relationship between liberty and equality is), as well as an account of politics (what political institutions and processes an egalitarian community should have). In both cases, that of liberty and of politics, equality plays the determining and presiding role. He does not argue that liberty is subservient to equality; it does not occupy a second order position, it does not depend upon equality in any causal way in order that we should think it an important value, and there may be other justifications for the kind of liberty which Dworkin wants to defend. The case for non-dependence that Dworkin wants to make for liberty does not apply to political institutions; indeed, in his view political institutions play a decidedly subservient role to the ideal of equality. The kind of institutions we have, how the government treats its members, and the policies it develops, administers, and executes should be informed by and serve the ideal of equality. But it is even more than equality playing the chief role in situating and defining liberty, law, and politics. Equality as Dworkin conceives it determines the kinds of questions we ask about liberty, politics, and the law, and therefore determines the place of all three.

Equality is, of course, a general and vague term which does mean a variety of things. In those four essays, for example, he successively discusses distributional equality, liberty as an adjunct of equality, and political equality. In each case, he tries to give a lucid and consistent account of these different aspects of equality within the framework of the abstract egalitarian principle.

Equality and Distributional Justice

In the first two essays concerning equality, Dworkin starts from this premise: how and in what manner should the government treat people as equals? This starting point is based upon an abstract egalitarian principle: "...government must act to make the lives of citizens better, and must act with equal concern for the life of each member."¹⁷ Dworkin's concern lies primarily with government: in what way should the government treat individuals as equals, what liberties should it protect, what institutions should it have in order to realize equality?

In addition to equality as understood as the abstract egalitarian principle, equality also seems to flow from the liberal premise of neutrality. Indeed, it would seem that all modern liberal political theories share that one principle: the government and its laws must remain neutral as to

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Dworkin, Political Equality, 1.

considerations of the good life.¹⁸ This premise of neutrality is translated into a question of equality when we attempt to discover how resources should be divided neutrally. Because the government should not promote or disfavor any individual's conception of the good, which is tantamount to say that it must treat each with an equal concern and respect, the question becomes: how are the resources of that society to be divided so that each is treated equally?

The question can be further broken down. We can ask: What counts as a resource? Some libertarians who accept the neutrality principle nevertheless do not think that a person's body, labor, and talent should be taken as resources to be divided, no matter how unequal that leaves some people.¹⁹ Dworkin (and John Rawls) reject this view. They both think equality demands that certain duties be imposed upon the more fortunate for the sake of those less fortunate; labor and talent count as resources, on their view, and should be subject to redistribution.

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Dworkin states it this way: "The first theory of equality supposes that political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life...I now define a liberal as someone who holds the first, or liberal, theory of what equality requires." Dworkin, Matter of Principle, 191-192.

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For a defense of this view, see Robert Nozick, Anarchy, State, and Utopia, (New York: Basic Books, Inc., 1974), 30-33, 213-231.

We can also ask: How should the resources be divided? In other words, by what formula or metric can we ensure that the resources are divided equally? Again, there are a variety of answers to this question. John Rawls answers this question by appealing to what he calls "primary goods" and the "difference" principle. Primary goods, such as wealth, opportunities, income, certain powers, are to be distributed according to his difference principle: we should seek, under conditions of risk (the uncertainty and scarcity that prevail in the original position), principles of distribution that maximize the condition of the worst off.²⁰ These primary goods are neutral in the sense that they are goods any rational person would want more of rather than less of no matter what his conception of the good was.²¹

As has been pointed out, Rawls' theory of primary goods as to the distribution of resources is really a theory of welfare distribution. What we are really concerned about in distribution in Rawls' scheme are levels of welfare, and not specifically wealth, opportunities, etc.²²

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John Rawls, A Theory of Justice (Cambridge: The Belknap Press of Harvard University Press, 1971), 90-95.

21

Ibid.

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See Larry Alexander & Maimon Schwarzschild, "Liberalism, Neutrality and Equality of Welfare vs. Equality of Resources," Philosophy and Public Affairs 10 (Winter 1987): 85-110.

When Dworkin considers two possible choices among the variety of possible theories of distributional equality, he first critiques equality of welfare and then defends an account of equality of resources. In Dworkin's words, equality of welfare is a "distributional scheme [which] treats people as equals when it distributes or transfers resources among them until no further transfer would leave them more equal in welfare;"²³ and equality of resources is one which "distributes or transfers so that no further transfer would leave their shares of the total resources more equal."²⁴ I will first outline the main points in Dworkin's critique of welfare equality and then move to a more detailed discussion of equality of resources.

Equality as Equality of Welfare

Dworkin distinguishes between three classes of theories of welfare distribution: (1) "success theories of welfare;" (2) "conscious state theories;" and (3) "objective conceptions" of welfare.²⁵ Success theories of welfare justify a distributional system by saying that a person's welfare depends upon the success that individual has in fulfilling his

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Dworkin, Equality of Welfare, 186.

²⁴

Ibid.

²⁵

Ibid., 191-193.

desires, ambitions, and preferences. A variety of success theories have been formulated, depending upon which preferences they take into account. Accordingly, Dworkin considers several in turn (though not all), and rejects them. First, there are those success theories which take into account political preferences. Dworkin rejects this interpretation on the grounds that such a distributional system would result in a higher share of resources for a bigot simply because his political preferences were not accepted:

So I assume that almost everyone would wish to qualify equality of success at least by stipulating that a bigot should not have more goods than others in virtue of the fact that he would disapprove a situation in which blacks have as much as whites unless his own position were sufficiently favored to make up the difference.²⁶

For much the same reason, he also rejects a success theory which takes into account not personal political preferences but nonpolitical impersonal ones. It would be silly to think that because I have a preference that Frank Lloyd Wright's mile high city be built I should be awarded a greater amount of resources because my impersonal preference is not successful.

Dworkin considers next a more restricted version of success theory, namely, the idea that in deciding what counts as equality of distribution we should consider only the success a person has in fulfilling his own personal

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Ibid., 198.

preferences about his life and circumstances.²⁷ This success theory can be divided into two types: the **relative success** in fulfilling preferences and the **overall success** in satisfying predilections. The former fails because people disagree about how important relative success is. Because equality of welfare proposes to make people equal in what is actually fundamental and important to them all, the fact that people disagree about the importance of relative success means that some will receive an unequal proportion of resources in relation to others.²⁸ When we take overall success as the measure, we fail to find any neutral standard by which to judge overall success. Whereas in determining relative success we only had to calculate how successful a person was in achieving his aims as he measured them, in overall success theories we have to measure a person's preferences against some objective judgement of how much overall success he actually has. Therefore, it is hard to see how we could "invent a test or metric for overall success that will be both pertinent to equality and independent of prior assumptions about equality in distribution."²⁹

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Ibid., 204.

28

Ibid., 207.

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Ibid., 219.

Dworkin then considers those theories which rely upon an equal amount of a conscious state. Enjoyment serves as a sufficiently broad version of the states of consciousness theory, and it fails much as the relative success theory failed. People disagree about the enjoyment they attach to enjoyment. Again, because equality of welfare aims to make people equal in what is really important to them, equality of enjoyment will result in making individuals equal in one respect but unequal in others.³⁰

Lastly, Dworkin evaluates equality of welfare theories which rely on an objective standard. These theories determine equality based not on an individual's own assessment, but on some other, objective assessment. Such a theory not only violates the neutrality principle (e.g., the state will decide what actually is best, despite the individual's own judgement, and distribute resources accordingly), but also fails because it "must assume an independent theory of fair distribution, and has no more power to justify giving some people more and others less than what they are entitled to have under that theory."³¹

In rejecting these different justifications of equality as equality of welfare, Dworkin proceeds to offer his own proposal, equality of resources.

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Ibid., 221.

³¹

Ibid., 225-226.

Equality as Equality of Resources

In formulating a theory of equality of resources, Dworkin centers the discussion around the proper and equal distribution of goods and resources available in a society. Goods and resources mean not only the material assets available, but also factors such as income, time, talents, and opportunities. This has the benefit of not relying on any welfarist conception of equality, like well-being or happiness.

The problem Dworkin confronts is two fold: he needs some mechanism to insure both that (a) resources are actually parcelled out equally and that (b) every one agrees on the way they are to be divided (since we could conceivably achieve actual equality in the division of resources in various ways). Dworkin proposes to solve both of these problems by recourse to an hypothetical auction.

Such an auction will satisfy the demands of equality when no one, after the auction, envies the bundle of resources another has obtained. This is the so-called 'envy test': "No division of resources is an equal division if, once the division is complete, any immigrant [Dworkin uses the example of people ship-wrecked on an island] would prefer someone else's bundle of resources to his own bundle."³² The auction is attractive because it allows the participants themselves to

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Dworkin, Equality of Resources, 285.

determine the fairness of the division, relying on their preferences, tastes, convictions, etc.³³

The envy test, however, needs to be supplemented in two ways before it can be considered a true distributor of equal resources. First, the initial endowments of resources must be equalized. This is necessary to avoid envy; if individuals had unequal amounts of money to begin with there would be no possible way to avoid envy in the auction that followed. Secondly, and more importantly, a set of initial assumptions -- the background or baseline -- have to be determined. The baseline resolves the form, both natural and legal, of the resources to be offered at the auction. This is the principle of abstraction:

When you bid for a painting in an auction of art, you assume you will be able to hang the painting where you like, look at it when you want, and so forth. Any auction requires a background of parallel assumptions...the principle of abstraction, which requires a community treat each of its members with equal concern...[is] a central part of any appropriate baseline.³⁴

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For this reason, the auction produces an equal distribution without abstracting from the personal characteristics of the individual. This should be contrasted to Rawls' "original position," where in the name of egalitarian justice the participant does not have any knowledge of his specific circumstances, talents, or inclinations. Dworkin writes: "Equality of resources insists that people be allowed to deploy all aspects of their personality in making the judgements on which the envy test depends." Dworkin, Place of Liberty, 19.

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Ibid., 21-25.

Treating each member with equal concern consists in having the auction be as sensitive as possible to the preferences and desires of each participant. The natural and legal form in which resources are to be auctioned are therefore as abstract as possible to take into account the individual's decisions and projects.

Moreover, treating each member with equal concern means taking the other person's preferences and decisions into account. "The auction proposes what the envy test in fact assumes, that the true measure of the social resources devoted to the life of one person is fixed by asking how important, in fact, that resource is for others."³⁵ This Dworkin terms the true opportunity costs, and it allows us to measure the true value of resources and whether the envy test has been met.

It would seem, then, that Dworkin, in relying on the principle of abstraction, divides it into two parts: the true opportunity costs of the market and the idea that resources must take as abstract a form as possible to ensure sensitivity to individual tastes.

The true opportunity cost is an attractive idea for the following reason: it supposes that each individual plan his life around the concerns and plans of others in the community. It allows for a mutual consideration on the part of individuals and fosters an awareness of the desires of others:

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Dworkin, Equality of Resources, 289.

"We have already decided that people should pay the price of the life they have decided to lead, measured in what others give up in order that they can do so."³⁶

Liberty

In "What is Equality? Part 3: The Place of Liberty," Dworkin sets forth the manner in which liberty is to be understood in the context of his theory of equality. Despite his emphasis on equality, Dworkin does not, as noted above, want to claim that liberty plays a subservient role to equality: it is rather that "liberty, whether or not people do value it above all else, is essential to any process in which equality is defined and secured."³⁷ The two ideas are co-dependent; the idea of equality as equality of resources that he wants to defend requires a substantive and constitutive role for liberty in order to be true equality.

It would appear on first view that the tension between the two ideas would force us to sacrifice one over the other. As he writes, any contest between equality and liberty is a contest liberty must lose.³⁸ For example, when Congress enacted a statute that limited the amount of money an

³⁶

Ibid., 294.

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Dworkin, Place of Liberty, 3.

³⁸

Ibid., 7.

individual could spend on behalf of a political candidate, that statute was declared unconstitutional by the Supreme Court.³⁹ The Supreme Court held that freedom of speech protected by the first amendment right was violated by an overtly egalitarian principle: the result of this decision is that rich people, allowed to spend as much as they wish on a political candidate, will have a much greater impact on the political process than a less wealthy person.

This case, and similar others, seem to present us with a clear case of the conflict between liberty and equality. This description also conforms to the spectrum of positions taken in American politics, where those on the left emphasize or endorse an egalitarian view to liberty's detriment and those on the right favor liberty at the expense of equality. However, Dworkin wants to insist that despite the apparent unfortunate conclusion that liberty must lose in a contest with equality, the two do not, in principle, conflict. Although it appears that liberty wins over equality in the previous example, he wants to claim that it does not; it is only the **form** of equality as understood in this case that was rejected, but not equality in its proper or important form. In other words, Dworkin wants to defend a view of equality which encompasses and subsumes within it liberty. This is what he calls a "constitutive" strategy which "builds liberty

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Buckley v. Valeo, 424 U.S. 1 (1976).

into the structure of its chosen conception of equality from the start."⁴⁰ And when we reject equality in favor of liberty, as the Supreme Court on its face did, we are actually rejecting not the best conception of distributional equality (namely, equality of resources) but a different form of it, a conception of equality which must produce a conflict between itself and liberty.

How then does liberty not conflict with equality? In what sense is liberty constitutive of equality? The force of his argument comes from an abstract egalitarian ideal which, he claims, few of us would disown. That abstract egalitarian ideal is this: "government must act to make the lives of those it governs better lives, and it must show equal concern for the life of each."⁴¹ Because we do or should accept that principle, we would not believe that it could be compromised when it comes into conflict with liberty.

As we noted in our discussion of equality of resources, Dworkin appeals to the abstract egalitarian principle in formulating the baseline liberty/constraint system which serves as the background or foundation for his envy test (which the imaginary auction is designed to satisfy). The auction serves to distribute resources equally in this sense: no one will envy the property assigned to or controlled by any

⁴⁰Dworkin, Place of Liberty, 13.⁴¹

Ibid., 7.

other person.⁴² But in order to auction goods in that manner, the auctioneer must have a background baseline system, a set of rights or liberties upon which the participants can base their choices. As Dworkin points out, it makes no sense to auction liberties and powers over goods as if they were resources themselves; the participants will always make their choices as if these specific liberties and powers were already the original baseline.⁴³ The connection between the baseline system and the envy test, the bridge between the abstract egalitarian demand for equal concern and the envy test's realization of that concern, lies in the "principle of abstraction."⁴⁴ The principle of abstraction provides us with the flexibility necessary to conduct the auction with as much sensitivity to the preferences and plans of the participants as possible. For example, it requires that we auction off the goods in their most abstract form (iron ore instead of steel), or their most divisible form (undeveloped land rather than acres of corn).

Furthermore, and this is the important point for folding liberty into equality, the principle of abstraction implies freedom of choice, in two ways. First, an ideal distribution

⁴²

Ibid., 18.

⁴³

Ibid., 21.

⁴⁴

Ibid., 25.

of resources can take place only when "people are legally free to act as they wish except so far as constraints on their freedom are necessary to protect security of person and property, or to correct certain imperfections in markets (or other auction-like distribution mechanisms)." ⁴⁵ Liberty is not the license to do as one pleases, or what he calls the "anarchist" view of liberty -- that is, the freedom to act without concern for others. Rather, liberty here means that individuals must be free to choose those resources which they think will best serve their interests compatible with the desires of others and with the least amount of constraint possible to preserve security. In this sense he can say that liberty is rights based; individuals must have certain rights which guarantee specific freedoms and which do not violate his idea of equality. We have the right to freedom of choice, in this abstract way, because freedom of choice is necessary for equality.

Secondly, liberty also means that individuals must be free to use whatever resources they acquire after the auction. In the first case, liberty is seen as essential in order that we may freely determine the life we are to lead; in the second case, liberty means the ability to freely realize that life we have chosen. In both cases, liberty plays a co-equal role with equality: in order to guarantee an egalitarian society,

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Ibid., 25.

the liberty to choose and the liberty to act must be protected.

As well as demanding this abstract freedom to chose, equality of resources also implies certain concrete rights to liberty. In particular, this theory of equality endorses the "liberal thesis that legal prohibitions cannot be justified on the sole ground that the conduct prohibited is offensive to some dominant religion or moral orthodoxy."⁴⁶ This would mean, of course, both freedom from a state mandated religion and freedom of conscience and the freedom of personal moral preferences, like sexual choice, employment, and family arrangements.

Dworkin's argument here rests on "opportunity costs." To recapitulate, the auction determines in an egalitarian fashion how resources are to be divided. The baseline provides a background or foundation against which our choices are to be made. What we need is a bridge between the two concepts which will allow us to determine how these resources will be measured so that the resources are equally divided: "Equality of resources uses the special metric of opportunity costs: it fixes the value of any transferable resource one person has as the value others forgo by his having it."⁴⁷

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Ibid., 29.

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Ibid., 26.

Opportunity costs give us a measuring stick by which we can determine if the resources have been parcelled out equally.

Dworkin is aware that, by using different baselines, we will produce different results in the auction. That is why Dworkin needs to identify the "true opportunity costs." What are true opportunity costs? As he sees it, we attain true opportunity costs when the auction takes place in the most abstract manner possible. In other words, the ideal auction must be held so that it is as sensitive as possible to the preferences of the individuals. True equality of resources can only be achieved when the preferences of individuals have been taken into account in as sensitive and flexible a manner as possible.

The principle recognizes that the true opportunity cost of any...resource is the price others would pay for it in an auction whose resources were offered in as abstract a form as possible, that is, in the form that permits the greatest possible flexibility in fine-tuning bids to plans and preferences.⁴⁸

We can now see how Dworkin argues that the concrete liberties of conscience (religion) and personal choices are necessary to his conception of equality. Because equality of resources demands that the life we chose to lead be measured not solely by our desiring it but in terms of the cost of that life to others, anyone who would wish to purchase, in the auction, a life which excluded certain sexual practices, for example, could not afford the opportunity costs to others.

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Ibid., 28.

Just as equality would dictate that a person could not lead a life of imperial connoisseurship, hoarding vast collections of masterpieces in a storehouse, because that would exceed that way of life's opportunity costs to others, so too someone desiring a life led under a government of religious intolerance could not afford the opportunity costs:

Given that some of his fellow citizens care about their religious or spiritual lives too, but are called to a different religion or none at all, he cannot purchase the environment he believes he needs in an auction whose baseline does not give it to him for nothing in advance.⁴⁹

In addition to an abstract notion of liberty as freedom of choice and the more concrete freedoms of personal preferences and religious freedom, Dworkin also argues that freedom of speech must be included within the baseline. The auction determines, with the greatest degree of sensitivity possible, how resources are to be divided. Sensitivity and true opportunity costs presuppose that individuals have some knowledge of their preferences and convictions; indeed, an egalitarian auction would be impossible without such knowledge. And this in turn presupposes that the individuals participating in the auction have had the opportunity to formulate, discuss, reflect on, alter and determine just what their preferences are. In this pre-auction arena, participants must have the freedom of expression if they are to understand both their preferences and the preferences of

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Ibid., 31.

others. Only then can the auction fulfill its end. "A complete account of equality of resources must therefore include, as a baseline feature, some description of the circumstances in which people's personalities will be taken as properly developed so that auction calculations can proceed."⁵⁰ Dworkin terms this the principle of authenticity.

This principle can be interpreted in two ways. First, it tells us that personalities are authentic when they have been formed in regard to an auction which distributes resources equally. Dworkin is not giving us a theory of personality development; he only makes the point that in order for individuals to develop a personality in terms of the auction, freedom of expression must be granted. Likewise, he does not make the same argument Mill made in favor of freedom of speech: namely, that freedom of speech is necessary if I am to educate myself in order to develop all of my talents and capacities. For Mill, such an exercise is fundamentally democratic: we can only maximize happiness, in terms of human self-development, when we discuss, argue, and debate in an arena free from coercion. In this way we come not only to educate ourselves individually but society as a whole becomes collectively self-educated.⁵¹ For Dworkin, freedom of speech,

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Ibid., 35.

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See J.S. Mill, On Liberty, especially Chapter II, "Of the Liberty of Thought and Discussion," 75-118.

although it does allow us to come to an understanding of our preferences and convictions, is not justified on Millian grounds. Rather:

Ideal authenticity requires the fullest possible opportunity not because people are always more likely to make wise choices with more time but because their choices should not depend on a view of their personality, and of the personalities of others, with whose formation they remain dissatisfied.⁵²

Taken in this more limited way, the auction and the principle of authenticity allow Dworkin to detour the Scylla of liberal thought -- namely, the fact that individuals during their development and maturation will necessarily form a conception of the good life and the requirement that, in order to respect others as equals, we must remain neutral towards those other, and often competing, conceptions of the good life. Dworkin sidesteps the problem because, on this reading, he does not allow for the personality of those in the auction to determine the choice of resources. Personality, on this view, is an accidental trait, as it were, and bracketing it allows for the most equal distribution of resources despite the personalities of those involved in the auction.

There is, however, a second way in which the auction can be interpreted, a more expansive reading in terms of how others are to be considered. On this reading, the idea of opportunity costs is decisive. Opportunity costs, to recall, was an attractive idea because it supposes that each

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Dworkin, Place of Liberty, 35-36.

individual plan his life around the concerns and plans of others in the community. Opportunity costs allowed for a mutual consideration on the part of individuals and fosters an awareness of the interests of others. Furthermore, an aspect of the principle of authenticity buttresses this notion. For, while the language Dworkin uses in discussing authenticity might be equivocal, he does say that

participants to the auction would want both an opportunity to form and reflect on their own convictions, attachments, and projects, and an opportunity to influence the corresponding opinions of others, on which their own success in the auction in large part depends.⁵³

By allowing for an intersubjective understanding of the interests of the entire community, we can reach an equitable distribution of resources which accords with the common good. And this leads us to the subject of the common good and the community.

Community

During the 1970's and 1980's, a vigorous debate has occurred between "communitarians" and "individualists."⁵⁴

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Ibid., 35.

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Of course not every one who is labelled a "communitarian" shares the same beliefs or argues for the same things. Some who would reject the label nevertheless reflect upon and question liberal individualism: see Charles Taylor's Hegel and Modern Society (Cambridge: Cambridge University Press, 1979) and Sources of the Self: The Making of Modern Identity (Cambridge: Harvard University Press, 1989). Michael Sandel's book, Liberalism and the Limits of Justice (Cambridge: Cambridge University Press, 1982), offers a

Although these terms blend a great variety of positions and arguments under one rubric, we can specify the basic thrust of each side. It will be helpful to briefly outline the main positions taken by both sides to see where Dworkin's idea of a political community fits within this wider debate.

Communitarians critique liberalism on two counts. One, they claim that the idea of an "unencumbered self,"⁵⁵ an individual without social ties (in theory) who chooses freely and supplies the basis of a political order which guarantees this freedom is a false one. Against the conception of an individual who decides, behind the "veil of ignorance," without the benefit of any knowledge concerning his particular circumstances, what the principles of justice are, the communitarian claims that no individual can ever be, in theory or practice, sundered from the historical, cultural, and linguistic world in which he lives. The Kantian transcendental self or the Rawlsian unencumbered self cannot be accepted

clear and sustained argument against what he believes are the main tenets of liberalism; and Liberalism and its Critics (New York: New York University Press, 1984), edited by Sandel, is a collection of arguments for liberalism and a response by several communitarians.

The same holds true for those under the umbrella of "individualists." John Rawls and Ronald Dworkin are the most well known defenders of liberalism, though they would not accept or endorse all of the arguments each presents.

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The term is Michael Sandel's, from Liberalism and the Limits of Justice.

without cost to those loyalties and convictions whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are -- as members of this family or community or nation or people, as bearers of that history, as citizens of this republic.⁵⁶

Two, several communitarians argue that the "premises of liberal individualism give rise to morally unsatisfactory consequences."⁵⁷ Among these conclusions are the neglect of a good (or goods) which the state should promote and is prevented from doing so by advocating state neutrality (the right is prior to the good, in Rawls' phrase⁵⁸) and hence the inability to achieve what they take to be a true or genuine community.

Against these criticisms, Dworkin offers two main arguments. First, he wants to claim that, as far as the "unencumbered self" claim goes, "the phenomenology on which this argument rests seems wrong, or at least overstated."⁵⁹

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Sandel, "The Procedural Republic and the Unencumbered Self," in Communitarianism and Individualism, edited by Shlomo Avineri and Avner de-Shalit (Oxford: Oxford University Press, 1992), 23.

57

Shlomo Avineri and Avner de-Shalit, introduction to Communitarianism and Individualism, 2.

58

Rawls says that "We should therefore reverse the relation between the right and the good proposed by teleological doctrines and view the right as prior." Rawls, Theory of Justice, 560.

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Dworkin, "Liberal Community," California Law Review 77 (May 1989): 489.

Secondly, Dworkin does not want to deny that state neutrality towards its citizens precludes the state from advocating some good: the good happens to be state neutrality, interpreted as equal concern and respect for all members of society -- or a "thin" conception of the good. This interpretation, of course, has wide practical consequences both for governmental policy and the principles embodied in the law (especially Constitutional law).

It will be helpful to see how Dworkin sets out his theory of community and political obligation within the context of his theory of jurisprudence. Specifically, the idea of integrity, in addition to being linked with equality, also serves as a link to his conception of the community. This also has the advantage of allowing us to use concrete examples in determining the place of the more abstract concepts associated with community.

Communal Obligation

We noticed above that the idea of integrity depends upon Dworkin's conception of equality. The idea of integrity is also interrelated to Dworkin's idea of the community. Specifically, integrity depends upon the moral principles of a community; in legislative and judicial decisions, the aim should be to discover those principles inherent or explicit in the community's moral values. Furthermore, this will justify the use of coercive power: "political society that accepts

integrity as a political virtue thereby becomes a special form of community, special in a way that promotes its moral authority to assume and deploy a monopoly of coercive force."⁶⁰

In a community that accepts and acknowledges the principle of integrity, the individuals respect the principles of both justice and fairness and assume the responsibilities incumbent upon them by their association in the community. As Dworkin ardently writes, integrity's "rationale tends toward equality...its command of integrity assumes that each person is as worthy as any other, that each must be treated with equal concern according to some coherent conception of what that means."⁶¹ Genuine communities obligate their members, if four conditions hold. First, the members must see their obligations as special, as not pertaining or holding to others outside of the community. Secondly, these must be personal obligations, and not obligations of the community as such. Thirdly, the members of the community must see that their obligations to other members of the group come from a general obligation of concern that they have for the group and not from any discrete, particular obligation. Finally, not only must they show concern for the other members, but it must be

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Dworkin, Law's Empire, 188.

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Ibid., 213.

equal concern.⁶² Dworkin has in mind here something like the obligations in familial relations, the responsibilities inherent by virtue of membership in a particular social group. Such an association of principle is more likely to meet the requirements of the above conditions; it is, therefore, a genuine community (as Dworkin understands it), one that can authorize and legitimate coercion. Judges should identify legal rights and duties in accordance with a coherent conception of justice and fairness as embodied in the moral practices and precedents of the personified community.

In that more recent article entitled "Liberal Community," Dworkin fleshes out what he means by community by discussing four different conceptions of community and the ways they have been used to attack liberal tolerance. In this case, Dworkin is concerned with the claim that liberal tolerance, understood as the assertion that it is wrong for government to use its power to promote or enforce its conception of the good, undermines community. This is ostensibly a response to communitarian critics who question the idea of tolerance as disruptive of, or a barrier to, communal obligations.

But in this context, Dworkin wants to turn the argument against liberal tolerance and for strong communal associations on its head, by claiming that "liberalism supplies the best

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Ibid., 199-201.

interpretation of this concept of community, and liberal theory the best account of its importance."⁶³

Dworkin's article was written, at least partially, with the Supreme Court's decision of Bowers v. Hardwick⁶⁴ in mind. In this decision, the Supreme Court upheld Georgia's law making sodomy a crime. The first argument against liberal tolerance issues from Justice White in his written opinion: namely, that the community has a right to use the law to support its vision of decency. In this view, the community is simply associated with the majority: what the majority wills through its lawfully elected representatives constitutes the community. The laws it imposes are legitimate for the reason that it is the majority. Dworkin's tactic in rebutting this form of community lies in linking ethical decisions with economic choices; just as we would not limit the economic realm by a strict majority, winner-take-all vote, so we should not limit ethical choice in the same manner. This is not just an argument by analogy; Dworkin insists that the economic and the ethical are interrelated such that we can divorce the two only artificially. While it is true that some economic decisions must be decided in a winner-take-all fashion (Dworkin's example is that of funding for the Strategic

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Dworkin, Liberal Community, 480.

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Bowers v. Hardwick, 478 U.S. 186 (1986).

Defense Initiative⁶⁵), it does not follow that all economic or ethical decisions must also be subject to strict majority rule. Underlying this claim is the role of individual choice. For Dworkin, the majority cannot decide what is right or wrong in the economic sphere because that would violate the principle of justice:

Justice requires that property be distributed in fair shares, allowing each individual person his or her fair share of influence over the economic environment...If we take a parallel view of the ethical environment, then we must reject the claim that democratic theory assigns a majority complete control of that environment. We must insist that the ethical environment, like the economic, be the product of the choices individual people make.⁶⁶

It would be absurd -- indeed, unjust -- to think that the majority could dictate what my choices are to be in the economic realm. So too in the world of ethics. This does not mean that there can be no regulation: we need laws to protect against theft and monopolies, just as it is permissible to limit the minority's impact on the majority in ethical matters. But to completely deny the minority its individual ethical choices would be a violation of justice, fairness, and integrity. Community cannot be identified with a numerical majority.

The second argument against liberal tolerance Dworkin terms "paternalism". Those who hold this view argue that the

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Dworkin, Liberal Community, 482.

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Ibid., 481-482.

community has a responsibility to each member of the community, and should use its political power to reform those citizens whose defective practices will ruin their lives. This idea of community is more attractive, because it starts from the assumption that we are not simply Hobbesian individuals who associate for benefits we cannot derive without that association. Paternalism suggests that we have an altruistic concern for others, that we inhabit a community where we take a special interest in others for their own sakes.

In dismissing this form of community, Dworkin makes a distinction between two forms of interest, two ways in which an individual's life can be better or worse: critically and volitionally. Volitional well-being simply means that a person is better off if he achieves something he wants. Good food, less visits to the dentist, to sail better all fall under volitional interests.⁶⁷ These are distinguished from critical interests, which are those achievements or experiences without which the individual would be worse off if he did not want them. As examples, Dworkin lists having close relationships with one's children and having success at work. These two types of interests are just that, two different types or classes of interest; the difference is not one of what is really in my interest and what I think is.

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Ibid., 484.

My volitional interests are genuine, real interests, not merely reflections of my present judgements, which I may later decide are mistakes, about where my critical interests lie. The two kinds of interests, the two modes of well-being are distinct.⁶⁸

The communitarian argument for paternalism appeals to critical interests. Furthermore, it forces us to confront critical well-being. Must our critical well-being be consciously endorsed by us, or is it enough simply to say that if a person's life has the components of a good life, the experiences, events, and achievements that make it up, then that life has critical value? For Dworkin, the individual must endorse those components, must consider them valuable, and this leads to the failure of community as paternalism. For if I am forced to change my life by the community and do not endorse that change, then my life has not been critically improved. Paternalism, well-intentioned though it may be, neglects to take into consideration that a moral life must be consciously chosen.

The third argument Dworkin calls "self-interest." This conception of community emphasizes the various ways in which individuals are dependent upon a community (materially, intellectually, and ethically), and argues that liberal tolerance prevents the community from serving those needs.⁶⁹

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Ibid., 485.

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This view, as Dworkin recognizes, has been put forward most forcefully by Michael Sandel in Liberalism and the Limits of Justice.

For Dworkin, this position states a half truth. While it is obvious and correct that we are all dependent upon the language, customs, and conventions of our community, it does not follow that a homogeneous and intolerant community is the only one which could maintain and further the bonds of association. Indeed, it would seem that a diverse and tolerant community could best serve our intellectual, material, and ethical needs. And even if we argue that we cannot disassociate ourselves from the bonds of community when considering our well-being, that does not mean that we can not 'detach' ourselves from connections one at a time, as it were, and evaluate them. There is no reason to think that we will lose the communal source of moral belief that a community engenders and that is necessary for self-identification if we evaluate those sources. As Dworkin points out, the strength of our moral convictions need not rest on the enforcement of those convictions or their popularity in the community. Furthermore, such detachment for unquestioned convictions does not imply self-disintegration:

But why should people not be able to reassemble their sense of identity, built around a somewhat different and more tolerant set of conditions, when their faith in the morality they associate with their family or community is for some reason shaken?⁷⁰

Here we arrive at the final argument against liberal tolerance, the conception of community that Dworkin finds most

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Dworkin, Liberal Community, 490.

persuasive, what he names the argument of "integration." This is the most substantive conception of community (and the least reductive of the four). He wants to argue that this conception of community, which liberal tolerance supposedly undermines, in fact is best seen in light of liberal theory.

According to community as integration, liberal tolerance makes an illegitimate distinction between the lives of individual people within the community and the life of the community as a whole. As Dworkin puts it:

...the value or goodness of any individual citizen's life is only a reflection and function of the value of the life of the community in which he lives. So citizens, in order to make their own lives successful, must vote and work to make sure that their fellow citizens lead decent lives.⁷¹

What is attractive for Dworkin about this conception of community is the full identification of the life of the individual with the life of the community. The success or failure of a community's communal life is a part of what determines whether an individual's life is good or bad; an integrated citizen knows that his own well-being depends to a certain extent on the community's well-being; and the individual must therefore take an active and participatory interest in the life of the community.

The community as integration argument by the communitarian fails, however, when we consider the specific character of the community. According to Dworkin, the

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Ibid., 480.

community as integration view anthropomorphizes the community:

...it supposes that a communal life is the life of an outsize person, that it has the same shape, encounters the same moral and ethical watersheds and dilemmas, and is subject to the same standards of success and failure, as the several lives of the citizens who make it up.⁷²

Despite the fact that the relationship between the community and the individual is strongly ethical, that the individual gains or loses not only through his own private acts but through the acts and achievements of the community, Dworkin rejects the view of the community as having any ontological priority over the individual. It is, he says, a "baroque metaphysics which holds that communities are fundamental entities in the universe and that individual human beings are only abstractions or illusions."⁷³

Instead, Dworkin wants to argue for a practical version of community and the individual's identification with it. Dworkin, using John Rawls' analogy, compares the community to an orchestra. The various individual musicians who comprise the orchestra are not satisfied with their own performance, however brilliant, but with the performance of the orchestra as a whole.⁷⁴ This example does not point to any ontological primacy of the community; rather, community is to be found in

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Ibid., 492.

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Ibid., 494.

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Rawls, Theory of Justice, 520-529.

social practices and attitudes. It is true that the community's life is different from the specific acts of its members; but this does not grant to the community any priority, either ethically or metaphysically.

The difference between the two versions should not be underestimated, for Dworkin will use the practical view of community to delimit a sphere where individuals integrate themselves with the community through collective and self-consciously communal acts. This sphere is comprised of the formal political acts of the community: "the acts of government through its legislative, executive, and judicial institutions."⁷⁵ If this seems disappointing, it is because this view of the relationship of the individual with the community appears to rob us of what community as integration, as argued by the communitarian, promised -- the precedence of the collective good along with the integration of the individual with the community in a strongly ethical manner. But from Dworkin's standpoint, the relationship between the individual and the community is still integrated, though it is an integration according to a "thin," republican sense of the good.

If we return for a moment to the professed purpose of the article, an examination of Bowers v. Hardwick, we can see that in claiming that integration with community consists only

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Dworkin, Liberal Community, 496.

in political acts, Dworkin can then argue that the community has no sex life. Only if we accept the metaphysical view of the community could we make any sense out of the idea that the state or nation has a sex life towards which the individual sexual activity of its citizens contributes. But since Dworkin rejects that view, he must also reject the view that the state has any interest in regulating the sex lives of its citizens. For if there is no identification of the two, if they are not integrated in that way, it makes no sense to claim that the state has a stake in, or is affected by, the sexual preferences or activities of its citizens.

We should also note what Dworkin claims are the advantages of limiting communal identification to purely formal political acts. He still wants to claim that he is not arguing against integration per se; just against the sort of integration that the community as integration, in a metaphysical sense, holds. Indeed, the individual, according to the liberal conception of community as integration (the idea that the individual has a stake in the political acts and decisions of the community), has a richer life because of this identification, and is thus a compelling reason, in Dworkin's estimation, why the liberal interpretation is superior to the stronger view of integration.

The integrated liberal will not separate his private and public lives in that way. He will count his own life as diminished -- a less good life than he might have had -- if he lives in an unjust community, no matter how hard he has tried to make it just. That fusion of political morality and critical self-interest seems to me to be the true

nerve of civic republicanism, the important way in which individual citizens should merge their interests and personality into political community. It states a distinctly liberal ideal, one that flourishes only within a liberal society.⁷⁶

Although Dworkin does not discuss or rely upon a distinction between civil society and the state, he does recognize the split, which he has tried to broach, between the personal life of the individual and his public life. Reconciliation between these two ethical spheres hinges on Dworkin's view of justice. In our private lives, we give special attention to those with whom we have closer ties: family, friends, co-workers, et al. It would not make sense to treat strangers with the same attention we give to these sorts of people. In our public lives, the opposite is true: we feel that each member of society should be treated equally regardless of their relationship to us. The reconciliation between these two separate spheres can only come about when the political sphere succeeds in distributing resources in an equal manner. Dworkin claims that only when the political realm attains a just distribution can we engage in the relationships and enterprises which constitute personal fulfillment, and notes Plato's argument in the Republic that the unjust man lives a worse life in the critical sense:

Plato's view [is] that morality and well-being are interdependent in an adequate ethics, that someone who does not behave in a just way leads a worse life in consequence...Someone does **pro tanto** a poorer job of

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Ibid., 501.

living -- responds **pro tanto** more poorly to his circumstances -- if he acts unjustly.⁷⁷

The Political Structure of the Community

At this point, we should ask a further, related question. Given the integrated idea of community that Dworkin favors, how does democracy further that idea -- i.e., how does democracy foster the identification of the private individual and the political life of the community? Does Dworkin see democracy as inherently necessary for the perpetuation of his conception of a just society, or is it incidental to that end? What specific institutions, form of government, and laws best realize the ideals of integrity and equality? Despite the fact that Dworkin's conception of a community is an ideal (as Dworkin recognizes)⁷⁸, we can nevertheless ask about what kind of political order approximates the type of communal relations he advocates.

In the last of his essays on equality ("What is Equality? Part 4: Political Equality"), Dworkin accepts that the society which best embraces the abstract egalitarian principle (the requirement that the government treat citizens

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Ibid., 502 & 503.

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"We cannot suppose that most people in our political societies self-consciously accept the attitudes of any of them...If we can understand our practices as appropriate to the model of principle...we should therefore strive to improve our institutions in that direction." Dworkin, Law's Empire, 214-215.

with equal concern and respect) should be democratic.⁷⁹ Nevertheless, this doesn't specify with any sort of precision what kind of democracy best serves the abstract egalitarian principle. Great Britain and the United States are both democracies, but each has different arrangements concerning the election of representatives, terms of office, what officials are appointed and which elected, what types of functions and responsibilities elected officials can delegate to their subordinates, etc. This has become especially pertinent in debates about the role of federal judges in the United States, as their appointment for life defies strict democratic principles. So while accepting a democratic political order in the abstract, the more pertinent question becomes, for Dworkin: what form of democracy promotes the egalitarian ideal?

Before answering that question, we should note two things. First, Dworkin assumes, based partly on his prior work and based partly on intuition, that democracy, in an abstract sense of the term, is the best form of government compatible with the abstract egalitarian principle. Democracy has already been selected; it is now a matter of seeing what kind of democracy best fits the ideal. Secondly, in determining what kind of democracy is most appropriate to an egalitarian society, Dworkin will give us, for the most part,

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Dworkin, Political Equality, 2.

scant few answers to those questions he raised at the beginning of his article, answers about what institutions, procedures, representatives and officials, and processes should be set in place. Instead, he will discuss what the abstract egalitarian principle demands when we consider it in a political context. Rather than give us a set of recommendations concerning specific institutions and the like, he will describe a principle which will set the parameters for any decisions involving the kind of democracy that should be implemented. In essence, Dworkin does not describe the type of democracy necessary for his conception of community, but rather tells us what equality, as he understands it, demands of our political processes. The reason for this will become clear when we discuss what he thinks equality demands: for now, we can say that it is because he does not believe that purely procedural considerations conform to the egalitarian principle.

What does equality demand according to Dworkin in the political sphere? Dworkin makes several distinctions in order to answer that question. First, he makes a distinction between two types of democracies: the detached conception of democracy and the dependent conception of democracy.⁸⁰ The dependent conception of democracy claims that the best form of democracy is that which produces the best results -- i.e.,

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Dworkin, Political Equality, 3-8.

those substantive results which treat citizens with equal concern. It is driven by "output"; it gives us a set of devices for producing the correct results (i.e., those which comport with Dworkin's egalitarianism). The detached conception of democracy is not concerned with the substantial results; rather, the detached democracy ensures the fairest procedures: the best democracy is one which distributes political power in an equal way. This form of democracy is driven by an "input test": equal distribution of power over political decisions.

Secondly, Dworkin distinguishes between different types of political power, what he labels the vertical dimension of political power and the horizontal dimension. This vertical dimension describes the power of individuals in relation to individual officials and bureaucrats. The horizontal dimension refers to the power between private citizens.⁸¹ A theory of democracy must make this distinction (and include the vertical dimension), according to Dworkin, because the relationships between private citizens do not necessarily provide us with a description of a democracy. That is, there are totalitarian societies where each private citizen has equal political power -- namely, none.⁸² Hence, a description

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Ibid., 9.

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Ibid.

of political power must take into account more than the relationships between private individuals.

The third distinction Dworkin makes concerns the ways in which individuals can make a difference in political affairs. Obviously, an individual has power in a democracy by virtue of his vote. This form of political power Dworkin terms "equality of impact,"⁸³ and signifies what sort of power an individual, acting alone, has over the political process. In contrast to equality of impact, we can describe the influence individuals have in making political decisions in terms of their ability to persuade others to vote or choose as they would like them to. "Equality of influence" is Dworkin's term for this aspect of political power.

Given these distinctions, Dworkin will argue for a dependent conception of democracy which allows a limited role for equality of impact but none for equality of influence.⁸⁴ Despite the popularity of the detached conception of democracy (popular precisely because of its apparent neutrality concerning questions of substantive results), Dworkin rules out the detached conception of democracy as fitting the egalitarian ideal in a two-step process. He does this by eliminating the detached conception of democracy seen through political impact and then, secondly, as political influence.

⁸³

Ibid.

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Ibid., 18-19.

In terms of political impact, the detached conception will not work on the vertical dimension because, in a representative democracy, it is necessary that the representatives have more impact on political decisions than private citizens. If by democracy we mean representative democracy, then by definition some will have more impact than others -- namely, those who represent us. So the detached conception of democracy fails to account for political impact on the vertical dimension.

Neither will the detached conception of democracy work on the horizontal level because, given that we think a democracy "requires not only widespread suffrage but freedom of speech and association,"⁸⁵ an individual's impact will not be lessened if his views are censored. The individual will still have a vote, and in that way an equality of impact on the horizontal level, but his ability to influence others will have been curtailed. In other words, equal horizontal impact does not in principle prohibit the suppression of certain liberties we take as fundamental, so long as each individual has the vote. On the horizontal level, equality of impact is not demanding enough; it allows for the violation of democratic principles even though it grants each individual the vote.

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Ibid., 11.

Because of these objections to the detached conception in terms of equality of impact, equality of influence is the only possibility remaining. Can we understand the detached view of democracy in terms of equality of influence? And on both the vertical and horizontal dimensions? Again, the answer is no, for the following reasons. On the vertical dimension, the problems with equality of influence (for the detached view of democracy) are several. First, it would be impossible -- and not desirable -- if our elected representatives only voted as the majority wished them to do (how could one punish those who didn't vote with the majority? How could we determine what the majority thought best in every situation?). It would be undesirable because we think, along with Burke, that the representative owes his constituents his conscience and his judgment, and not his unflinching obedience.⁸⁶ The nature of representation is such that it would seem to exclude, for the detached conception of democracy, an equality of political influence. Furthermore, Americans do not seem to object to those provisions which ensure an inequality of influence along the vertical dimension, such as fixed terms for Presidents, Senators, etc. So, the detached view does not, within equality of influence on the vertical dimension, serve the egalitarian ideal.

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Ibid., 12-13.

On the horizontal level, equality of influence seems a much more appealing notion, because of our conviction that some individuals should not, simply because they are wealthier, have a greater influence over political decisions. Despite the initial appeal of this egalitarian position, Dworkin also rejects it, because it conflicts with other egalitarian goals. Inequalities of influence arise from inequalities of wealth; and it is the unequal distribution of wealth that is objectionable, not the inequality of influence per se. Furthermore, even if we imagined that all resources were distributed equally, attempts (Dworkin describes three) to level inequalities of influence are objectionable by themselves.⁸⁷ The cause of inequality of influence is the prior condition of inequality of resources, and while Dworkin thinks that underlying cause should be remedied, that is not

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For example, we could reduce the role of influence in politics overall. But this would mean prohibiting speech and association (the tools, as it were, of influence), and that is unacceptable. Secondly, we could limit influence by limiting campaign funding. This is good if there are differences of wealth, but Dworkin here is assuming that resources have been distributed equally, and hence curtailing one individual from participating in politics in that way would be inegalitarian, as this individual would be limited in pursuing the life he wanted, while others would not be similarly restrained. Finally, we could educate people to not attempt to exert influence in political decisions in respect of the special advantages they have (i.e., wealth). This too is unacceptable, because, one, it is impossible to separate "dancer and dance in political argument;" and two, that would encourage individuals to ignore what they take to be the best reasons for engaging in political life. Ibid., 15-16.

an argument for an equality of influence according to the detached conception of democracy on the horizontal dimension.

We are left to consider a dependent conception of democracy. Recall that on this conception, the substantive goals and results determine the equality and not the participatory fairness. What goals should the dependent conception of democracy, in tandem with the egalitarian ideal, foster? Dworkin discusses two: symbolic goals and agency values.

The symbolic consequences of any political order are measured in how the vote is distributed. Equality demands that the "voting assignments carry a symbolic declaration of equal standing for all."⁸⁸ If individuals are considered equally worthy and worthy of respect, then their vote must be accorded an equal weight. This argues for a dependent conception of democracy along the horizontal dimension, but this is not an absolute rule. It is not absolute because the symbolic goals of equality of impact along the entire political community will permit deviations, so long as those deviations do not adversely effect the "standing or importance of those whose impact is made less."⁸⁹ So, for example, the fact that the people of New Hampshire have more impact than the people of California in electing Senators is allowed: the

⁸⁸

Ibid., 19.

⁸⁹

Ibid.

decision which granted that inequality of impact was not a decision motivated by a lack of respect for one group. This 'deviancy principle' also allows Dworkin to endorse a (hypothetical) voting scheme which gives the inner-city poor more impact (by electing more representatives, for example). Such a voting scheme would obviously violate the detached conception of democracy (it would allow the votes of some to count for more than the votes of others). But it does not violate the dependent conception of democracy because the symbolic goal of an equal vote does admit of exceptions, provided the exceptions do not detract from the equal concern and respect of others.⁹⁰ That the inner-city poor have a 'greater vote' than their wealthier suburban neighbors does not diminish the government's respect for suburban inhabitants; such a voting scheme will not detract from the egalitarian ideal so long as others -- whose vote impact is not increased -- are not deprived of the moral agency, symbolic recognition, or sense of community, much as the citizens of California are not deprived of agency, recognition, and community though their impact is not equal to that of the citizens of New Hampshire in Senate elections.

The second substantive goal is that of agency value. By agency value, Dworkin means the way in which our moral life is satisfactorily extended into our political life. This is a

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Ibid., 7 & 20.

vague definition of agency value because agency value is itself a vague term. It entails the opportunity to express our moral convictions in political life, as well as the opportunity to express those commitments to others. For this reason, agency value is related to political liberty, especially the liberty of speech.⁹¹

Agency value is most important, however, because of its connection to equality. Freedom of expression and commitment are necessary aspects of moral agency in political life, but it is the ability to "make a difference" that most fulfills our agency values.⁹² If we do not think that our moral commitments actually can make a difference in political life, engagements in politics do not satisfy our moral agency. In terms of equality, this means that each individual must be assured of a certain "leverage."⁹³ In some cases, particularly in small districts, the opportunity to vote will provide citizens with the means to satisfy their moral agency. But in large districts this leverage is negligible. Hence, Dworkin proposes that the media be made available to all to express their moral commitments in the attempt to influence others. Since disparities of wealth are one of the primary sources of

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Ibid., 21.

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Ibid.

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Ibid.

inequality of access, then certain media (Dworkin does not say exactly what media and how much) must be made available to those who wish to exercise their moral agency to influence others. We should also note that he is not advocating that there be an equality of influence; he is not arguing that everyone must have equal influence. Rather, in order to satisfy our agency values, individuals must have the opportunity to influence others; otherwise, politics will seem a barren and worthless enterprise.

Dworkin has, then, put forward not specific proposals for concrete institutions, but a set of guidelines which will determine what form of democracy best comports with the egalitarian principle. First, the conception of democracy should be dependent and not detached; it is concerned not with procedural questions, but with substantive results. Secondly, the symbolic values of participation require an equal impact of vote, though this is not an inflexible rule, so long as those whose vote is diminished are still treated with equal concern and respect. The agency values require certain political liberties as well as leverage, and therefore demand an equality of opportunity to influence others. This entailed not simply the vote, but also access to media where the vote has a negligible influence.

Conclusion

In the preceding sections, we sketched the main thrusts of Dworkin's argument. We looked at his theory of jurisprudence, and the underpinnings of that theory: namely, how integrity, liberty, community, and, most importantly, equality each plays a critical role in his overall moral theory. His theory is more than jurisprudential, although that jurisprudence obviously has important and consequential results, as his writings on current Supreme Court decisions (e.g., Roe v. Wade and subsequent cases effecting abortion rights, cases involving questions of the scope of freedom of speech, and the Nancy Cruzan and Dr. Kevorkian cases concerning euthanasia and the right to die) and interpretative Constitutional questions demonstrate.

But Dworkin also attempts to construct what we might call a fully moral political theory; he builds a liberal theory of justice using the primary concerns of the "classical liberals:" rights which trump all other competing claims, state neutrality towards different ideas of what the good life is and therefore a state which insists on toleration, a constitutive and fundamental place for liberty, all of which rest on a certain interpretation of equality. The latter idea is foundational for Dworkin, as he gives equality priority and supremacy within his overall political theory. He does not rely on the arguments of Hobbes and Locke, who claim that in some sense we are all equal; instead, he takes as his starting

point the Constitution, along with the 14th Amendment, and argues that the best interpretation of the Constitution requires that the state must show equal concern and respect for each of its members. This follows from the ideal of equality embodied in that document and amendment. In the effort to flesh out what equal concern and respect means, he develops a theory of distributional justice, where equality is best thought of as the equal distribution of resources (and not an equality of welfare). This latter characteristic distinguishes him from libertarians, who agree with him concerning rights but disagree on the matter of equality and the concomitant requirement that the state's duty is to actively pursue a policy based on egalitarian principles.

All of these aspects of his political theory interrelate. The idea that we possess rights, certain claims or powers which are universal, inviolable, and inalienable, means that we must also have the freedom to exercise those rights. If we limit or abolish the liberty to act, the rights we possess are rendered impotent. Similarly, by virtue of the fact that rights are absolute and supreme, the state must not offer, endorse, and encourage any particular conception of the good life; it should remain neutral in that respect, and allow each to pursue his own conception of the good life so long as he does not infringe upon the right of another to follow her own conception of the good life. State neutrality, however, means more than that. The state must also treat each of its

member with equal concern and respect. This follows from both the premise of equality and the claim that we possess rights.

Equal concern and respect led him to formulate an account of distributional justice, interpreted as an equality of resources. Because of this interpretation of equality, he argues that our communal obligations lie in the public sphere, an idea which not only means that we should treat others equally and with respect in the formal acts of government, but also that communal obligation entails an integration with the community. We count our lives worse if our society acts unjustly (i.e. treats some as unequal or unworthy of respect). This idea of communal integration is best seen in the light of liberal theory and liberal society, an integration which explains what obligations we have and how we identify with the community.

It is certainly an exaggeration to say that the liberal self is atomistic, unconnected, deprived of any social ties, alone and wandering, concerned only with the freedom to choose and the protection of rights. Such a view simply cannot be found in any of the sophisticated "liberal" writers. Those who make such claims do not appreciate the associative tendencies in liberal society; they do not take the step from freedom of choice and maximum options to voluntary association. Both aspects are constitutive of liberalism. And certainly Dworkin, who sincerely values the benefits of a community (a shared purpose, friendship and love, common

projects and common aims, the understanding that others must have a place in one's plans and desires) does not argue for or presuppose that caricature.⁹⁴

Finally, Dworkin's conception of democracy does not argue for any specific set of institutions or practices, except those that comport with the abstract egalitarian principle. He does assume that democracy best fits the egalitarian principle, and that conception of democracy must be dependent. In other words, he rejects the popular detached view of democracy, the procedural view, because it does not, either in terms of impact or influence, on the horizontal or vertical level, measure up to his egalitarian principle. More specifically, political practices and institutions are to be judged as to how they fulfill the symbolic values of participation and the moral values of agency. These values dictate equality of impact both within districts and across districts, as well as political liberties (e.g., freedom of speech) and leverage. The specific institutions of a democratic government gain legitimacy by how they measure up to Dworkin's egalitarianism; in this way, equality serves, as it does in questions of communal obligation, distributional

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Mark Tushnet, in "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles," offers that sort of caricature in his critique of Dworkin, to which Dworkin properly and correctly responds as being simply wrong. Harvard Law Review 96, no. 781 (1983): 783ff.

justice, and jurisprudence, as a foundation for Dworkin's liberal political theory.

CHAPTER 2

HEGEL'S IDEA OF FREEDOM IN THE PHILOSOPHIE DES RECHTS

Before turning to an examination of the argument as found in "Abstract Right," the first section of the body of Philosophie des Rechts, I first want to discuss both the presuppositions and the argument Hegel makes in the "Introduction" to the Philosophie des Rechts. This will allow us to see why it is Hegel begins as he does: what right means for him, why he starts with this particular conception of right, and what method or manner of proof he will use. By examining the argument found in the "Introduction," we will also see how that argument foreshadows the argument proper as found in "Abstract Right."

The presuppositions Hegel consciously makes in the "Introduction" are of two kinds. First, there are the presuppositions that Hegel brings, from the Enzyklopädie, to the discussion of right in general in the **Introduction** of Philosophie des Rechts. Secondly, there are those arguments which are developed in the "Introduction" and are then carried over into "Abstract Right" as presuppositions.

Regarding the presuppositions made in the "Introduction" which have been carried over from the Enzyklopädie, the first concerns the starting point itself. That is, why should we

begin with the concept of right? How has that concept been proved, which would allow us to begin with it? In the Philosophie des Rechts, in the "Introduction," Hegel presupposes the proof of the concept of right.¹ The proof of the concept of right will likewise be presupposed within "Abstract Right." Despite the fact that the proof of why one should start with the concept of right is presupposed, Hegel does discuss in the "Introduction" what the term right means. Because he does discuss right in a cursory way in the "Introduction," it will be useful to spell out what that term means for him.

In determining what Hegel means when he uses the term right (**Recht**), I would like to look first at the etymological description of the words and cognates associated with right and, secondly, in a general way at the different sections of Philosophie des Rechts, and the reason why Hegel divides the

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Hegel, Grundlinien der Philosophie des Rechts, (Hamburg: Felix Meiner, 1955), §2, 19. Elements of the Philosophy of Right, edited by Allen Wood, translated by H.B. Nisbet (Cambridge: Cambridge University Press, 1991), 26. For all future references, I will give the section (§) number, the German pagination, then, following a semi-colon, the English pagination. If the reference is taken from a Remark or an Addition, I will add an "R" or an "A" after the section number.

The proof of the concept of right was given in the Zyklus der philosophischen Wissenschaften III (Werke 10), edited by E. Moldenhauer and K. Michel (Frankfurt am Main: Suhrkamp Verlag, 1970), §485-487, 303-306. The English translation is: Hegel's Philosophy of Mind: Part Three of the Encyclopedia of the Philosophical Sciences, translated by William Wallace and A.V. Miller (Oxford: Clarendon Press, 1971), 240-243. Hereafter Encyclopedia 3.

book the way he does. The former will allow for a more historical understanding of the uses of the word **Recht**, though this is not without substantive import; the latter will allow us to see why Hegel thinks the concept of right must necessarily be conceived in the way in which he articulates it.

The German language, unlike English, makes a hard distinction in meaning between right (**Recht**) and law (**Gesetz**). Latin (**ius** and **lex**), French (**droit** and **loi**), and Italian (**diritto** and **legge**) all make a similar distinction. Right can either mean a right in the sense that one has a duty towards others (the right to free speech, for example, entails the normative injunction not to infringe upon the capacity of an individual to speak) or it can mean that the individual is inviolable within a certain protected sphere (i.e., the right to privacy means that there are certain locations which are sacrosanct and within which the individual is free to do as he or she wills). Right can also signify the collective body of laws, that is, the law as a principle (i.e., Roman law, civil law, the common law, etc.). The law, as **Gesetz**, and in distinction to **Recht**, signifies particular laws. The law against speeding, for example, would be a **Gesetz**. **Recht** can also sometimes mean justice, although not justice as a virtue (**Gerechtigkeit** is the German for justice as virtue); one would translate **Recht** as justice, for example, in the phrase "justice was on his side." The German compound words

Staatsrecht and **Naturrecht**, translated as constitutional law and natural law, indicate that English does not make the same distinction in meaning and has no one word which fulfills the function of **Recht**.

The distinction in German between right and law, and Hegel's conscious decision to analyze the concept of right, indicate that he is not essentially concerned with the particular laws of particular nations. Particular laws are referred to, of course, but mainly for explanatory and pedagogical purposes; his primary aim is not a critique of existing laws but an analysis of the concept of right.

The distinction between right and law may or may not indicate an essential component of the concept of right. By pointing to this linguistic difference, we have seen only that right and law are not necessarily synonymous. Is there anything about the concept of right itself which would indicate that it should be considered separate and distinct from the law as **Gesetz**? And how does Hegel define right within Philosophie des Rechts?

The Philosophie des Rechts is divided into three major sections (excluding the "Preface" and "Introduction"). These three major sections correspond to three distinct conceptions of right. The three sections -- "Abstract Right" (**Das abstrakte Recht**), "Morality" (**Die Moralität**), and "Ethical Life" (**Die Sittlichkeit**) -- are the three specific ways the concept of right develops according to its inner principle.

What is the "inner principle," of the concept of right? What is inherent in the concept of right which differentiates it from law? Nothing other than freedom. "Right is any existence [Dasein] in general which is the existence of the free will. Right is therefore in general freedom, as Idea."² The concept of right is the concept of freedom (as manifested in the free will) as it exists. When freedom exists in a way which accords with its inner principle (i.e., when its existence 'conforms to,' is in agreement with, all that the idea of freedom entails), freedom exists as Idea. In the Addition to §1, the same point is made by using the example of the relationship between the body and the soul:

The unity of existence [Dasein] and the concept, of body and soul, is the Idea. It is not just a harmony, but a complete interpenetration. Nothing lives which is not in some way Idea. The Idea of right is freedom, and in order to be truly apprehended, it must be recognizable in its concept and in the concept's existence [Dasein].³

Right is therefore distinguished from law. The laws are the particular application of the concept of right in specific circumstances. States, when applying the universal concept of right to various cases and conditions, produce laws. Laws do not have the character of necessity that the concept of right does; laws pertain to the contingent situations unique to the culture of a nation or a people and its stage of historical

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Hegel, Philosophy of Right, §29, 45; 58.

³

Ibid., §1A, 26.

development, although, by virtue of the fact that they may be an expression of right, they may be rational.⁴ But that positive laws are rational is a contingency; the only way to determine if they are rational is in virtue of their correspondence with the concept of right.

That the concept of right is the concept of freedom is presupposed within the Philosophie des Rechts. This does not mean that the specific ways in which the concept of right (or freedom) develops is presupposed; it is not, as the three sections of the book indicate. The elucidation of the concept of right, the unfolding of what right means, will show that right 'moves' from its initial formulation as abstract right to morality, and from morality to ethical life. Each of these moments or stages is an essential aspect of the concept of right; right is defined -- right defines itself -- as abstract right, as morality, and as ethical life.⁵ But the proof that the concept of right is freedom occurs not in Philosophie des Rechts but in the Enzyklopädie.⁶

4

Ibid., §3 & R, 21-28; 28-34.

5

"Each stage in the development of the Idea of freedom has its distinctive right, because it is the existence of freedom in one of its own determinations...Morality, ethics, and the interest of the state--each of these is a distinct variety of right, because each of them give determinate shape and existence to freedom." Ibid., §30, 46; 59.

6

Ibid., §2, 19; 26.

The second major presupposition Hegel makes concerns the general method of proof, what Hegel calls the "scientific procedure," or the "dialectical method." This is also explicitly presupposed in the "Introduction," and hence within abstract right as well.⁷ The general method of proof also relates to the immanent development of the concept (in this case, the concept of right). Within the Philosophie des Rechts, he again gives a cursory outline of what the "scientific procedure" or "dialectical method" is. He does this by contrasting various other methods of dealing with the philosophy of right against his own method, rejecting each of them in turn.

First, one may begin an analysis of right by seeking definitions used within the law. By procuring a (correct) definition, one not only gains a firm foundation upon which the legal theorist can construct theories, but one also gains knowledge, via the definition, about the matter under consideration. The problem with this procedure is that we are concerned about what is right and legal, and definitions do not tell us if the law corresponds to right. Definitions only make a statement about the matter being defined and not a determination about the rightness of the definition. The inadequacy of this method can be seen when a system of law is contradictory. In that case, it is not only a matter of being

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Ibid., §2R, 21; 28.

unable to tell whether the definition is right, but definitions as such become increasingly difficult to formulate. Hence, in Roman Law, no definition of the human being was possible, because the slave could not be contained within that definition.⁸

As a second alternative, we might proceed by measuring the definition against the prevailing ideas that people have about the subject, instead of defining the thing on its own terms. This, however, has nothing to do with science, which is the attempt to account for the necessity of the thing itself. Comparing it to prevailing ideas tells us nothing about the necessity of the concept of right; it only tells us that the definition is, or is not, in agreement with current opinion.⁹ Furthermore, the method of contrasting the concept of right with prevailing ideas and opinions develops into a contrast between the concept of right and "our own heart and enthusiasm" which then "are made the source of right."¹⁰ The first method, that of securing definitions, fails because definitions do not tell us what is right and because definitions cannot be formulated in an incoherent or contradictory legal system; the second method, that of judging

⁸ Ibid., §2R, 20; 26-27.

⁹ Ibid.

¹⁰ Ibid.

the concept of right in terms of prevailing opinion, and its inevitable development into a contrast with the subjective feelings of the heart, turns the accidental and incidental into the source of right.

There is another method of proceeding which Hegel contrasts with his own, and that is what he terms a "historical demonstration"¹¹ of the concept of right. In an attempt to explicate the existing legal structures and institutions, the historian seeks to show how they have historically developed, what their historical causes are. This mode of explanation, however, while it is valuable as a historical endeavor, is not philosophical, because it does not seek to explicate the concept of right on its own terms. In other words, a distinction must be made between the historical emergence of a specific legal system and the concept of right in itself. Here is an indication that Hegel does not simply attempt to justify the existing status quo, or the Prussian state, when he writes:

... a determination of right may be shown to be entirely grounded in and consistent with the prevailing circumstance and existing legal institutions, yet it may be contrary to right and irrational in and for itself, like numerous determinations of Roman civil law which followed quite consistently from such institutions as Roman paternal authority and Roman matrimony.¹²

¹¹

Ibid., §3A, 30.

¹²

Ibid., §3R, 23; 29.

The point is not that the various determinations do not develop historically: they do, and at the very least an acquaintance with those specific historical structures is necessary. That the concept of right manifest itself in history is essential and necessary; but it is a necessity which comes from the concept of right itself. If that were not the case, one would be left with a 20th century form of positivism, where either right is identical with existing posited law or where the law and right (for 20th century positivists, read morality) is sundered, there being no essential connection between the two. A form of this can be seen in the position of Friedrich Karl von Savigny, whom Hegel attacks for attempting to erect a German legal code based on the social context in German history when those legal provisions emerged.¹³ He attacks Savigny precisely because the concept of right and its historical determinations are not equivalent. The historical determinations of right must be judged on the basis of the concept of right itself and not vice-versa.

The Argument Concerning Freedom in the Introduction

We noted that the "Introduction" provides an argument concerning the general character of the free will and Hegel's attempt to explicate the overall requirements of normativity

¹³

Ibid. See also the translator's note in the English edition, 394.

based upon a free (i.e., self-determining) will. This is not a presupposition, of course: an argument is given in the "Introduction," which is then carried over into "Abstract Right." What is that argument found in the "Introduction" concerning the character of the free will and how does that character provide the basis (and the only basis) for the normative validity of freedom as self-determination?

In the "Introduction," Hegel describes the general concept of the free will. This general concept of the free will takes, in the subsequent sections, various specific forms. Nevertheless, the general concept of the free will is presupposed by each of the specific forms which are subsequently explicated. The general concept of the free will Hegel outlines as follows:

(1) In order for the will to be unconditionally free, to have the power to set ends for itself, an "I" must be postulated which has the capacity to posit ends for itself which are not in any way given to it independently of, or prior to, its activity of choosing. The "I" regards itself as having the capacity to abstract from any limitation, whether it be an internal limitation such as drives, inclinations, or needs, or some externally given limitation, such as its circumstances or relations to others.¹⁴

14

Ibid., §5, 30; 37.

This is characterized by Hegel as "negative freedom"¹⁵ -- the ability to abstract from any given content, to be conscious of oneself as unqualified or determined by anything particular. It is the capacity to abstract from any given content which allows the will to be wholly self-determining.

This is independence from any given as such, and is, as a general description of the free will, the position called by Peter Singer the "classical liberal conception of freedom."¹⁶ That is, the common way of viewing freedom is as freedom of choice, or, in Hegel's terms, "arbitrariness" (*Willkür*), the ability to choose from any set of givens whatever it is one wants to choose. Although this view of freedom is criticized by Hegel¹⁷, it is valid in so far as it abstracts from all givens.

Furthermore, this moment of the free will constitutes the universal moment. The will exists as universal because, as abstracted from any limiting conditions, it is, as Hegel variously characterizes it, a "pure reflection into itself" or

¹⁵

Ibid., §5R, 30; 38.

¹⁶

Peter Singer, Hegel (Oxford: Oxford University Press, 1983), 25.

¹⁷

Hegel, Philosophy of Right, §15R, 37; 48, where he says that "the commonest idea we have of freedom is that of arbitrariness...When we hear it said that freedom in general consists in being able to do as one pleases...[this] is the will's abstract certainty of its freedom, but it is not yet the truth of this freedom."

"the pure thinking of oneself."¹⁸ The will's universality consists in the essentially negative relationship it has toward any limiting conditions.

It follows from this general characterization that normative validity is possible only if the will is undetermined, in the sense that the will is not constrained by any "outside" factor, such as nature, either an external nature (circumstances, God, etc.) or an internal nature (in the form of drives or appetites). If the attempt is made to derive normative validity from some "outside" source, as natural law and natural right theories attempt to do, the will is no longer free -- it is determined by that "outside" factor. The same holds true for the lack of normative validity for the classical liberal conception of freedom, for the reason that on this account of freedom, the will, though taken as removed from any "outside" givens, nevertheless must choose from among givens. Freedom taken as **Willkür**, because it is not unconditional and universal, cannot, therefore, be normatively valid and binding. This last point can be further clarified by looking at the second aspect of the general character of the will.

18

Ibid., §5, 30; 37. "This is the limitless infinity...or universality." See also the Addition to §5 for Hegel's characterization of the various ways in which this one-sided universality has been exalted throughout history (i.e., in the Hindu religion and the French Revolution's reign of terror).

(2) If the will were left in this stage, it would be wholly indeterminate. It would not have a content of its own, would not, indeed, have any content at all. Willing entails willing something; the will must give itself some determinate content; it must be self-determined, a this rather than a that.¹⁹ The concept of a free will demands not only the potential to abstract from every given, but also the ability to actually determine itself by choosing some content. This second moment is the negation of the first moment, but a moment inherent in the very concept of the free will.

This moment of the development of the free will constitutes its particularity. In distinction to the universality of the first moment, where the will abstracted from any determinate and limiting given, in this moment the will gives itself a particular content.²⁰

In respect to this second general moment of the free will's development, we can say that normative validity consists not only in the removal of the will from any "outside" determinant but in the recognition that the will, in order to be free, must will itself -- i.e., it must be self-determining. Freedom consists not simply in the ability of the will to abstract itself from any given, but in its ability

¹⁹

Ibid., §6, 31; 39.

²⁰

Ibid. "Through this position of itself as something determinate, 'I' steps into existence...[this is the] particularization of the 'I'."

to will itself as its determinate content. As Hegel puts it, the "abstract concept of the Idea of the will is in general the free will which wills the free will."²¹

(3) The two preceding moments -- the will's capacity to abstract itself from everything given, and the will's ability to determine itself -- taken as a unity constitute the freedom of the will. To be self-determining, the will knows the determinate content (what was thought to be in the second moment a restriction or a limitation) as something which is its own, which it has put there, and which makes the will's freedom actual and real. "It knows the latter [the determinate content] as its own and as ideal, as a mere possibility by which it is not restricted but in which it finds itself merely because it posits itself in it."²² In other words, the will wills itself as its "object" or "content." This unity of the two aspects of the will -- the unity of the potentially self-determining will and the actually determined will, with the actual self-determining will as a result -- constitutes the will's positive freedom. The free will is the activity of conscious self-determination. Normative validity is possible only if those two conditions are met. If they are not, the freedom of the will would be compromised -- the will would be dependent upon that "outside"

²¹

Ibid., §27, 44; 57.

²²

Ibid., §7, 32; 41.

given, relative to it, and therefore incapable of providing the necessary universality entailed in normativity.

This constitutes the general structure of the will as a self-determining "I" as described in the "Introduction." This general structure will be carried over into the discussion of each of the stages of right. The general character of the self-determining subject will play itself out within each stage of right (abstract right, morality, and ethical life). Although a particular content will be given in each of the three stages, this content does not compromise the requirement that normative validity come from the self-determination of freedom. Rather, the particular content in each sphere will come from, or arise, precisely from the will as it determines itself. The particular content, in other words, is required by the self-determination of the free will; it is not given to the will externally, as it were, and therefore does not limit the will's freedom or jeopardize the self-determining character of the will. Since we are here concerned with abstract right, we can now move on to a discussion of the structure of that particular sphere of freedom.

Abstract Right

The Argument Concerning Freedom in Abstract Right

The first moment of the general character of the free will is its ability to abstract from any and all givens, to know itself as wholly undetermined. The first condition for

the possibility of a free will is, therefore, that its self-determining activity be independent from any determination, either internal or external. Hence, the first stage which satisfies this condition is the will conceived of as abstract (devoid of any determinate content), as universal (as undetermined by any content, the "I" is necessarily universal), and immediate (i.e., the "I" knows itself simply as that "I" which lacks content; the self is "simple infinity and hence purely identical with itself").²³ Abstract right is the logically first stage which satisfies the requirements of a self-determining will. What is the minimal requirement which satisfies a self-determining will? The minimal requirement is that the will be devoid of any given constraint; that is, at minimum, the necessary condition for a free will. That is why abstract right is the **logically** first stage of the self-determining will: abstract right satisfies the minimal conditions necessary for freedom.

It is this logically first stage of the free will, where the will is taken as abstract, immediate, and universal, which Hegel calls "personality." Persons, because they are that form of consciousness which know themselves as undetermined by any inclinations or external condition, are identical, for there is nothing determinate about the abstract will which could constitute the ground of difference with an other will.

²³

Ibid., §34-35, 51-52; 67-69.

It follows from this that persons in this sense (and only in this sense) are equal, since persons have abstracted from all content there is nothing to distinguish them; personality entails identity and equality. Persons are the barest minimum condition of self-determining selves.

Abstract right and the stage of self-consciousness which corresponds to it -- personality -- form the minimum requirements for the free determination of the will. However, the second moment of the general character of the will, the necessity of choosing some determinate content, must also be accounted for. In explicating this moment, the necessity of private property will manifest itself. This is done in the "Abstract Right" section in the following manner.

We have considered the first moment of the will in abstract right. That will was characterized as abstract, immediate, and universal. That characterization, however, represents only one aspect of the person. On the other side, the person does have a particular content -- namely, the desires, needs, and aims, along with the external conditions (relations with others, social and historical circumstances, etc.). "In accordance with the moment of particularity of the will, it has in addition a content consisting of determinate ends, and as exclusive individuality, it simultaneously encounters this content as an external world immediately

confronting it."²⁴ As noted above, any given determinate content is contingent as far as the abstract will is concerned; any given particular confronts the person as something other than itself. Particularity is not self-related, like the abstract will (the person), is not free, and comes under the category, in relation to the person, of **thing**. Things are not-free, not self-determining objects or modes of being (i.e., drives, inclinations, and desires are all characterized by Hegel as things, though they are not objects in common-sense usage). Because they are other than free, self-determining persons, things may be used as a means, unlike persons.

That personality must be embodied in things follows from the second moment of the general character of the free will. Not only are persons abstracted from any determinate content (the first moment), but they must also give themselves some content in order to satisfy the requirement that a will must will something as its own will. In other words, negative freedom consists in the abstraction from any determinate content; positive freedom entails the will's embodiment, the requirement that it give itself some content consonant with the universality of the self-determining will. And that content is nothing other than the will itself, embodied in

24

Ibid., §34, 51; 67.

property. As Hegel puts it, the "thing thereby becomes mine and acquires my will as its substantial end."²⁵

The necessity of embodying the will in property can be seen in the distinction Hegel makes between possession and property. When I possess something, I merely exert an external control over the thing: it is simply in my power to control the external thing, a thing which is not necessarily mine. In other words, possession does not necessarily imply ownership. But this is not the same as placing my will in a thing. For when I do the latter, I objectify myself (in consciously placing my will in the thing; by declaring it mine), I become an object for myself, give myself a content, impart to my freedom an external existence.²⁶ The object which I give to myself is my own will; it is the end and the content which I will when I embody my will in property.

The requirement that the will embody itself in an external thing can also be elucidated in the context of the definition of right. The concept of right, taken as the concept of freedom (i.e., the free will), demands an objective existence. This follows from the immanent self-development of the concept of freedom. Because the will must not only abstract from all determinate content but must also give itself a content, the will must embody itself in property.

²⁵

Ibid., §44, 57; 75.

²⁶

Ibid., §45, 58; 76-77.

Although Hegel does make a distinction between mere possession and property, he does indicate that it is not enough to simply place my will in a thing (and own it as property). I must also take possession of it, which means that I must also make a thing objectively mine. **Taking possession** is therefore to be distinguished from mere possession, and signifies either the actual act of physical seizure or the designation of some external thing as mine.²⁷ Taking possession of a thing, though subsequent to placing my will in a thing (which constitutes the minimum requirement for property as such), is a necessary moment of embodying my will in private property. In taking possession of the thing I objectify my will and fulfill the conditions for others to recognize my right to place my will in things.²⁸

That the embodiment of personality takes the form of property (more specifically, private property) follows from the necessity of the embodiment of personality. Property is the objective embodiment of my personality, the actualization of the free will. Property therefore represents the barest minimum condition of the self-determination of the free will. Furthermore, this condition must take the form of private property, that is, the embodiment of the individual will. Since, in this first stage of right, the will is taken as

²⁷

Ibid., §54, 64; 84.

²⁸

Ibid., §51, 62; 81.

simple and immediate, as the contentless and self-relating "I," the capacity to embody personality must take the form of private property. Relations to other wills and the recognition of another's right to embody their will in property are logically secondary requirements found in abstract right. The minimum condition of self-determination is the capacity to place my own (i.e., private, individual) will in an external thing. Persons embody property in an individual or private manner.²⁹ (This is why communal property is seen as "inherently dissolvable," and why Hegel praises the state-ordered dissolution of the communal property of monasteries, saying that a "community does not ultimately have the same right to property as a person does.")³⁰

Private property represents the first possibility of the actualization of the free will. It is the first and minimum condition of self-determination, the first way in which the free will becomes 'connected' to, is made manifest in, becomes objectively real, in the world. As the individual incorporation of freedom, it does not articulate anything further than the simple ability to own property. That is, the concept inherent in abstract right does not tell us how much property, or what kinds of property, an individual can own;

²⁹

Ibid., §46, 58; 77.

³⁰

Ibid., §46, 58; 78. "Inherently dissolvable," is the translation of **an sich auflösbaren**. The second quotation cited above occurs in the Addition to §46, 78.

nor does it tell us what a just distribution of property is.³¹ Distributive justice, on this account, is a consideration not inherent in the conception of autonomy; distributive questions follow from, and are not presupposed by, the logically first consideration of freedom.

Moreover, the articulation of this first stage of the actualization of free will is the articulation of the intelligible, or rational, consideration of freedom. The necessity of private property is a rational necessity, not a physical one; the demands of freedom in this stage come from the necessity of embodying abstract personality, and not the satisfaction of the will's particularity (the needs, interests, desires, etc.).³² For this reason as well, questions about distributive justice -- inquiries about the amount and kinds of property necessary to satisfy the needs and interests of individuals -- are irrelevant to the normative significance of the embodiment of the will in private property.

This point can also be made if we look at the transition to "Abstract Right" as found in the Enzyklopädie. The account of the transition from "Subjective Mind" (**Geist**) to "Objective Mind" makes clear why Hegel thinks that it is not happiness or

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Ibid., §49, 61; 80.

³²

Ibid., §49, 60-61; 79-80.

the satisfaction of needs which fulfills the first minimum condition for freedom.

In the end of the first section of that work, the argument moves from "The Impulses and Choice" (**die Triebe und die Willkühr**) to "Happiness" (**Glückseligkeit**) to "Free Mind," (**der Freie Geist**) all within the broader category of "Subjective Mind."³³ The contradiction, and its resolution, found within these last sections of "Subjective Mind" leads to "Objective Mind," or the same point that is articulated within the Philosophie des Rechts.

The problem discussed within those sections is this: given that each "I" contains within itself inclinations and passions (in the form of impulses), how is it to be determined which impulses are rational, which good and which bad, which to be satisfied and which curtailed?³⁴ The most we can say is that the impulses demand to be objectively satisfied, a satisfaction which therefore entails an examination of those objective structures -- the laws, the institutions of the state, etc. -- where the relationship of the various impulses would be determined and realized.

And while we can say that the impulses require objective satisfaction, that does not tell us, as far as the "I" is concerned, which impulses may or may not be satisfied:

³³

Hegel, Encyclopedia 3, §473-482, 295-302; 234-240.

³⁴

Ibid., §474.

impulses often contradict one another and there is no way to determine which should be sacrificed or limited in order to produce the satisfaction of them all.

The desire to satisfy the impulses, taken as a totality, constitutes the desire for happiness. Happiness is therefore seen as the next logical consequence of the desire to satisfy certain desires -- i.e., the desire to satisfy all desires. In order for this to occur, what must happen? The will, in order to satisfy all the desires, must abstract from all of them -- i.e., it must pull back, as it were, and see itself as free from all desires with the capacity to choose those desires the will thinks necessary to achieve happiness. It is the act of abstracting from all of the particular desires, the process of recognizing that, in order to satisfy the desires, one first must abstract from each and every one of them, which leads the will to recognize that its freedom consists not in satisfying this or that desire (or the totality of the desires) but in not being determined by any desire.

Initially, freedom of the will does not consist in the capacity to chose to satisfy certain desires, but in the capacity to abstract from all desires and to know itself as undetermined by any desire. From a normative standpoint, happiness, and the satisfaction of needs or desires, is non-essential to the first determination of freedom. What is essential is, first, the abstraction from any given content (including an internal content, like impulses, desires, or

drives) so that the will is now conceived as self-grounding and self-determining, and, secondly, the moment wherein the will gives itself a determinate content -- i.e., places itself in a thing, which is to say it places itself in private property.

This can also be expressed in the following way: if we take as essential the satisfaction of needs, private property becomes a means to that end. Private property, from the point of view of the satisfaction of needs, is nothing more than one contingent avenue -- among many -- which serves that purpose. Hence, from that viewpoint, questions about distribution become primary, since the main task is to satisfy everyone's needs. But from the standpoint of the concept of freedom -- that is, of the self-determining will -- private property becomes an end in itself³⁵; it is the minimum condition of realizing the freedom of the will. Private property therefore is nothing other than the embodiment of the will; what one wills is not the thing per se, but one's own free will as embodied in property. To say the same thing another way: when the will places itself in private property, the will wills itself. As Hegel puts it: "But this predicate [that property becomes 'mine'], on its own account merely 'practical', has here the signification that I import my personal will into the thing." And then, in the following

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Hegel, Philosophy of Right, §45R, 58; 77.

section: "In his property the person is brought into union with himself."³⁶ In order to be self-determining, the will must will nothing other than itself; in order to give itself a determinate content and existence, the will must place itself in private property. And a thing (as opposed to a person) is the only means available to the will to satisfy this requirement.

Personality, as the first stage of the development of freedom, can also be characterized as essentially negative. When Hegel writes that the command of abstract right is, "Be a person and respect others as persons,"³⁷ he is doing nothing more than issuing a negative command: namely, the personality of others must not be infringed. As noted before, persons, as abstract, universal, and immediate, are essentially identical and equal. Therefore, the appropriate comportment towards one another is negative: they may not violate the right of another to be a person.³⁸ In the context of private property, this means that the other must be recognized as having a normative claim to embody property. When another places their will into a thing, that right must be recognized. Recognition

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Hegel, Encyclopedia 3, §489-490, 307; 244.

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Hegel, Philosophy of Right, §36, 52; 69.

³⁸

Ibid., §38, 53; 70.

is thus implicit within the concept of abstract right.³⁹ And it is to the explicit recognition of another's right to own property, through a contract, that we now turn.

The category of private property is structured in three stages, each of which is a progressively more adequate embodiment of the abstract will. These three stages of possession are: (1) immediate bodily possession; (2) original possession; and (3) contract (derivative possession).⁴⁰ As for bodily possession and original possession, it is not necessary to examine these two stages in great detail; it will be enough if we indicate what they mean and then move to the more important consideration, the third stage, that of contract.

Bodily possession refers to the first and minimal condition of ownership. Insofar as the will has an actual existence, it has it in corporeal form. From the will's standpoint, the body is a 'possession', but only in so far as the will wills it. The body is not 'possessed' as a thing is possessed; the relationship between the body and will is one of identity, strictly speaking, and not one of ownership. In accordance with the character of this first determination of the free will, the body is seen as external to the will (hence

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Ibid., §51, 62; 81.

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The section numbers for the discussion of immediate bodily possession, original possession, and derivative possession (contract) are as follows: immediate bodily possession, §47-48; original possession, §49-70; and contract, §71-80.

Hegel speaks of possession), and therefore one only possesses a body, and also one's life, only in so far as one wills it. "The animal," Hegel says, "cannot mutilate or destroy itself, but the human being can,"⁴¹ since destruction or mutilation pertain to something possessed, and an animal does not possess its body. Nevertheless, from the standpoint of another will, the body must be recognized as a free entity, not subject to the use of an other will. This is so because the body and the will, from the external perspective of another will, are one and the same: the will achieves real existence only through the body. Corporeal existence, therefore, cannot be treated as a means by another; it cannot be considered like a thing, capable of subordination, use, or possession by another. This is why the relation towards others, in abstract right, is essentially negative: the duty consistent with personality is the duty not to violate the body of another.

Original possession constitutes the abstract right of property. Recall the distinction between mere possession and taking possession: taking possession, the actual physical seizure or designation of a thing as mine, was characterized as an essential moment for the constitution of property. Taking possession makes actual the act of placing one's will in a thing, makes property actual and real, gives it existence where it was formerly merely inward. The only condition

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Ibid., §47R, 59; 78.

placed upon this requirement is that no other will already occupy that thing.⁴² Original possession -- taking possession, or, in modern terms, the right of first occupancy -- can, of course, take place in a variety of ways, all of which depend upon the contingent circumstances surrounding the particular thing (e.g., someone may designate a thing theirs by marking it with a sign, by removing it, by working it, etc.). How a thing is taken possession of is not the essential consideration; that a thing is taken possession of is.

Unlike bodily possession and original possession, contract consists of a mode of acquisition brought about by a relation of two wills. Indeed, the relation of "will to will is the true distinctive ground in which freedom has its existence."⁴³ Whereas in original possession the relation concerned the will and a thing, in contract two wills recognize the right of each other to place their will in things. Contract makes manifest the right, and corresponding duty of the other, of exclusive ownership (which is nothing more than the right of personality).

In this type of possession, both the alienation of the thing, and the corresponding appropriation of the same thing by another will, take place simultaneously (otherwise the appropriation would be simple original possession and not

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Ibid., §51 & A, 62; 81.

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Ibid., §71, 78; 102.

contractual possession). Even though one will alienates something, it does so as property; and the other will appropriates this property as the first will's. Hence the first will continues to have an objective existence, an existence made actual in property, even though the will has alienated the property. "I am and remain an owner of property, having being for myself and excluding the will of another, only in so far as, in identifying my will with that of another, I cease to be an owner of property."⁴⁴ Outside of contract, in original possession, if I choose to alienate my property, the thing would become an empty vessel, a **res vacua**: it would be available for appropriation without my consent. In contract, the thing, while it is alienated, is simultaneously appropriated; it does not revert to a status outside of property and thus requires my consent for it to be taken by another.

This may be expressed in another way. The two wills, one of which appropriates and the other which alienates the property, are identical; in contract, they form a common will.⁴⁵ The two different wills are united in exchanging one thing for another and in this sense they are common. And it is on the basis of this common will that a contract can exist and have legitimacy. The common will allows for either the

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Ibid., §72, 79; 104.

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Ibid., §75, 80; 105.

exchange of property or a gift of property (the only two kinds of contract) insofar as the common will makes possible both the simultaneous expropriation and appropriation of the property. It is only by virtue of this common will that the two different acts (the giving of one thing to another, and the giving of another thing to the other) can occur at the same time. The recognition of the right of each to own property, to embody their will in a thing, is precisely what the contract consciously makes evident.

A contract therefore expresses a common agreement between wills. The particular property claims each will makes is united in the contract, and this is specifically what the contract makes manifest. However, this commonality is itself a relation between wills only in regard to this specific property claim and, more importantly, depends upon the contingency of each of the wills. That is, it is purely by chance that two wills come to agreement in contract; there is no necessity that two wills should come to such a common agreement.⁴⁶ If there is no agreement, then the will is refused its right.

Through a contract, two different wills are made identical. Insofar as each will is expressing its right to own property, and that right is recognized, each will is still immediate and abstract. This conforms to the first

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Ibid., §81, 87; 113.

requirement of abstract right, namely the capacity to abstract from anything particular and limiting. However, the second essential moment of abstract right, the actual determination of a particular content, must also be expressed. This is done through the specific property claims stipulated in the contract (i.e., the recognition by others that one has a right to embody his will in a thing), and is characterized as the moment of particularity.

The third moment, harkening back to the general character of the free will, consists in the unity of the first two moments. The will's capacity to abstract itself from everything given, and the will's ability to determine itself, taken together, or as a unity, constitute the freedom of the will. Self-determination is the will's consciousness of the determinate content (what was thought to be in the second moment a restriction or a limitation) as something which is its own. The positive freedom of the will is the activity of conscious self-determination.

The Transition from Abstract Right to Morality: Wrong & Revenge

The determination of the freedom of the will in abstract right is only the first determination of the will. Because the recognition of the right to private property, through contract, is susceptible to wrong, abstract right ends in a conflict, arising out of the movement of abstract right itself, a conflict which cannot be resolved by the standards

set by abstract right. Wrong, an inherent and necessary moment within the dynamic of abstract right, precipitates, via revenge and punishment, the transition from abstract right to morality.

There are three specific ways in which right enters into a relation with wrong. First, one will may not recognize another's right to this particular property, which Hegel characterizes as a non-malicious wrong. Second, in the case of fraud, a semblance of the right to property is maintained, but a semblance only; the true value of the right to property is violated. And thirdly, in the case of coercion and crime, the right to property is altogether negated; a crime severs any relation between the will and right, and says, in effect, that this will has absolutely no rights.⁴⁷

The preceding summarizes the ways in which wrong occurs within abstract right, but does not yet tell us why wrong must occur within the dynamic of abstract right. Why does Hegel claim that abstract right **necessarily** generates wrong within its dynamic? To answer this, recall that the will within abstract right is "relatively" or abstractly universal: it is free insofar as it has divested itself of any determination and content. In this sense, persons are abstractly equal: abstract right demands only that individuals abstract

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Ibid., §83, 88; 116. The discussion of each type of wrong occurs in the following sections: unintentional wrong, §84-86; fraud, §87-89; and crime, §90-103.

themselves from determinations, not that they will a particular end based on their inclinations, preferences, an idea of the good, etc. Nor are they obligated to will right itself. This explains why the description of abstract right is put negatively: what abstract right commands is the injunction "not to violate personality and what ensues from personality."⁴⁸ But while the will is abstractly universal within abstract right, it is also particular in so far as the individual appropriates property according to his own subjective reasons. In other words, while removing itself from particularity as such in order to be self-determining, the will is at the same time limitless particularity:

Since they are immediate persons, it is purely contingent whether their particular wills are in conformity with the will which has being in itself, and which has existence solely through the former. If the particular will for itself is different from the universal, its attitude and volition are characterized by arbitrariness and contingency, and it enters into opposition to that which is right in itself; this is wrong.⁴⁹

From another individual's perspective, it is a matter of chance that another individual's particular choices (i.e., what he places his will into) respect the abstract right of other persons.

What follows when two wills, each of whom makes a reasonable claim from their perspective, come into conflict?

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Ibid., §38, 53; 70.

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Ibid., §81, 87; 113.

This will inevitably occur, given that the will in abstract right is externalized, and hence questions arise concerning exactly what has to be shown in order to appropriate something. Even if both parties act in good faith, each is still acting from **his** or **her** standpoint; and though my claim be a reasonable one, the other individual can with equal reasonableness make a claim contrary to mine. From the standpoint of abstract right, there is no means available to adjudicate the normative claim each will makes. As Peter Benson puts it:

While abstract right articulates principles of right that are certainly qualified to establish valid entitlements, the presuppositions of abstract right [i.e., that the will abstract itself from all determinations] make the determination of entitlements -- and thus the entitlements themselves -- impossible.⁵⁰

An external, common, public judgement is necessary in order to mediate the conflict between two wills, since they are incapable of doing this, given the presuppositions of abstract right, from their own perspective. Or, to put it another way, freedom as conceived as abstract right must develop and incorporate the specific ends of individuals (based on their particular interests and needs), although those ends must be compatible with right. This is the transition from abstract right to morality. However, before we undertake that task, it remains to be seen how the actual

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Peter Benson, "The Basis of Corrective Justice and its Relation to Distributive Justice," Iowa Law Review 77 (January 1992): 610.

transition from abstract right to morality occurs within the Philosophie des Rechts.

That transition takes place in the third case of wrong -- namely crime. Because the recognition of my right to place my will in property is nullified in this third instance of wrong, I must assert my right to negate the criminal's negation of my right (revenge is thus the negation of the negation). Abstract right requires that I take revenge; I must affirm my right to place my will in property, and that can only be done, in the face of the criminal's annulment of my right, by negating his assertion. The logic operative in abstract right, the principle of freedom in abstract right, demands revenge.

However, if freedom is left in this form, the outcome of such a relation will be an unending conflict, the incessant and duplicating claim of my right to place my will in property versus the negation of that right by the criminal. This is not simply an aberration of a singular instance; it is indigenous to liberty realized as abstract right, and cannot be resolved on the basis of abstract right. This can be seen if we compare the assertion of the will vis-a-vis private property with the assertion of the will in revenge. In the case of private property, the will declares a thing its own because it must both "objectify" itself, will something, make itself actual in the world, and that "thing" which it makes real, which it gives itself as an end, is the will itself. In

the case of the assertion of the will in revenge, the will is not making itself real in the world or willing itself as its own end, but is countering another will which denies the right of the first will to place itself in property. The will in this case is negating a claim against its right; it is not asserting its freedom by locating itself in property. This is why the assertion in revenge appears as just another wrong to the will which has denied its right: it is seen as a subjective judgement against the right of the criminal's will. The criminal views the act of revenge as a denial of his right and not as an objective judgement in the name of right itself. Only punishment can dissolve this infinite progression.

Punishment serves in the name of right itself and is an appeal to an objective and disinterested point of view. That is, it is an appeal to the law itself.⁵¹ (This is why Hegel characterizes punishment within societies without laws or magistrates as revenge, and why there is a remnant of revenge as punishment in legal codes still in use -- for example, when a decision to bring a suit to court is left up to the individual.)⁵² Punishment, although akin to revenge in that both are acts of particular wills and both negate an act of wrong, differs from revenge in that punishment negates the specificity and particularity of the individual's claim and

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Hegel, Philosophy of Right, §103, 99; 131.

⁵²

Ibid., §102A, 130.

asserts the universal: namely, an assertion explicitly for the universal principle of right.⁵³ That is why revenge, although the claim of an individual against a wrong, is nevertheless a wrong as well. Revenge does express the right of the individual against another's denial of that right, but it also denies the other's right at the same time. Revenge is thus characterized as taking the form of a subjective judgement against another will, as a contingent manifestation of justice, and a particular will's new infringement.⁵⁴ Revenge is an infinite progression which can only be stopped by a disinterested judgement, a judgement which is not confined to the subjective interests of the two wills, is therefore universal, and which "speaks" for the law itself. This judgement is punishment.⁵⁵ Only punishment can negate the

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Revenge, albeit it a negation of wrong, is itself essentially wrong; it is "a new infringement." Ibid., §102, 99; 130.

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Ibid., §102, 98-99; 130.

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Although revenge is a wrong from both the avenger's and the culprit's point of view (the former because it is the action of a subjective and contingent will, the latter because as subjective and contingent it violates the criminal's right), the criminal still deserves to be punished. Hegel's theory of punishment is retributivist, as opposed to consequentialist or utilitarian. In committing a crime, the criminal, as a rational being, says, in effect, that he should be treated as he himself has acted. "For it is implicit in his action, as that of a rational being, that it is universal in character, and that, by performing it, he has set up a law which he has recognized for himself in his action, and under which he may therefore be subsumed as under his right." Ibid., §100, 95; 126.

criminal's act, but it is precisely punishment which abstract right cannot account for.

Why can't abstract right account on its own terms for punishment, that is, overcome the infinite progression of revenge? Abstract right deals with the will as "personality" and this means: an "I" abstracted from all determinations, internal (desires, appetites, or passions) and external (social relations, natural circumstances). The 'stratum' or 'thing' with which abstract right is concerned is only the simple "I." It follows from this that when the free will places itself in property, it's claim is to private property, to "my" property. Abstract right cannot account for anything other than the simple "I" and its relations with things, property, and other wills, given that all content -- save for the will willing itself when it embodies itself in property -- has been withdrawn from the will.

But in punishment, the situation arises where the subjectivity of the free will is confronted with the necessity of a universal judgement in order to dissipate the unending progression of revenge. Only a universal judgement which speaks with the prerogative of right can supply this. This universal judgement cannot be imposed upon the will from the outside, since that would restrict the freedom of the will. In order for the will to remain free, the simple "I" of abstract right, devoid of concrete determinations, can only do this if, though "a particular and subjective will, [it] also

wills the universal as such."⁵⁶ The will, formerly devoid of content, if it is to overcome the contradiction of revenge as a response to wrong, must now will not its embodiment in property, but itself in itself: it must recognize that its own subjective capacities -- its capability of self-determination as well as its contingent and particular self -- is the ground of its freedom. Whereas in abstract right the will willed itself when it embodied itself in property, in morality the will wills itself in itself and not in an external thing. The "negation of the negation," the overcoming of the ceaseless repetition initiated by wrong, lies in the will's recognition that the contingency and arbitrariness which characterized wrong and revenge can only be surmounted if that contingency is internalized, as it were.⁵⁷ The will now sees that it is not in the abstraction from all determinate content and the subsequent embodiment in property that its freedom lies (although those aspects will always remain a necessary requirement of freedom), but in the will's capacity for self-determination, its intentions, motives, and purposes, in a word, its subjectivity:

This question of the self-determination and motive of the will and of its purpose now arises in connection with morality. Human beings expect to be judged in accordance

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Ibid., §103, 99; 131.

⁵⁷

Ibid., §104R, 100; 132.

with their self-determination, and are in this respect free, whatever external determinants may be at work.⁵⁸

Freedom, formerly taken to be the embodiment of the will in property, is now seen as the self-conscious willing of one's own inner intentions or purposes. And this is to say that the will is free only if it is self-consciously aware that what constitutes its freedom is precisely its capacity to be self-determining. In Hegel's words as to the former point:

The moral point of view therefore takes the shape of the right of the subjective will. In accordance with this right, the will can recognize something or be something only in so far as that thing is its own, and in so far as the will is present to itself in it as subjectivity.⁵⁹

And then, in regard to the claim concerning the will willing its own capacity for self-determination: "But this identity of content receives its more precise and distinctive determination within the moral point of view, in which freedom, this identity of the will itself, is present for the will."⁶⁰

Morality

The Idea of Right as Morality

In the realm of the moral, the individual is now characterized not as a person (as he or she was in abstract

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Ibid., §106A, 135-136.

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Ibid., §107 & R, 102; 136.

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Ibid., §110, 103; 138.

right) but as a subject. In abstract right, the individual as a person constituted the logically first (and minimal) determination of freedom: the person is a bearer of rights (the right to possess private property, the right to alienate that property, the right to have that right acknowledged by others) and that is all. What is important in abstract right is the necessity to place one's will in something external -- private property -- and the recognition of that right by others. In John Rawls's phrase, Hegel is a "constructivist," one whose claims about normativity include only that which is entailed by the character of the free will itself and not by any external considerations (such as nature, natural law, natural rights, or divine commandments).⁶¹ This is consonant with Hegel's claim that the only starting point possible, if the will is to be considered free, is that of a will devoid of any determinations. Withdrawn and removed from all external and internal givens, the will must yet will something -- i.e., itself -- and so it must place itself in an external thing, and this embodiment of itself constitutes the logically first stage of freedom. As we have seen, abstract right represents the logically first, and minimally necessary, articulation of the free will.

The development of freedom within abstract right has necessarily led to the starting point of morality: the

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John Rawls, "Kantian Constructivism in Moral Theory," Journal of Philosophy 77, no. 515 (1980): 554-572.

contradiction of wrong and revenge has led to a new determination of freedom -- a determination which incorporates the standpoint of abstract right but brings it to a more comprehensive level, and thus takes into account the self-conscious willing of one's inner intentions as well as the awareness that the capacity for self-determination constitutes its freedom. From the standpoint of morality, it is not enough to merely recognize the right of others to own private property and to honor the contracts into which one enters; that standpoint has been superseded by the necessary movement of freedom itself. In the moral sphere, the entire person, including their intentions and purposes, their well-being and happiness, is now of concern. In abstract right, the needs, interests, and inclinations of the individual were taken as extraneous to the will's freedom, as not belonging essentially to the will. (This is what differentiates Hegel's view of private property from Locke's position: private property, for Hegel, is the embodiment of the will and necessary, though not sufficient, for freedom; for Locke, private property serves a utilitarian function, ministering to the needs of the individual.)⁶² Right is embodied in the

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See Chapter 5 of the second Treatise of Government, where Locke first claims that God has given the world to men to "make use of it to the best advantage of Life, and convenience. The Earth, and all that is therein, is given to Men for the Support and Comfort of their being." And then, further on, when speaking of the limitations of private property (i.e., how much are we justified in taking from nature), Locke asks: "But how far has he given it us?"

purposes and intentions of the subject, although it must be noted that individual subjectivity is not identical with the concept of right: there is an explicit distinction between right itself and the subject, and this will take various forms in the account of morality, culminating in ethical life.

The difference between right itself and the will as subjectivity points to another way of characterizing the moral point of view. In abstract right, the will was immediate; it was pure willing, identical to itself, devoid of any external or internal empirical content. In morality, the will is reflected into itself; at the same time, the will must give itself an objective existence: "...the will is the aspiration to overcome this restriction -- i.e., the activity of translating this content from subjectivity into objectivity in general, into an immediate existence."⁶³ In giving itself an objective existence, two features of the individual must therefore be taken into account: not only the inner purposes and intentions of the will, but the actions which express those purposes and intentions and which give them a concrete existence.

To enjoy. As much as any one can make use of to any advantage of life before it spoils; so much he may by his labour fix a Property in." John Locke, Two Treatises of Government, edited by Peter Laslett (Cambridge: Cambridge University Press, 1988), 286 & 290.

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Hegel, Philosophy of Right, §109, 103; 138.

In its relationship to others, the subjective will now stands in a positive orientation. In abstract right, the will's relations to others was characterized as negative: the injunction in this sphere was to not infringe upon the rights of others. In morality, it is not a negative relation to others, but a positive comportment: one should will the will of others:

In morality, on the other hand, the determination of my will with reference to the will of others is positive -- that is, the will which has being in itself is inwardly present in what the subjective will realizes...But not just one will is present here...In the moral sphere, however, the welfare of others is also involved, and it is only at this point that this positive reference can come into play.⁶⁴

In abstract right, the will's relationship to others consisted of recognizing that others also have the right to place their will in property, the corresponding duty not to infringe on that right of others, and the duty to honor a contract (which is nothing more than the recognition that the other has a right to embody his will in a thing and to expropriate that thing). These are formal rights accompanied by formal duties and their essence is negative: do not infringe on another's right to private property. In morality, the will's relationship to others goes beyond the simple recognition of rights and duties. Since the ground of the will's freedom is now in itself (and not in an external thing), and in action so far as that action is the expression

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Ibid., §112A, 140.

of the will's intention, the will relates to others positively. From the moral standpoint, it is not primarily a matter of respecting rights, but of taking into account, in one's actions, the free will of others as their freedom is expressed through their plans, motivations, goals, etc.

Because the subjective will must objectify itself through action, various aspects of the moral will are distinguished within the sections on morality. Specifically, there are three components of the moral will: (1) purpose and responsibility; (2) intention and welfare; and (3) the conscience and the good.⁶⁵

Hegel makes a distinction between the purpose (**der Vorsatz**) of an action and the intention (**die Absicht**) of an action. The definition of the purpose of the action is simply the foreseeable consequences of the act. Responsibility for an action means that a subject is only responsible for those actions which he or she knowingly willed. Hence, Hegel claims that Oedipus cannot be accused of parricide: Oedipus did not know that it was his father whom he fought at the crossroads -- nor was it his purpose to kill his father. Oedipus cannot be held responsible for an action he did not consciously will despite what he himself believed.⁶⁶ Hegel here identifies a distinction in action which the ancient world did not make.

⁶⁵

Ibid., §114, 105-106; 141.

⁶⁶

Ibid., §117A, 144.

The difference between the ancient attitude toward responsibility for one's actions and the modern attitude lies in the distinction between deed (**Tat**) and act (**Handlung**), a distinction unknown to the ancient Greeks. The deed, the entirety of the consequences of an action whether consciously willed or expected, is for the Greeks deserving of responsibility. The ancient Greeks had not developed what the modern world calls subjectivity; they did not think of themselves as individuals capable of free choice.⁶⁷ For the moderns, with the emphasis placed upon the employment of the will, the placement of the will into everything that they do, it is only the act, that aspect of the action which I consciously will and reasonably expect, which can carry the requisite culpability.

It will of course happen that consequences which I did not anticipate or intend will come about as a result of my actions. As soon as the action is let loose in the world, it is subject to forces and ramifications which were not originally a part of my purpose. Am I responsible for those consequences which I did not intend? Only in so far as they

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See the Addition to §279, 321, where Hegel notes that the Greeks "based the ultimate decision on completely external phenomena such as oracles, the entrails of sacrificial animals, and the flight of birds, and that they regarded nature as a power which proclaimed and expressed by these means what was good for human beings. At that time, self-consciousness had not yet arrived at the abstraction of subjectivity, nor had it yet realized that an 'I will' must be pronounced by man himself on the issue to be decided."

can be reasonably foreseen. And in order to reasonably expect certain consequences from certain actions, I must look not to the immediate factual act, but to the universal component of the action. In other words, Hegel here makes a distinction between the purpose of an act and the intention of an act. Intention differs from purpose in this respect: purpose indicates the immediate fact of existence (e.g., I want to see a movie and I see it; the fact that I saw the movie is my purpose) whereas intention signifies the underlying aim of the action (why it is I wanted to see the movie). Whereas purpose points to the specific content of an action, the intention comprises "that universal aspect" of the action."⁶⁸ In willing an action, I will a particular (i.e., this particular act) but I also will a universal (i.e., the motive or reason for this particular act).

Furthermore, we have the right to recognize the action as mine, that it fulfills my desires, interests, concerns, etc., so long as it refers back to me as the realization of my will. Such a satisfaction of the accord between will and its realization Hegel terms welfare or well-being (**das Wohl**). Well-being consists in the fulfillment of the subjective intentions, the realization of the ends which the will has set itself. Well-being does not involve the singular aspects of the action, but the totality of actions; it concerns the will

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Ibid., §119, 109; 147.

as it relates to its aims and interests in action as a whole. This is well-being, or, in the Enzyklopädie, happiness.⁶⁹ The claim that the will should find its satisfaction in an end the content of which it has given to itself -- indeed, it is a right of the subject to find such an attainment -- is another way of expressing the difference between the ancient and modern world; Hegel goes so far as to say that it constitutes the "pivotal and focal point" in the difference between the two.⁷⁰

Transition to the Good and Conscience

It is in the discussion of distress that the transition from welfare to the good takes place. Distress signifies an extreme threat to life, and hence a threat to the capacity for rights. The right of the person in distress must take precedence over any other claim, such as the right to property, simply because without life there could be no rights. In terms of the example of the Addition to section 127, the person who stole a loaf of bread in order to preserve himself would certainly be violating the property rights of another, but the violation does not constitute simple

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The discussion of happiness occurs in Hegel, Encyclopedia 3, §479-480, 299-300; 238.

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Both claims -- that the subject has a right to attain the satisfaction of his ends, and that this constitutes the difference between the ancients and the moderns -- are found in Hegel, Philosophy of Right, §124, 112; 151.

thievery⁷¹. The upshot of the discussion on distress is this: the tension between the right to have one's desires satisfied and the abstract right of another's property shows the contingency of both the right to property and the right of the subject to satisfy his or her welfare. Distress shows how both rights, the universal determination of freedom and the particular determination of freedom, the right to property and the right to satisfy one's welfare, come into conflict. It is this conflict which forces the transition to the good and conscience.

The conflict between the dictates of the right to property and the right of the subject to satisfy his welfare -- and the transition to the good -- can be expressed in another way. In §130, Hegel says that "...welfare is not a good without right. Similarly, right is not the good without welfare..."⁷² The subject has a right to happiness or welfare, but this right cannot override the right of others to embody their wills in private property. Similarly, the mere respect for private property rights is not sufficient to ensure a community of happy individuals or individuals whose welfare has been secured. What distress precipitates is the necessity of moving towards a unification of both sides, a combination

⁷¹

Ibid., §127A, 155.

⁷²

Ibid., §130, 116; 157.

of the right to happiness or welfare found in morality with the right to abstract freedom found in abstract right.

Borrowing a term from John Rawls, we can say that right and welfare or well-being are lexically ordered.⁷³ Freedom as abstract right must come first; it is the logically first determination of the free will. Is this an absolute right, in the sense that the logically first determination of freedom must always take priority over any other determinations of freedom? No, because, as we have seen in the case of distress, or in conditions so severe as to prompt a violation of abstract right, right can take second place, as it were, to well-being. This is so when the agent's life is in danger. Without life, there would be no possibility of right. Therefore, well-being, in the sense of survival (or in the sense of the ultimate condition necessary for abstract right, namely life), will take precedence over right.

We might ask at this point: does this mean that Hegel, who has placed abstract right as logically prior to well-being, undercut his own position? Does the fact that well-being must take precedence, in that severe circumstance, mean that abstract right is not the first logical determination of freedom? Is it not actually well-being which has a logical priority over right? Although Hegel does want to claim that the two must go together ("**fiat iustitia** should not have

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Rawls, Theory of Justice, 42-43.

pereat mundus as its consequence")⁷⁴ does he not subordinate well-being to right, as the case of distress shows? In different terms, the claim could be made that self-preservation must take priority over any act of willing: for the will to will in the first place, it must be embodied, and that embodiment entails a minimal satisfaction of needs (sustenance, health, etc.). Need satisfaction, welfare, or well-being take priority, on this view; they are the *sine qua non* of the freedom of the will.

How does abstract right have logical priority over welfare considerations? Abstract right is the first, though minimal, determination of freedom. In order to be self-determining, the will must place itself in property, in something external. No external considerations (or internal considerations extraneous to the simple and pure will) can be taken into account, because if they were, the will would not be free -- it would be determined by those alien factors (the satisfaction of wants, needs, desires, etc.). It would seem, by giving well-being priority in the case of distress, that the logical priority of abstract right has been undermined.

There are several replies to that objection. First, although well-being does take precedence over abstract right in life-threatening situations, this does not amount to a logical priority for welfare. Abstract right is the first

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Hegel, Philosophy of Right, §130, 116; 157.

logical determination of freedom; that welfare in dire occasions must override property rights does not sabotage that claim. Abstract right must be the first determination of freedom, simply because the will could not be free if it were determined by something external to it. Abstract right has a logical, or lexical, priority. The claim that willing is an embodied activity, and therefore certain welfare considerations (the maintenance of life) must take precedence in order that the will may will at all, makes at once too much and too little of the claim that abstract right has a lexical priority. It makes too little of the claim in the sense that if one gives up the strict logical necessity of beginning with the free will as set out in abstract right, one has annihilated Hegel's conception of philosophy as a science.⁷⁵

It makes too much of the claim because, as Hegel attempts to show in this discussion of distress, in the world, no division like the conceptual division between welfare and right can be made; we are not first property holders (or potential property owners) and then beings interested in our welfare. Indeed, the connection between the will and life is necessary: life, defined as the totality of the particular interests of the individual, is nothing other than welfare.

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"It [the science of right] has therefore to develop the Idea, which is the reason within an object [**Gegenstand**], out of the concept; or what comes to the same thing, it must observe the proper immanent development of the thing [**Sache**] itself." Ibid., §2, 19; 26.

Hence welfare is also necessarily connected to the will.⁷⁶ Or, as it is put in the Addition to §127, for someone not to be able to save himself when confronted with a life threatening situation, "he would be destined to forfeit all his rights; and since he would be deprived of life, his entire freedom would be negated."⁷⁷

In the development of the concept of freedom, a point has been reached which takes into account the place where the objection (the claim for the priority of life) arises: the tension (or more strongly, the contradiction) between the priority of freedom taken as abstract right and the priority of freedom taken as life becomes evident as freedom has developed to this point. The objection that self-preservation must take precedence because the will cannot will unless embodied simply takes one side of the argument and claims precedence for it as opposed to the other side (the logical priority of abstract right). But what Hegel here shows is that both points of view are inadequate, or not yet the truth: a further, higher determination of freedom is necessary if the impasse is to be resolved, a determination which springs from the conflict itself.

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Ibid., §127, 114-115; 154.

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Ibid., §127A, 155.

The Good & Conscience

The satisfaction of welfare is incompatible with abstract right when confronted by the case of distress. And this is as much to say that, although both aspects have a validity within themselves, they remain one-sided and contingent. When placed in opposition, as they inevitably will be placed, we can see that neither one is absolute: abstract right takes logical precedence (in considering the freedom of the will, the will must be conceived of as not being determined by external or internal influences), but must give way to well-being in the case of distress (or else life itself would be negated). Well-being does not figure into the first determination of freedom, but does override that first determination in distress. Because neither side expresses or encompasses the entire truth concerning the ground of the normative, both sides are contingent: there is no necessity to the claims of either right or well-being, as the case of distress shows. "Such necessity [of the occurrence of distress] reveals the finitude and hence the contingency of both right and welfare..."⁷⁸ Both sides must be unified, brought together.

The good is that principle of unity. For an act to be good, then, it must promote the welfare of the actor, as well as the welfare of others in general, and it must be right --

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Ibid., §128, 115; 155.

i.e., objectively right, right as such, or universally right. The good consists in the unification of both of these sides; to perform a good act, to do one's duty, is "...to do right, and to promote welfare, one's own welfare and welfare in its universal determination, the welfare of others."⁷⁹

Within the sphere of the moral, then, these two aspects of action -- welfare and intention -- should be unified by the good. The dynamic of action should be ruled by the intention of doing the good, which is universal. The good is that which holds the dynamic together; it is the principle by which my particular interests and desires should be integrated with what is right itself. The point of view of the moral domain has as its essential feature the distinction between the subject's particular interests and right itself. On the subjective side, the moral subject is required to know what is good and to do it. Subjectivity is still distinguished from the good although the good is entirely dependent upon subjectivity to be made actual. Likewise, subjectivity is dependent upon the good as that which ought to be done. Hence, the good appears as a duty, a command, something that the individual is called upon to do. The aim of action is to be right (or universal). And the subject must will that. It is not enough in the moral sphere to merely do what is good or right; you must also intend to do it. On the subjective side,

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Ibid., §134, 120; 161.

the demand is for the agent to recognize that what is valid is what is good, and to know that as his/her own truth. The demand of objectivity consists in the good's demand that the action done as good is actually done.

However, as Hegel notes in sections §'s 134 & 135, this formulation makes manifest the indeterminate nature of the good. Because right itself, expressed as a principle, has form only ("do your duty"), there arises a collision between the principle (the good) and the duties of the particular subject. Here Hegel has reached the Kantian position. For Kant, the categorical imperative -- "act only according to that maxim by which you can at the same time will that it should become a universal law"⁸⁰ -- is a moral rule which commands unconditionally. The test of the categorical imperative is logical consistency: can we will the maxim of an action universally, that is, without contradiction? The categorical imperative, in Hegel's view, as the most abstract and general formulation of the good, divorces itself from the particular; it cannot specify how one is to act in this or that particular situation without bringing in some outside, determinant content, a content which is not encompassed by the demands of logical consistency. The categorical imperative therefore fails to give us any guidance as to whether or not

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Kant, Grundlegung zur Metaphysik der Sitten, Volume 4 of Kant's gesammelte Schriften, 421. Foundations of the Metaphysics of Morals, translated by Lewis White Beck, (Indianapolis: The Bobbs-Merrill Company, Inc., 1959), 39.

a specific content is a duty -- it is an "empty formalism," a morality given to the "empty rhetoric of duty for duty's sake."⁸¹ Hegel writes:

One may indeed bring in material from outside and thereby arrive at particular duties, but it is impossible to make the transition to the determination of particular duties from the above determination of duty as absence of contradiction, as formal correspondence with itself...On the contrary, it is possible to justify any wrong or immoral mode of action by this means.⁸²

Kant was correct in associating morality with reason and with emphasizing the importance of duty (indeed, in the Addition to §135 the Kantian conjunction of rationality and duty is called "sublime"); but, in sundering the universality of duty from the particular, he has left morality indeterminate. Duty, the good, is detached from the particular but the only way in which to act is in and through the particular.⁸³

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Hegel, Philosophy of Right, §135R, 120; 162.

⁸²

Ibid., §135R, 120; 162.

⁸³ In response to Hegel's criticisms of Kant, several commentators have offered rejoinders and rebuttals of Hegel's position. It is not to my purpose to mediate that debate. In this footnote, I would only like to point out the main lines of the response. Patrick Riley, in "On Kant as the Most Adequate of the Social Contract Theorists," Political Theory 1 (1973): 450-471, attempts to defend Kant against the charge of arid formalism by showing how the categorical imperative necessarily includes within its scope a consideration of an end, and that this end does lend content to its formal character. See also his article "The 'Elements' of Kant's Practical Philosophy: The 'Groundwork' after 200 years (1785-1985)," Political Theory 14 (1986).

Steven Smith, in Hegel's Critique of Liberalism,

Because particularity, or content, cannot be derived from the good or right, consciousness must attempt to derive it from the subjective side, or conscience: "Subjectivity... is that which posits particularity, and it is the determining and decisive factor -- the conscience."⁸⁴ To determine what is good, the moral conscience, which is simply the formal aspect of morality without any objective content, uses as its guide the certainty of its conviction. Conscience becomes identified with the certainty of the individual's own convictions; and conscience may or may not be convinced of what is actually the good. It follows from this that one will decide to act according to what one believes to be good, or will not act if one doesn't believe: all is dependent upon the subject, and what it determines the good to be:

(Chicago: University of Chicago Press, 1989), 110, makes much the same point, where he claims that Kant sought "to clear himself of the charge of 'empty formalism'... [by wedding] his standard of universalization to a doctrine of 'objective ends'." However, in a recent article "Defending Hegel from Kant," in Essays on Kant's Political Philosophy (Chicago: University of Chicago Press, 1992), 269-304), Smith, while acknowledging that the Kantian response does contain some validity, nevertheless does not believe that "Hegel's criticisms were simply as wrong as Kant's defenders make out." (271.)

See also: Allen Wood, "The Emptiness of the Moral Will," The Monist 72 (July 1989): 454-483; Pingcheun Lo, "A Critical Reevaluation of the Alleged 'Empty Formalism' of Kantian Ethics," Ethics 91 (1988): 181-201; and Sally Sedgwick, "On the Relation of Pure Reason to Content: a Reply to Hegel's Critique of Formalism in Kant's Ethics," Philosophy and Phenomenological Research 49 (1988): 59-80.

Here, within the formal point of view of morality, conscience lacks this objective content, and is thus for itself the infinite formal certainty of itself, which for this very reason is at the same time the certainty of this subject.⁸⁵

Because the principle now guiding conscience -- the subject's truth -- is the certainty of its own conviction, divorced from any external authority, it is always possible for the subject to become evil. This is so because the subject has no objective criterion by which to judge if its certainty is objectively true; its conviction constitutes the standard of moral worth, and it is always possible for the subject to err.⁸⁶

Indeed, Hegel claims that subjectivity as conscience determines itself in ever greater degrees to be above or beyond the good. Hence, in §140, Hegel describes the several stages in the movement of the moral conscience, from acting in bad conscience to hypocrisy to "irony", wherein the subject is explicitly and completely above the law. From a conscience which knows what it does is in opposition to what is right, to the assertion that this action is right for others, to the

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Ibid., §137, 122; 164.

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"Conscience, as formal subjectivity, consists simply in the possibility of turning at any moment to evil; for both morality and evil have their common root in that self-certainty which has being for itself and knows and resolves for itself." Ibid., §139R, 124; 167.

claim that this action is good for the subject itself,⁸⁷ conscience turns ever increasingly inward, relying on its own conviction of moral certainty, a certainty divorced from any objective criterion. For example, in the last stage, that of irony, conscience goes so far as to become evil: conscience, according to Hegel, says "...I am also beyond this law and can do this or that as I please. It is not the thing which is excellent, it is I who am excellent and master of both law and thing; I merely play with them as with my own caprice, and in this ironic consciousness in which I let the highest of things perish, I merely enjoy myself."⁸⁸ All these moments of conscience display the tension between a subjectivity which ought to be universal and the good which ought to be particular.

The Transition from the Good & Conscience to Ethical Life

This opposition is resolved, or negated, and the position of ethical life attained, when the two aspects -- the good and conscience -- are understood to contain what each of them formerly denied to the other. On the subjective side, conscience ought to be good, but has no objective criteria by

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These are the three moments of evil -- bad conscience, hypocrisy, and subjectivity's declaration of its own absoluteness -- and are described in §140 & R & A, 125-139; 170-184.

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Ibid., §140R, 139; 182.

which to determine what is good. On the objective side, the good ought to be realized, made actual, but this can only be done through an individual or a subject. In their one-sidedness, or abstractness, each aspect is now seen as identical with its opposite.⁸⁹ Both conscience and the good are identical in so far as they are indeterminate. Conscience, at the apex of its amorality, is free from any determination; it will not allow any criteria to determine what is good and is therefore

empty of all ethical content in the way of rights, duties, and laws...in addition, its form is that of subjective emptiness, in that it knows itself as this emptiness of all content and, in this knowledge, knows itself as the absolute.⁹⁰

The good is also indeterminate and abstract; it remains unrealized, a pure essence, devoid too of any content.

The identity of the two one-sided and abstract moments, their unity, is ethical life (**Sittlichkeit**). As the name implies (the German word **Sittlichkeit** is derivative from **Sitte**, meaning custom), the good exists in the actual conditions of the world -- i.e., the social and legal institutions give actuality and existence to the good. Subjectivity is the good insofar as it is now aware that the

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"But the integration of these two relative totalities into absolute identity has already been accomplished in itself, since this very subjectivity of pure self certainty, melting away for itself in its emptiness, is identical with the abstract universality of the good." Ibid., §141, 140; 185.

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Ibid., §140R, 139; 182.

social and legal institutions make possible the existence of the good. When the subject is aware that those social conditions are necessary for the good, the subject then has an objective criterion (the existing laws and institutions) which it can claim as its own. Hence, conscience is then the good. "Ethical life is the Idea of freedom as the living good which has its knowledge and volition in self-consciousness, and its actuality through self-conscious action."⁹¹

According to the terms of Hegel's logic, the concept of freedom, in ethical life, now exists as Idea. The Idea is the unity of the concept and existence. The concept is freedom, and it has been made actual in the existing social structures of modern society and through the subjective recognition of those existing social institutions: "...the concept which becomes manifest as their unity and has attained reality through this very positing of its moments...now exists as Idea."⁹²

The final and fullest articulation of freedom can only be accomplished when there exists an adequate, or sufficiently developed, nexus of social, legal, political, and cultural supports which allow for both abstract right and the rights of the subject (moral "rights"). Ethical life represents both sides of what were formerly, in the moral standpoint, taken to

⁹¹

Ibid., §142, 142; 189.

⁹²

Ibid., §141R, 140; 185.

be disjunctive: on the one hand, ethical life comprises the objective, actually existing set of institutions and laws which supply a universal determination of what is good. On the other hand, ethical life incorporates the subject's self-conscious awareness that those laws and institutions are the conditions for the good being made actual. It is in this double-sided way that Hegel describes ethical life in terms of substance and accident. Although individuals are analogous to accidents, substance (the existing socio-legal apparatus) would not be substance without its accidents.⁹³ Although the social order does not depend upon the individuals who comprise it for its existence, the social order is nothing else but the self-consciousness of its individual members.⁹⁴

Ethical Life

The Idea of Freedom as Sittlichkeit

Subjectivity is now seen to be rooted in communal life, grounded in the objective world of laws and institutions. Individuals are born, as it were, into a communal life, but it

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"Substance is accordingly the totality of the Accidents, revealing itself in them as their absolute negativity (that is to say, as absolute power) and at the same time as the wealth of all content." Enzyklopädie der philosophischen Wissenschaften I (Werke 8), edited by E. Moldenhauer and K. Michel, (Frankfurt am Main: Suhrkamp Verlag, 1970), §151, 294-295; 213. Hereafter Encyclopedia 1. See also Hegel, Philosophy of Right, §145A, 190.

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Hegel, Philosophy of Right, §146-147, 143-144; 190-191.

is a community whose laws and institutions they themselves come to perpetuate, know, and produce. Hegel uses an ancient story to illustrate his point: a Pythagorean, when asked how best to educate a child, replied: "Make him the citizen of a state with good laws."⁹⁵

Ethical life, in turn, is itself divided into 3 parts: the family, civil society, and the state. Each of these three divisions of ethical life represents a different aspect of the universality of ethical life. The family is the immediate (or natural) universality of ethical life; here, one does not exist as an individual separate from the family but essentially as a member of a larger unity, though a unity limited by its dependence upon the feeling of love.⁹⁶ Since this aspect of ethical life falls outside the focus of the dissertation, commentary upon it will be limited, though one aspect bears remark.

This occurs in §170, where Hegel notes that an evolution takes place within family life in the concept of property. In abstract right, private property signified the placing of one's will (and the concomitant necessity to recognize that right by another) into an external thing. Private property is necessary in order for the will to be free: the will must place itself into some external thing, make itself actual in

⁹⁵

Ibid., §153R, 148; 196.

⁹⁶

Ibid., §157-158, 149; 198-199.

the world, and this satisfies the concurrent requirement that the free will not be bounded or limited by any external factor.

In the moral sphere, abstract right is transformed. In abstract right, the will's relationship to an other will is essentially negative. Furthermore, the subjective disposition of the other will is, on abstract right's terms, irrelevant to that determination of freedom. In morality, the subjectivity of the other will now comprises an essential moment of right; which is to say, the welfare (the choices, purposes, and intentions of the will, expressing the will's freedom, and made manifest in action) of the other must be taken into account. This is why the relationship to another will is positive, and not simply negative as it was in abstract right. As one will expresses its freedom in the world, it must take into account the expression of freedom of others. This transforms the concept of private property as found in abstract right; private property is not simply the first and most abstract moment whereby the will embodies itself, but is now seen as a means whereby the subjective intentions (i.e., the moral freedom) of all individuals is vouchsafed.⁹⁷

The conception of abstract right (and private property) undergoes a further transformation in ethical life. The first stage of that transformation occurs in the section on the

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Ibid., §112-113, 104-105; 139-141.

family. Private property in a familial context is no longer individual in character; it does not serve to satisfy the needs of a single individual, as it did in abstract right, and again in morality (even though the relationship between two wills in morality is essentially positive). Property in the context of a family is communal in nature and serves a higher end than the expression of the individual's freedom, though it will do that as well. As Hegel writes: "...this [private property] is here transformed, along with the selfishness of desire, into care and acquisition for a communal purpose, i.e., into an ethical quality."⁹⁸ This change in the conception of private property will undertake a further transformation, a development which will be made explicit when it is taken up below in the context of civil society.

Civil Society & The System of Needs

Civil society is the second aspect of ethical life and represents the "formal universality"⁹⁹ of that sphere. Before attending to the specific character of civil society, some general remarks are in order. First, the idea of "civil society" is a modern notion, as Hegel points out.¹⁰⁰ John

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Ibid., §170, 156; 209.

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Ibid., §198, 149; 198.

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Ibid., §182A, 220-221.

Locke, for example, writing in the 17th century and on the cusp of the modern age, still refers to "Civil or Political Society." Like Plato, Aristotle, and Cicero, Locke makes no distinction between civil society and the state, between the agent or agents invested with political power and a realm where individuals may conduct their lives and their personal business free from political interference or coercion.¹⁰¹ This is of course especially true in Plato and Aristotle, where the polis as a political community both orders the affairs of all its members and, more strongly yet, is considered the precondition for the development of human potential (and hence as prior to the individual). It is only with the rise of a modern economic system, seen in the incipient capitalist nation-states, that civil society as a realm separate from the political sphere originates.¹⁰² With the emergence of civil society, political economists such as Adam Smith and David Ricardo attempt to explain the "mass movements" and "mass relationships in their qualitative and quantitative

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I take these examples concerning the lack of distinction between the social and the political, between civil society and the state, from Steven B. Smith's Hegel's Critique of Liberalism, 141.

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For an excellent discussion of the historical emergence (and a theoretical analysis) of civil society, see Adam Seligman, The Idea of Civil Society (New York: The Free Press, 1992). See also Michael Walzer, "The Idea of Civil Society," in Dissent (Spring 1991): 293-304.

determinacy and complexity."¹⁰³ Hegel, familiar with the writings of these political economists, understands civil society as that realm where the needs of individuals are both created and satisfied within an increasingly complex division of labor.¹⁰⁴

Within civil society, the individual attempts to satisfy his personal needs and desires. The end of such an attempt rests in satisfaction; the individual, in fulfilling his needs through work, has as his goal his personal satisfaction. In terms of the concept of freedom, civil society is that arena where the individual's freedom (will) is expressed in terms of the work he chooses to perform, the projects he embraces, the voluntary exchanges he makes, and the contracts he decides to engage. However, the individual, in attempting to satisfy his needs (and hence his freedom) through work -- work, as defined by Hegel, is the appropriation of "material which is immediately provided by nature"¹⁰⁵ for the satisfaction of human needs -- is also involved in a relation to others. Others have needs as well, needs conditioned and created by their social relationships, and they attempt to satisfy those

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Hegel, Philosophy of Right, §189R, 170; 227.

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Ibid., §209A, 240: "Only after human beings have invented numerous needs for themselves, and the acquisition of these needs has become entwined with their satisfaction, is it possible for laws to be made." Emphasis mine.

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Ibid., §196, 173; 231.

needs, cognizant that their actions involve relations to others.

In abstract right, we noticed how, in Hegel's discussion of private property, the recognition by another to the right to place one's will into private property constitutes an essential aspect of private property. The other must recognize that this property is mine; the other acknowledges that I have a claim on it, have 'placed' my will in it, and deserve to have that right acknowledged, just as they deserve to have that same right recognized. In a sense, private property is not literally private: it depends upon a social context (or at least one other person) for its legitimization. A parallel effect occurs within the context of the system of needs. Within civil society, the needs of individuals occur in a social setting. The individual's needs become socialized -- i.e., individuals acknowledge that their needs can only be satisfied through the recognition that the system alone can fulfill their needs. And the pursuit of needs within the system always takes place when individuals mutually recognize that the other has a right to satisfy their needs:

Needs and means, as existing in reality, become a being for others by whose needs and work their satisfaction is mutually conditioned...This universality, as the quality of being recognized, is the moment which makes isolated and abstract needs, means, and modes of satisfaction into concrete, i.e., social ones.¹⁰⁶

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Ibid., §192, 171; 229.

Within civil society, the pursuit of needs manifests itself in a system where the satisfaction of an individual's needs is conditioned both by the needs of others and the recognition that in fulfilling my needs I am also assisting others in the fulfillment of their needs. Again, as Hegel puts it: "In this dependence and reciprocity of work and the satisfaction of needs, subjective selfishness turns into a contribution towards the satisfaction of the needs of everyone else."¹⁰⁷

I noted above that Hegel defines work as the appropriation of nature for the satisfaction of human needs. This corresponds to the transformation of the concept of freedom in abstract right by the moral point of view. In abstract right, freedom lies in placing one's will in an external thing; willing the will in a thing is the first determination of freedom. In the moral point of view, freedom now takes into account the subjectivity of the person, the ability of the individual to control and direct his or her own thoughts, intentions, and actions. The concept of freedom has not only been amplified by the transition to morality, it has been altered. And another development of private property can be seen in the early sections of civil society.

It is true that individuals, within civil society, still retain their right to private property, just as they did in

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Ibid., §199, 174; 233.

abstract right, as well as in morality. Now, however, the sanction for private property has changed. Before, in abstract right, the justification for private property rested on the only possible (and initial) conception of freedom. In morality, the justification for private property lies in the means that individuals make of property as an expression of the individual's free choices and intentions. In modern civil society, an elaborate system of production, division of labor, exchange, technical education, consumption, and satisfaction of needs and wants has emerged. The functions within this system are interdependent; each aspect of the totality relies upon the others for its proper realization. Private property is now seen as a resource to serve the satisfaction of needs within the complex matrix of civil society. Private property does remain a right within civil society, just as it was within abstract right and morality, but it now contains a further and enhanced element. Private property not only guarantees individual freedom by allowing individuals to place their wills into an external thing (as in abstract right), it not only allows individuals to express their subjective freedom in their choices, but it also allows individuals to realize their needs (and hence their freedom as autonomous -- i.e., moral -- beings). Civil society -- specifically, the system of needs -- has taken the two prior justifications for private property, has retained them, but has altered them at the same time. Furthermore, it does this within civil society

by means of an ever increasingly intricate system which operates such that it allows for the satisfaction of the needs of everybody.

Nevertheless, within the system of needs there is no absolute guarantee that needs will be met: that is entirely dependent upon the individual and the system which objectively exists in society. As a step towards the surety that those needs will be satisfied, something more is required. There must exist laws, and those laws must be universal, i.e., they must apply to all individuals equally and without exception. Within the system of needs, freedom is considered

abstractly and hence as the right to property. Here [within the administration of justice], however, this right is present no longer merely in itself, but in its valid actuality as the protection of property through the administration of justice.¹⁰⁸

Law and the Administration of Justice

The preceding can be put another way: The satisfaction of an individual's needs obviously depends upon some sort of protection of private property. It is the aim of the law (or what Hegel calls in all of its various parts the "administration of justice")¹⁰⁹ to serve this function. In this way, the right to private property is no longer contained within itself, as it was in abstract right. Since the law now

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Ibid., §208, 180; 239.

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Ibid., §208, 180; 239.

explicitly protects the right to private property within civil society, that right has an objective actuality, has been given an objective existence, which it did not have in abstract right or morality.

The objective existence of right through the law is determined in two ways. First, the concept of right becomes objectively existent when it is posited as law. Secondly, the law must also, in order to be valid, be promulgated.¹¹⁰ Hegel plays here on the German word **setzen**, meaning 'to posit', and the word for specific laws, **Gesetz**, which we would call positive law (and this latter as opposed to right, **Recht**). These two aspects -- positing the law and promulgation of the law -- constitute the requirements for right to objectively exist and be valid. "For the law to have binding force, it is necessary...that the laws should be made universally known."¹¹¹ This forms the basis of Hegel's criticisms of the English common law tradition, its lack of codification, and hence its irrationality, as well as his praise for the French (Napoleonic) legal code.¹¹² On the one hand, since the law in

¹¹⁰

Ibid., §211 & R, 180-183; 241-243.

¹¹¹

Ibid., §215, 185; 246.

¹¹²

See Ibid., §211, 182; 242, where Hegel states that though the English have collected in many volumes both written law (statutes) and unwritten law (common law), the English law system is filled with "enormous confusion." This is so because the common law is contained in the judgments of judges -- hence judges "constantly act as legislators."

England is not always or expressly posited by a legislature, but is contained in the customs of the people, customs which are divulged, interpreted, or discovered by judges, right has not been made objectively existent in any systematic, determinate, comprehensive, and thus rational manner. This leads to the further confusion that judges in England make the law since they are the final arbiters of what is customary and whether a previous judgement conformed to the unwritten common law. Secondly, the English common law tradition, in its written form contained in the voluminous decisions of all previous judges, cannot possibly be known by the population at large. It can only be assimilated by those few specialists who undertake to comprehensively study it. This violates the second requirement of right as law, namely that it be promulgated. If the law is not codified in a systematic manner, and is therefore not capable of being disseminated, it

Furthermore, they are at one and the same time dependent upon the authority of their predecessors (judgements are rendered on the basis of the common law) but are also independent of it (since they are to determine whether earlier decisions are in conformity with the common law). For his enthusiasm for the French civil code, see Ritter, Hegel and the French Revolution: Essays on the Philosophy of Right, translated with an introduction by Richard Dien Winfield (Cambridge: MIT Press, 1982), 126-127. An excellent discussion of the historical circumstances of the debate about codification in Germany, as well as the civil law tradition in general, can be found in John Henry Merryman's The Civil Law Tradition (Stanford: Stanford University Press, Second Edition, 1985).

will not be known to the people, and "man must know about it if it is to have binding force for him."¹¹³

Just as the system of needs requires law to objectively ensure that needs will be satisfied through the safeguarding of private property, the making and promulgation of laws cannot, by itself, wholly ensure that private property is secure. For it is still possible that the individual's needs will not be satisfied or that private property will not be guaranteed. This can happen in two ways. First, it is still necessary that some protection exist when infringements upon the individual's attempt to satisfy those needs occur. The police¹¹⁴ serve this function; they protect the security of individuals, allowing them the freedom to pursue their own ends. Secondly, simply protecting the individual against infringements upon their freedom is not enough; the police serve a negative function, as it were, responding to encroachments upon the right to private property. What is needed is a systemic social order or set of institutions which acts positively to ensure the welfare of individuals. Only

¹¹³

Ibid., §215A, 247.

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The term Polizei has a broader connotation than the translation "police" indicates. For Hegel, the Polizei not only protect the individual against criminal acts, but also regulate and oversee all those aspects of civil society which bear upon the welfare of the individual. Thus, within the section entitled "Police," Hegel discusses not only crime, but the regulation of commercial activity (§235-236), the supervision of education (§239), and succor for the poor (§241-245).

through such an objectively existing means can the individual's livelihood (the means of satisfying their needs) be assured. The corporations discharge that task.

The Corporation

Whereas the police (or public authority) protects the right of individuals to freely determine how they are to satisfy their needs within society compatible with the rights of others to do the same, the corporation allows individuals to both secure the satisfaction of their needs by providing for their livelihood, as well as by educating those individuals in such a way that their personal interests mesh, or are transformed, into the concern of the state as such. The corporations, voluntary associations, and professional groups provide a bridge between the interests of individuals and the universal concerns of the state.

Within such an organization, the individual member of the corporation comes to recognize that his own personal concerns are identical with the concerns of society itself. The corporation serves as an instrument, mediating between the particular needs of the individual and the needs of society. Via work, one not only receives or develops a skill, but also the recognition for that skill, which in turn justifies that individual's right to draw upon society. Through one's association with a corporation, one fulfills a general social need and hence derives from the corporation the right to

recognition. One becomes identified with a group, profession, or class, and not simply with oneself.¹¹⁵ The individual's interests now become the group's interests. And as the individual recognizes the relationship between the corporation and society as a whole, he also recognizes that the interests of the corporation are those of society as a whole. Through the corporation, and more generally within the dynamics of civil society, a rational organization of needs emerges from the dynamic of civil society which is predisposed to fit into the universal as a whole.

In addition to providing the means whereby the individual's interests are met (the entire nexus of which Hegel likens to a second family for the individual), the corporation also represents the interests of the individual in the political realm. Direct democracy or universal suffrage, from Hegel's point of view, only atomizes the masses; neither can serve the mediating function whereby private interests are educated and transformed into higher interests. The corporation does fulfill that mediating purpose, and thus the corporation should represent the people in the legislature. The corporation allows its members interests and needs to be heard, it gives them a political voice and vote, and at the same time prevents the private interests from appearing "as a crowd or aggregate, unorganized in their opinions and

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Ibid., §253, 205; 271.

volition, and do not become a massive power in opposition to the organic state."¹¹⁶ The ultimate function of the corporation, then, as it has developed from the feudal guild to the voluntary association in a modern capitalist society, is to provide a middle ground for the bourgeoisie and citizen by serving the interests of both. Corporations consciously make known the relationship between the individual needs of the members and the universal needs of the state:

In our modern states, the citizens have only a limited share in the universal business of the state; but it is necessary to provide ethical man with a universal activity in addition to his private end...[this] can be found in the corporation...only in the corporation does it become a knowing and thinking [part of] ethical life.¹¹⁷

The State

Within civil society, the end is the satisfaction of individual needs and wants; civil society acts, through its ever complex nexus of institutions and practices, as a means for the fulfillment of individual subjective freedom. The state, in contrast to the realm of civil society, is seen as an end in itself; society is not simply the guarantor of the interests of the individuals, but has become the very end of the individual. The state exists for its own sake; it is an organic unity. The modern state incorporates both the ancient

¹¹⁶

Ibid., §302, 263; 342.

¹¹⁷

Ibid., §255A, 273.

Greek ideal of a unity between individual and state as well as the modern recognition of individual freedom and right: "The state is an organism, i.e., the development of the Idea in its differences...Predicates, principles, and the like get us nowhere in assessing the state, which must be apprehended as an organism..."¹¹⁸ The state is the highest expression of both concepts; in the state, as one writer puts it, "Man reaches the height of ethical life...as a member of a specific, individual national community, which forms an independent state and exists to promote a shared conception of the common good."¹¹⁹

The state can also be characterized in terms of the Hegelian triadic structure of universality, particularity, and individuality, a structure which animates the entire Hegelian corpus. Within ethical life, the family represents a simple universality: it is a realm of unity, but a unity determined by feeling (i.e., the love of the members of the family for one another). As the family dissolves, it gives way to civil society, the realm of particularity, or difference; it is that realm where the individual attempts to fulfill his or her

¹¹⁸

Ibid., §269A, 290.

¹¹⁹

Z.A. Pelczynski, "Nation, civil society, state: Hegelian sources of the Marxian non-theory of nationality," in The State and Civil Society: Studies in Hegel's Political Philosophy, edited by Z.A. Pelczynski (Cambridge: Cambridge University Press, 1984), 265-266.

desires, ambitions, and goals as an individual.¹²⁰ Despite being the sphere of difference, civil society still has a relationship to universality. This is so because, first, the individual does not fulfill his or her needs without reference to others, and secondly, in fulfilling his or her needs the individual also, through the various institutions and structures of civil society, satisfies the needs of others. Civil society therefore can be characterized as a "formal universality."¹²¹ By identifying civil society as a formal universality, Hegel points to two features of that realm: first, the individual does attempt to satisfy his or her needs, and does not have the satisfaction of the needs of others as his self-conscious aim. Civil society is the arena of particularity in this respect. However, in fulfilling those needs, the needs of others are similarly met, and civil society has developed institutions and means whereby the welfare of all is secured. In this sense, civil society is formally universal: it has evolved such that its manifold structures ensure the satisfaction of the needs of all (even though each individual remains enclosed within his own interests). Via the mediating corporation, the particularity of civil society and its formal universality give way to the "substantial universality" (**substantiellen Allgemeinen**) of the

¹²⁰

Hegel, Philosophy of Right, §182A, 220-221.

¹²¹

Ibid., §182 & A, 165; 220-221.

state.¹²² The state is a substantial universality because its individual members self-consciously will that the state is their end. "The state is the actuality of the substantial will, an actuality which it possesses in the particular self-consciousness when this has been raised to its universality; as such, it is the rational in and for itself."¹²³

This can yet be put another way, in terms of the difference between the understanding and reason (**Verstand** and **Vernunft**). Within civil society, universality is experienced as a limitation: this is the point of view of the understanding, where the state appears solely as a constraint on the freedom of its members. From civil society's point of view, the state is the government, which acts as regulator, an inhibition on the self-interest of the individual, as a curb on the appetites of the bourgeoisie. From the point of view of reason, in the state the concerns of the universal are identical with the concerns of the individual. In civil society, the rights and duties of citizens were clearly separate; within the state, no such distinction obtains. "Particular interests should certainly not be set aside, let alone suppressed; on the contrary, they should be harmonized with the universal, so that both they themselves and the

¹²²

Ibid., §157, 149; 198.

¹²³

Ibid., §258, 208; 275.

universal are preserved."¹²⁴ The organization of the State maintains the individuals in their individuality (i.e., protects the individual's rights, supports the family) but also brings them back to a consciousness of their identity with the whole (society).

Civil society, then, consists of individuals acting out of, and fulfilling, their own self-interest; and in this self-interested action they realize that they cannot satisfy their own ends without recourse to others. It is only by recognizing their dependence upon the entire complex of inter-relationships and their ensuing obligation to others that the individual can fulfill his wants. From the sphere of particularity and formal universality comes true universality: the recognition of the universal ends of individuals taken as a whole. The state is, for Hegel, that realm wherein lie the universal interests of its members. Civil society is divisive; it does pit each against each; but it is also that necessary moment wherein the members realize that they also belong to an ethical community.

This view of the state as an organic totality which is greater than its parts owes much to the ancient Greek polis, and its theoretical elaboration in Plato and Aristotle. Hegel's interest in and admiration for the harmony of the polis is well documented -- as is his subsequent rejection of

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Ibid., §261, 217; 285.

the polis as possible in modern society.¹²⁵ The difference between the polis and modern society lies in subjective freedom: the ancients had no such concept, and when it did appear it destroyed the simple harmony of Greek life. "Plato, in his Republic, presents the substance of ethical life in its ideal beauty and truth; but he cannot come to terms with the principle of self-sufficient particularity, which had suddenly overtaken Greek life in his time..."¹²⁶ Hegel sees modern society as the culmination of the spirit of the polis and individual liberty: both ideals become actual in the nineteenth-century state.

The organic language Hegel uses to describe the state, its penultimate role within a society, and the sacrifices demanded of the citizens for the state, constitute one of the most controversial aspects of Hegel's **Rechtsphilosophie**. Many commentators object to and dismiss this aspect of Hegel's political philosophy; as a representative argument, we can point to the various interpretations given to the now infamous phrase: "The state consists in the march of God in the world

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See George Armstrong Kelly, Hegel's Retreat from Eleusis, (Princeton: Princeton University Press, 1978), 198. See also M.J. Inwood, "Hegel, Plato and Greek 'Sittlichkeit'," in The State and Civil Society: Studies in Hegel's Political Philosophy, 40-54; and Shaun Gallagher, "Interdependence and Freedom in Hegel's Economics," in Hegel on Economics and Freedom, edited by William Maker, (Georgia: Mercer University Press, 1987), 159-160.

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Hegel, Philosophy of Right, §185, 166-167; 222-223.

(**Es ist der Gang Gottes in der Welt, dass der Staat ist**).¹²⁷ As Walter Kaufman points out, a better translation of this phrase would be "It is the way of God in the world, that there should be a state."¹²⁷ First, we should remember that this phrase is taken from an addition, and not Hegel's own text. That in itself might or might not vanquish the objection made to Hegel, depending upon how one feels about the **Zusätze**. The translation of the phrase, however, makes a great deal of difference. When translated as "the march of God..." the phrase has been taken to mean either that Hegel defends the status quo (i.e., nineteenth-century Prussia), or that he subordinates the individual and individual rights to the concerns of the state. Further evidence for the latter interpretation comes from Hegel's discussion of war, and the dictate that it is the citizen's

duty to preserve this substantial individuality -- i.e., the independence and sovereignty of the state -- even if their own life and property, as well as their opinions and all that naturally falls within the province of life, are endangered or sacrificed.¹²⁸

However, if we translate the sentence literally, we can see that it is not fair to say that Hegel believed that some authoritarian God manifested Himself in the Prussian state,

¹²⁷

Ibid., §258A, 279. Walter Kaufman's translation is to be found in Hegel's Political Philosophy, edited by W. Kaufman (New York: Atherton Press, 1970), 279. A literal translation would read: "It is the way of God in the world that the state is."

¹²⁸

Hegel, Philosophy of Right, §323, 279; 360.

and in that respect Hegel's political philosophy is a forerunner of militarism, fascism, or totalitarianism. Hegel continually stresses that within the three divisions of ethical life (the family, civil society, and the state) each is a necessary part of the whole. In the absence of any of the three moments of *sittlichkeit*, freedom cannot be said to have reached its highest determination. Because of this, the state must protect private rights, including the right to private property; the particular concerns are also the concerns of the state, and the state must preserve those rights.

What is bothersome to these commentators is that, in viewing the state as an organism, as a totality greater than its parts, Hegel seems to place the state above the individual, asks of the individual certain corresponding duties to the state, and devalues individual freedom for the sake of the state. This anxiety about the Hegelian state is a variation of the slippery slope argument (where does the state's authority end? Is there nothing it cannot command?), and views Hegel from the classical liberal point of view. By the general term "classical liberal" I mean those political theorists whose primary concern is with the rights of individuals, and hence with the limits of state (or governmental) coercive power. On this view, the critique of the conception of the state as an organic totality begins from the assumption that any external authority is a restriction,

or potential constraint, on freedom. Thus, they ask: what is the sphere within which external authority and power may not encroach? What are the limits of state power?

To Hegel, this question takes a one-sided, abstract position (namely that of abstract right), and proceeds from that position. From that point of view, the right to own property, to place your will in any thing, takes precedence. Therefore any encroachment upon that right appears as a violation of the individual's right to embody his will as he sees fit. Even though, for classical liberals, the justification for private property is not undertaken in Hegelian terms (no appeal to how the free will must determine itself is made), the end is the same: the right to private property remains the horizon by which to judge the state. It is not a long step to see how this right becomes transformed into a general right to privacy (especially in the sense that the home -- private property -- becomes a haven), or a right to do as one pleases (with any of the various restrictions placed upon that right, such as Mill's harm principle, etc.).

But, of course, Hegel does not see abstract right as the final determination of freedom. As freedom develops from abstract right to morality, for example, what was contained in abstract right is preserved, but brought to a new determination. As we have seen, the right to private property within morality does not mean the first and most abstract moment wherein the will embodies itself (though it is still

that), but has now become the means whereby the subjective intentions (the moral freedom) of the individuals is preserved and guaranteed.

Secondly, the position which takes the central problem to be the ways in which external authority may violate the liberty of individuals, and critiques Hegel on the grounds that he does not perceive the threat from the state to individual liberty, misconstrues the task of philosophy. The task of philosophy is not, as he says in the preface, to tell the world how it ought to be. Rather, Hegel attempts to discover and make explicit what is already inherently rational within the existing structures of a particular society. What is rational and inherent within what exists Hegel terms "actual." Actuality differs from existence as the Aristotelian notion of essence differs from accidents. Not everything that exists is actual; actuality denotes what is necessary, not what is contingent or arbitrary concerning existence.¹²⁹ From the classical liberal perspective, Hegel offers either a silent acceptance of the status quo or a positive defense of it. But from Hegel's point of view, the classical liberal position has not made the distinction between actuality and existence, a distinction which further relies upon the notion that existing political/social orders are to be judged in terms of the idea of freedom as it has

¹²⁹

Hegel, Encyclopedia 1, §6, 47-49; 8-10.

developed, a judgement which Hegel undertakes in the Philosophie des Rechts.

The classical liberal question as to the extent of state authority does not recognize that the question is already moot: there already exists a relationship between civil society and the state and the relationship is this: civil society would not be possible without the state. Historically this is of course true, as civil society is the relatively recent phenomenon of the modern age. But logically it is true as well: the state precedes civil society in the first place because civil society is no true community, but simply an aggregate of atomistic individuals pursuing their particular desires. But more importantly, the state is logically prior to civil society because it is only the state which allows for the identification of individual well-being and self-development with the common good:

Since the state is objective spirit, it is only through being a member of the state that the individual himself has objectivity, truth, and ethical life. Union as such is itself the true content and end, and the destiny of individuals is to lead a universal life; their further particular satisfaction, activity, and mode of conduct have this substantial and universally valid basis as their point of departure.¹³⁰

The state proper has articulated itself into the various different moments (family, civil society, government) all of which are necessary. But such an articulation would not be

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Hegel, Philosophy of Right, §258R, 208; 276.

possible if the state were not the ground and the source of articulation:

The actual Idea is the spirit which divides itself up into the two ideal spheres of its concept -- the family and civil society -- as its finite mode, and thereby emerges from its ideality to become infinite and actual spirit for itself.¹³¹

This is akin to Aristotle's claim that the polis exists prior to the individual, and is that which allows the individual to become a full human being, with this difference: the modern state now allows for the fullest and most mature manifestation of freedom, whereas Aristotle and Plato did not recognize the importance of individual subjective freedom.

Two specific examples will illustrate Hegel's point: his discussion of the constitution and his argument concerning war. The constitution, Hegel claims, is nothing other than an expression of the spirit of the nation: it is the manifestation of the way in which a people have self-consciously organized their political affairs.¹³² Hence, each state has a constitution appropriate to its stage of development, its customs, traditions, and practices, and it is impractical to think that a constitution could be given to a state a priori, as Napoleon gave the Spaniards a

¹³¹

Ibid., §262, 217; 285.

¹³²

Ibid., §271, 233; 304.

constitution.¹³³ Because the constitution is the expression of the organic life of the state, one cannot say when, or where, the constitution was first made; it arose out of the practices and situation of the people, and represents their spiritual development:

The question--To whom (to what authority and how organized) belongs the power to make a constitution? is the same as the question, Who has to make the spirit of a nation?...What is thus called 'making' a 'constitution' is--just because of this inseparability--a thing that has never happened in history, just as little as the making of a code of laws.¹³⁴

This is not to say that there is no possible way to judge if a constitution is bad or good: the criteria of judgement is the concept of freedom itself. A constitution is rational, therefore, when it is the expression of a state which conforms to the concept of freedom. And that occurs, as we noted above, when the concept of freedom developed into an ethical state -- i.e., when the state has differentiated itself into those various moments, when it allows for the satisfaction of individual freedom, and at the same time brings individual freedom into accord with the universal good of the state.¹³⁵

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Ibid., §274, R & A, 239-240; 312-313.

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Hegel, Encyclopedia 3, §540, 336; 268.

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Hegel, Philosophy of Right, §272, 233; 305.

Hegel's discussion of war provides the second example of his organic conception of the nature of the state. If wars were engaged in merely to protect the property and security of individuals, no one would fight and die in them, for surely there are easier ways of protecting property and life (Hobbes' point that one is simply irrational if one does not flee from a life threatening situation is to the point here):

It is a grave miscalculation if the state, when it requires this sacrifice, is simply equated with civil society, and if its ultimate end is seen merely as the security of the life and property of individuals. For this security cannot be achieved by the sacrifice of what is supposed to be secured -- on the contrary. The ethical moment of war is implicit in what was stated above.¹³⁶

There already must be some identification by the individual with the state in order for the individual to sacrifice his life for it. It is a description, not a prescription; Hegel claims to be revealing to us what is already implicit within the phenomenon of war. To ask: what are the limits of state authority? is to presuppose a decisive separation of the individual from the state, a separation which does not account for the de facto identification of the individual with the common good of the state. This is not to say that the state, for Hegel, has a life of its own apart from the individuals who comprise it or that it exists as some sort of super-entity to which we must pay obeisance; nor does the individual subordinate or sacrifice his interests and

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Ibid., §324, 280; 361.

rights for the sake of the state. In both cases, the distinction is faulty: in modern, constitutional states, freedom has developed such that the state is consciously comprised by individuals who knowingly recognize its legitimacy and who realize that their rights and interests are the rights and interests of the whole, and who are members of a state which protects their right of individual subjectivity.

Having said that, we understand that this provides scant comfort to those who are primarily concerned with the limits of state power. It must be acknowledged, after all, that any state which has the power of coercion at its command does pose a possible threat to liberty. But this objection does not speak to Hegel's analysis; I can see no reason why he wouldn't accept the proviso. It is no argument against him to say that it is potentially dangerous that the state wields overwhelming force. Of course it does, and of course some states abuse that power. Hegel does advocate a constitutional monarchy, and though it is a monarchy, there is an articulation of powers which could check or act as a balance on an excessive use of governmental force.

The question is not: is the modern state antithetical to liberty? Rather, the question put to Hegel should be: does the modern state follow from the concept of freedom? The upshot of this question would turn Hegel's claim around: freedom demands not a modern state, but its elimination. The modern state, on this reading, does not constitute the arena

where human beings realize both their particularity and universality, where individuals satisfy their personal needs and achieve their individual freedom, as well as finding a common and universal purpose. Rather, the state acts as an "agent" for, represents only a portion of, its citizens (the class of the bourgeoisie); the state, far from being the necessary step to ethical life, in fact represents and enhances the stratification of society, and prevents one class of people from achieving liberty.

This is a difficult problem, and one to which we will have to return in greater detail in the final chapter. For now, we will note that the objection hinges on the meaning of political emancipation and private or personal freedom, and the division between the two. We have, Marx will claim, gained political emancipation at the price of personal liberty -- and therefore have gained no emancipation at all. This question will be answered, in terms of Hegel, indirectly in the next chapter. That is, we will ask the same question of Dworkin. In answering that (in terms of Dworkin's writings on the political community), we will ask: Can one coherently make a distinction between political and private emancipation? Or does Hegel's analysis of freedom undercut that objection? In answering the question as it applies to Dworkin, we will see that Dworkin is in the same position that Marx claims Hegel is in, though with less hope of salvation.

The Government: Monarch, Executive, and Legislature

Within the state, although not identical to it, lies what we customarily consider the state proper -- that is, the government. The government is not identical to the state for Hegel because the state encompasses, since it is an organic unity, all of the elements of ethical life (the family, civil society, and the government). The state as we conceive it is synonymous with the government, whereas for Hegel it is only one -- but the highest -- aspect of ethical life.

The government, in its turn, is articulated into three separate functions: the monarch, the executive, and the legislature. The division of governmental power into three different roles corresponds to the three aspects of ethical life. Hence the monarch represents individuality, or concrete universality: it is the monarch who, though a single will, is the most universal aspect of the state.¹³⁷ Furthermore, the monarch also contains within himself all three moments of ethical life, according to the monarch's functions. As the monarch is the highest representative of the constitution and the laws, he is universal; as he serves as a consultant to the executive, and therefore aids in applying the universal laws to particular cases, he is particular; and as the ultimate decisions concerning the state reside with him, he is individuality.

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Ibid., §275 & A, 240; 313-314.

The executive power, charged with implementing and overseeing the laws, is particular, in so far as the executive applies the universal laws to specific cases. Under its jurisdiction falls the administration of justice and those activities undertaken by the public authority (public health and safety, education, poverty relief, law enforcement, etc.). These duties fall to the "universal estate,"¹³⁸ what we today call the bureaucracy. Like the monarch, the executive power -- specifically, questions concerning Hegel's explanation of the bureaucracy and its function within the government -- will also be taken up in the next chapter.

The third part of the government is the legislature. The legislature provides the link to civil society, or the people. The legislature occupies a dual position: on the one hand, it acts in a universal manner (as do the monarch and executive); on the other hand, it represents the interests of the corporations, and through the corporations the individuals who comprise them.

The legislature is itself comprised of two parts, or houses: the upper house, made up of representatives from the agricultural class (who attain this position through primogeniture), and the lower house, comprised of representatives of the business class (and therefore of the corporations). It is the latter that is of interest here.

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Ibid., §291, 255; 332.

In the preceding discussion of civil society, we noted that the corporations serve a mediating function between civil society and the state. They do this in two ways. First, the corporations secure for the individual the possibility of satisfying his needs while at the same time transforming, through education, the individual's interests into the interests of the whole. The individual not only secures his livelihood, but comes to understand the role his own task plays within his particular business, the role the business plays within society, and the ways in which the entire nexus operates in securing the needs of society as a whole.

Secondly, the corporations provide a voice in the government for their members. Via representation in the legislature, the corporations provide a bridge between the government and the individual. "Viewed as a mediating organ, the Estates stand between the government at large on the one hand and the people in their division into particular spheres and individuals on the other."¹³⁹

It is almost exclusively in this latter sense that the upper house within the legislature is discussed within The Philosophy of Right.¹⁴⁰ The task of this estate is to educate

¹³⁹

Ibid., §302, 263; 342.

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Of the 23 sections devoted to the legislature (§298-320), only the first two, §298 & 299, discuss the role of the legislature in its law-making capacity: "The legislative power has to do with the laws as such, in so far as they are in need of new and further determination..." Ibid., §298,

the public on the workings of the government: as the legislature deliberates, the public becomes aware of its relationship to the government, and how its interest is inextricably bound to the interest of the state; in this way the legislature performs a mediating function between the particularity of civil society and the universality of the state. It is worth quoting §314 in full:

The determination of the Estates as an institution does not require them to achieve optimum results in their deliberations and decisions on the business of the state in itself, for their role in this respect is purely accessory. On the contrary, they have the distinctive function of ensuring that, through their participation in [the government's] knowledge, deliberations, and decisions on matters of universal concern, the moment of formal freedom attains its right in relation to those members of civil society who have no share in the government. In this way, it is first and foremost the moment of universal knowledge which is extended by the publicity with which the proceedings of the Estates are conducted.¹⁴¹

It is clear that the main role for the legislature is not the making of the laws, but of educating the public about the universal concerns of the state. Or, in Hegel's terms, the task of the legislature lies in raising the consciousness

259; 336. The remaining 21 sections discuss the legislature's role as a mediator between civil society and the state. Hegel also raises the question, in the Addition to §329, as to whether the legislature should have the power to wage war. He answers in the negative, arguing that if the reason we should not allow sovereigns and their cabinets (the executive) to wage war is because they are subject to the passion of the moment, the same can equally be said of the legislature, who are liable to the passions of the people.

¹⁴¹

Ibid., §314, 272; 351-352.

of the many from the particular sphere of civil society to the universal realm of the state:

The provision of this opportunity of [acquiring] knowledge has the more universal aspect of permitting public opinion to arrive for the first time at true thoughts and insight with regard to the condition and concept of the state and its affairs, thereby enabling it to form more rational judgements on the latter.¹⁴²

Despite Hegel's refusal to grant to the legislature a primary function of making the law, it is worth considering what the laws mean when considered from two different aspects, that of civil society and that of the state. From the perspective of civil society, the laws relate to the individual in two ways. First, the laws, though universal themselves, have a particular content when they are applied to civil society: the laws govern in general the particular relationships, types of property, and kinds of contract which

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Ibid., §315, 272; 352. Concerning public opinion, Hegel makes a number of assertions which, while not fundamental to the argument in ethical life, are worth noting. First, the legislature's deliberations should be public, for only if they are open to all can the public become educated as to the universal concerns of the state (§314). Secondly, in this process of education the public will come to understand the role of civil servants and legislators and will therefore be less inclined to set its own interests against the interests of the state (§315 & A). Finally, Hegel thinks there should be a wide freedom of the press, though this freedom is not absolute or unlimited (§319 & R) -- though the specificity of the law in determining what can or cannot be said must necessarily remain indeterminate, owing to the ambiguity in determining the exact relationship between the words and the intention or purpose of the writer (or speaker) (§319R).

are the substance of civil society.¹⁴³ This constitutes the particularity of the law within civil society. The laws also relate to the individual in an individual manner: that is, laws reconcile specific and individual disputes, regulate specific actions and behavior, and apply on an individual basis. In this sense (what Hegel calls the "purely positive" aspect of law), the law is individual within civil society.¹⁴⁴

Within the realm of the state, the laws are no longer viewed as particular or individual -- they are universal. The laws concern themselves with the common good, the good of all, and not with particular areas or individual cases. Though they manifest themselves in that way, that is not what is essential about the law from the state's perspective. What is essential is that the laws be made out of a concern for the good of society as a whole:

It is possible to distinguish in general terms between what is the object of universal legislation and what should be left to the direction of administrative bodies or to any kind of government regulation, in that the former includes only what is universal in content -- i.e., legal determinations -- whereas the latter includes the particular and the ways and means whereby measures are implemented.¹⁴⁵

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Ibid., §213, 183-184; 244.

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Ibid., §214 & R, 184; 245.

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Ibid., §299R, 259; 337.

Conclusion

This, then, is the argument as found in the Philosophie des Rechts. I have tried to sketch out the way in which the various shapes of freedom manifest themselves in accordance with the developmental logic of the concept of freedom itself. If we take a step back, and ask about the general character of Hegel's **Rechtsphilosophie**, we can see that it is an attempt to not only describe the development of the concept of freedom and what the idea of freedom entails, but it is also prescriptive. That is, Hegel's description of the development of freedom also affords us a standard by which to judge modern social/political institutions, criteria we can use to determine if, or to what extent, modern institutions are rational. Stephen Houlgate puts it quite clearly when he writes that,

Hegel thus well understands that in so far as reason determines what is it also determines what comes to be, and indeed what is to be and therefore should be. Thus, in so far as Hegel seeks to reconcile us as rational beings to the world which we inhabit through the speculative, theoretical comprehension of reason's work in the world -- his account will at the same time inevitably disclose what reason requires there to be brought about, that is, what should be brought about by rational beings.¹⁴⁶

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Stephen Houlgate, "Hegel's Ethical Thought," Bulletin of the Hegel Society of Great Britain, no. 25 (Spring/Summer 1992): 3.

Furthermore, not only is Hegel's **Rechtsphilosophie** prescriptive, but, as Houlgate (among others)¹⁴⁷ points out, it is reconciliationist as well. Hegel seeks, through a philosophical account of the rational nature of the social world, to reconcile otherwise alienated individuals to that world. It is the philosophical account, what Hegel calls a rational insight (**vernünftige Einsicht**), and expressed in terms of the Rosicrucian rose, which provides reconciliation and allows us to see the divine in human suffering:

To recognize reason as the rose in the cross of the present and thereby to delight in the present -- this rational insight is the reconciliation with actuality which philosophy grants to those who have received the inner call to comprehend.¹⁴⁸

Given that Hegel's **Rechtsphilosophie** does entail a reconciliationist prescriptive element, what does this bode for our situation? In general terms, we can say that the

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That reconciliation is a guiding motif of Hegel's social philosophy -- of his entire philosophy -- is not a controversial interpretation. For example, Michael O. Hardimon, in "The Project of Reconciliation: Hegel's Social Philosophy," Philosophy and Public Affairs 21 (Spring 1992): 165, writes that "the central aim of Hegel's social philosophy...is to reconcile his contemporaries...to the modern social world." Charles Taylor says that "the task of philosophy is to further this identification by laying bare the rational foundation of the real, and through this identification the rational state will come to completion." Hegel and Modern Society (Cambridge: Cambridge University Press, 1979), 124-125. See also Fred Dallmayr, G.W.F. Hegel: Modernity and Politics (Newbury Park, CA: Sage Publications, 1993), 249-250, and Allen Wood's Hegel's Ethical Thought (Cambridge: Cambridge University Press, 1990), 6-7.

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Hegel, Philosophy of Right, Preface, 16; 22.

atomistic and divisive forces within modern society which Hegel identifies, and attempts to overcome, have, since his time, only multiplied. From the passing away of the corporations as Hegel understood them, to the insistence within Western societies on the legitimacy of a more participatory democracy, to the near total ascendancy and instinctual acceptance of the liberal view of negative freedom (with its attendant consequence of placing the individual into an antagonistic relationship towards the government and its representatives), individuals within modern society appear transitory and fragmented, unsure of their connection to their culture (which itself appears splintered). As Walzer notes,

There cannot be much doubt that we (in the United States) live in a society where individuals are relatively dissociated and separated from one another, or better, where they are commonly separating from one another -- continually in motion, often in solitary and apparently random motion, as if in imitation of what physicists call Brownian movement. Hence we live in a profoundly unsettled society.¹⁴⁹

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Michael Walzer, "The Communitarian Critique of Liberalism," Political Theory 38 (February 1990): 11. Walzer specifically mentions "Four Mobilities," the ways in which Americans are "unsettled": geographically, socially, maritally, and politically. That is, Americans change their residence more often, do not stand where their parents stood (i.e., they are more likely to have a different economic status, profession, social status, education, etc.), divorce and marry more frequently, and do not owe political allegiance to a particular leader, party, or movement.

I should also note that Walzer does not lament the unsettled character of American society in the way that certain communitarians lament it; nor does he think it requires the measures they do although he does advocate a "periodic communitarian correction" to the disassociative tendencies of modern liberal society. *Ibid.*, 21.

If this view is correct, it may well be that the most pertinent writings for our condition are those of Hobbes, as we now seem to have simultaneously destroyed the conditions for a liveable civil society and anachronistically reproduced a state of nature within the remnants of the social order (though a literal state of nature in some urban areas). It is a disconsolate irony that the aspirations expressed in the theories of modern liberal societies are in the process of being ravaged by the practice of liberal societies.

Can the reconciliation which Hegel aimed at be our reconciliation? Can anything of the prescriptive element in Hegel's social theory aid us? The objection is made that the political philosophy of Hegel, if pertinent to his own time, cannot now be pertinent; that the social institutions and cultural **Weltanschauung** that flourished in Germany of the early 19th century flourish no longer, and for that reason Hegel's prescriptions cannot apply to 20th century societies¹⁵⁰; and that his conception of the state is either

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See Charles Taylor's Hegel and Modern Society, 135, where he writes concerning the implausibility of Hegel's solution: "We might think that the development of the modern industrial, technological, rationalized society...entrenching as it did the Enlightenment definition of man, has put paid to any and all expressivist visions of man in communion with nature, and nature as expression of Spirit, which the Romantic era spawned. Hegel's vision, albeit more rational in form and penetrating in insight, has gone under with the rest." See also Allen Wood's book Hegel's Ethical Thought (Cambridge: Cambridge University Press, 1990), 259, where he states that individuals, within modern Western countries, are "typically so far from being able to identify themselves rationally with their social

too authoritarian, or outmoded in so far as it unrealistically hearkens back to an idealized view of an Aristotelian **koinonia politike**, or neglects the modern (and now global) importance of the democratic form of government in favor of a now irreversibly obsolete monarchy.¹⁵¹

But what is the alternative? In the next chapter, we will use Hegel to critique a representative of the reigning ideology of modern American and British society. Without making the absurd claim that we could go back to early 19th century Europe or reconstitute the structures of political and social life which Hegel describes into the contemporary age, we will see how Hegel's **Rechtsphilosophie** can offer constructive criticism of one voice of the predominate beliefs of our time. Dworkin presents us with an alternative to

roles that Hegel's notion of liberation through ethical duty is to strike them as either dangerous or a bad joke."

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See Dallmayr's G.W.F. Hegel: Modernity and Politics, 253, where he writes that "the process of democratization spreading since Hegel's time has the effect of challenging both his metaphysical premises and their manifestation on the political plane..." Dallmayr does not think that this necessarily repudiates one aspect of Hegel's criticism of democracies, as a modern democracy can contain the institutions and groups which organize our interests and prevent the atomism which Hegel thought part and parcel of democratic societies. It does mean, however, that "the point which contemporary democracy demands a revision of Hegel's formula concerns chiefly his conception of the state [i.e., the monarchical form of government]." (Ibid., 254.) See also Dallmayr's "Rethinking the Hegelian State," in Cardozo Law Review 10, No. 5-6 (Mar./Apr. 1989): 1337-1361. For a defense of the Hegelian conception of the state see Bernhard Schlink, "The Inherent Rationality of the State in Hegel's Philosophy of Right," in Cardozo Law Review 10, No. 4-5 (Mar./Apr. 1989): 1427-1434.

Hegel's moral and political philosophy -- and in the next chapter we will examine which option offers us the hope of deliverance and which the prospect of delusion.

CHAPTER 3

HEGEL & DWORKIN: THE INDIVIDUAL, SOCIETY, AND THE LIMITS OF LIBERAL EGALITARIANISM

In the first two chapters we have examined, in isolation, the moral, political, and legal theories of Dworkin and Hegel. In Dworkin's case, we looked at the ethical underpinnings of his theory in terms of four main ideas: integrity, liberty, community, and equality. With respect to Hegel, we followed the argument of the Philosophie des Rechts, attempting to explain Hegel's theory of freedom. This strategy allowed us to see the main arguments and concerns of each philosopher (within the limits of those four concepts and the Philosophie des Rechts). Now we will be able to compare them, to see what each might say about the other. Before we do so, it is necessary to say a few words about the issues to be addressed.

This chapter will be divided into two main sections. Because the focus of the dissertation is on the relevance of Hegel's social/political philosophy to the contemporary liberalism of Dworkin, the comparison of the two will be undertaken in terms of Dworkin's theory. That is, we are primarily concerned with how Hegel might respond to the contemporary moral/political philosophy of Dworkin and not

with Hegel's philosophy of right per se, or, alternatively, with the ways in which the Hegelian **rechtsphilosophie** could be made, or is not, feasible for us. The main difference between the two, and the difference which grounds their many particular disagreements, concerns the relationship between the individual and the community (in Dworkin's terms) or the state (in Hegel's). The first section of this chapter will therefore be an examination of their positions on the connection between the individual and the community/state.

The strategy regarding the relationship of the individual and society will be to discuss the idea of the community within the context of the recent debate between liberalism (or individualism) and communitarianism, a debate already referred to and discussed in chapter 1. After a general and brief discussion of this debate, I will focus on three main themes: the communitarian critique of the liberal conception of the self, Dworkin's ideas concerning democracy, and the neutrality thesis. Within these three themes, we will set forth Hegel's possible responses to the notions of individuality and community as set out by Dworkin. This should make apparent the differences in their conceptions and the criticisms Hegel would bring to bear on Dworkin's conception of the relationship of individual and community.

The second major section of this chapter will discuss the ramifications of Dworkin's position concerning the individual and the state. That is as much to say that this

section will examine Dworkin's concept of equality (a concept also explicated in terms of Dworkin's theory in the first chapter). The first subsection of the second main section will discuss the ways in which Dworkin attempts to justify his position concerning equality. This first subsection will be divided into three main parts, and be devoted to a discussion of the epistemological or methodological foundation of Dworkin's theory of equality, what Hegel's criticism of the position would be, and possible rejoinders from Dworkin's point of view. What methodology does Dworkin use to justify his conception of equality? Does he make explicit any sort of epistemological considerations concerning the idea of equality, give a justification for beginning with equality, or is equality simply assumed to be the foundational political and moral principle? Dworkin's justifications for thinking equality can be the foundational political principle are three in number: there is the argument based on individual worth, the claim that equality is an accepted American ideal, and, linked with the second claim, the proposition that equality is the spirit of the age. Each of these three justifications will comprise the three parts of this section. In addition, we have to ask how Hegel would respond to the presuppositions and arguments Dworkin uses concerning equality.

The second subsection of the second main section will examine the substantive claims Dworkin makes on behalf of his theory of equality, and will be divided into five parts.

Dworkin has not only given us an interpretative theory of the law, but, as we have seen, has fleshed out a broader theory of justice as well. His main concern in this latter respect is egalitarian, and with the formulation of a coherent theory as to how equality is best understood, what this conception of equality means for modern (though primarily American and English) institutions, and the relationship between equality and liberty and politics. From the standpoint of his earlier work (Taking Rights Seriously), Dworkin would seem to have shifted from a rights based jurisprudence, predicated on individual liberty, to a concern with an egalitarian principle of justice. This is true, but, as was noted in chapter 1, only in the sense that he explicitly makes manifest what he held before: the language has changed, but the key concepts have remained the same. Furthermore he claims that his notion of equality is not at odds with the claims of liberty and rights; in fact, his argument is that his view of equality makes the best sense out of what he calls the "liberal" position. Dworkin's idea of liberty, therefore, does not comprise a separate section, and will be taken up under the rubric of equality, as will the idea of integrity.

The second subsection of this section of the chapter, then, will be an examination of the idea of equality, and its relation to Hegel. First, we will look at the injunction Dworkin begins with: the idea that the state must show equal concern and respect towards its citizens. Secondly, we will

examine what Dworkin argues is the implication of that injunction: namely, an equality of resources. Are these two conceptions of equality plausible? Although Hegel does not give us, in the way Dworkin does, a fully articulated theory of equality, what would he have to say both about the injunction that the government treat its citizens with equal concern and respect and that this means resource equalization? Concerning the latter claim, it will be argued that Hegel would not endorse an equality of resources, based upon the argument that an equality of resources demands a conflation of two distinct normative spheres. Nevertheless, although Hegel would not endorse an egalitarian position, he does think that the state has some role to play in the regulation of civil society. How much state intervention in civil society would Hegel countenance? That question will be the topic of the third part, and will contrast the view of Dworkin and Hegel on taxation and state intervention. Fourthly, in order to understand why it is Hegel would not subscribe to an egalitarian position, we will examine his arguments concerning democracy. In the fifth and final part of this section of the chapter, several points will be made in respect to Dworkin's theory of egalitarianism, understood as an equality of resources, that are non-Hegelian in nature. Dworkin's theory of equality suffers from certain defects, it will be argued, which are endemic to all egalitarian theories, and which do not rely upon Hegel's conception of freedom.

The Individual and the Community

Liberalism/Universalism and Communitarianism

In the first chapter, while examining Dworkin's jurisprudential theory, we had occasion to note the main outlines of the debate between communitarians and liberals. This controversy has generated a great deal of pyrotechnics during the last decade, though what we can sift out of the ashes left by the flames is another matter. It does seem, however, that both sides have to a degree misunderstood one another and that an argument which pits communitarians against liberals does not encompass what might be a more plausible position, some sort of a "communitarian individualism." John Rawls, for example, has countered criticism of his theory of justice by appropriating many of those criticisms.¹ The position which recognizes the merits of both sides has gained more popularity of late², and, indeed, Dworkin has responded to the many criticisms of liberal positions by communitarians by attempting to incorporate within his legal/moral philosophy an account of the various ways in which the individual relates

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John Rawls, "Justice as Fairness: Political not Metaphysical," Philosophy and Public Affairs, 14 (1985): 224-251; and "The Idea of an Overlapping Consensus," Oxford Journal of Legal Studies 7 (1987): 1-25.

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See, for example, Alan Ryan, "Communitarianism: the Good, the Bad, and the Muddly," Dissent (Summer 1989): 350-354. Michael Walzer makes much the same point in "The Communitarian Critique of Liberalism," Political Theory 10, No. 1 (1990): 6-23.

to the community. Indeed, as the first chapter indicated, Dworkin is far more "communitarian" than other theorists in the liberal nest, attempting to give us a plausible account of how liberalism, properly understood, fosters an ethical bond between individuals and their community. That is, Dworkin attempted to derive an integrated view of individual and community through the substantive results of a democratic process, and not by the typically liberal method of procedural fairness. However that may be, the debate between individualists/liberals and communitarians is itself centered around differing, and competing, claims about the individual and the individual's relationship to the community.

We will first examine the nature of the debate, and Dworkin's relationship to it. Although he has only sparingly commented on the communitarian critics per se, he does discuss the concept of community in some detail.³ We will then examine Hegel's views on the salient points of the argument. Hegel, it will be argued, clearly espouses views from both sides of the argument. In other words, he can just as well be characterized as a "communitarian liberal" as not -- the positions normally attributed to both sides do not, in Hegel's case, fit. Dworkin, as our discussion of his conception of

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Dworkin's criticism of communitarianism is found in an article he wrote on Michael Walzer, accusing Walzer's book Spheres of Justice of relativism ("To Each His Own," New York Review of Books, April 14, 1983), and in the essay "Liberal Community."

the community in chapter 1 showed, would also like to circumvent the communitarian criticism of liberalism: whether he has done so successfully, at least in Hegelian terms, is another question.

We summarized the broad outlines of the debate in the first chapter by saying that communitarians critique the liberal position on two main counts. One, they deny that the account of the self, as envisioned by liberals, is plausible. For example, Rawls, in A Theory of Justice, argues that in determining principles of justice reliance upon the empirical frameworks individuals find themselves in is unnecessary: the Rawlsian self behind the veil of ignorance can reach principles of justice, satisfactory to any rational being, without recourse to any social, cultural, historical, empirical contexts. This view of the self as noted in chapter 1 has been called "unencumbered" by Michael Sandel, and he argues that the principles of justice which Rawls wishes to derive from behind the veil of ignorance depend upon the commitments -- the "encumbrances" -- that individuals do as a matter of fact share.

Secondly, communitarians critique liberals on the ground that the consequences which liberal individualism breeds are at best amoral and at worst immoral. Because of the neutrality towards the good which the liberal advocates ("the

right is prior to the good" in Rawls' phrase),⁴ the liberal is led to defend, for the sake of the individual and individual rights, a state of affairs which does not consider what the good for the community as a whole is. Because of this, the liberal, in defending state neutrality towards conceptions of the good life, undermines the possibility of a genuine community. Two deleterious consequences can flow from this position. First, a society which embraces individual rights over the good becomes, paradoxically, a society which is more vulnerable to infringements on individual liberty.

Secondly, a society which espouses neutrality towards the good becomes, as many have argued the United States has become, a society which is injuriously atomistic in character. With no strong sense of community, with each individual left to pursue their unfettered desires, society becomes an aggregate of competing and clashing interests, more a Hobbesian state of nature than a stable community.

How might these criticisms apply to Dworkin, if they do at all? Has Dworkin effectively answered their force (if they have force)? An examination of the first communitarian critique, and its application to Dworkin, will occupy the first part of this section. Within this section, we will see

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For example, Rawls says, in criticizing teleological conceptions of justice, that "we should therefore reverse the relation between the right and the good proposed by teleological doctrines and view the right as prior." Rawls, Theory of Justice, 560.

that what separates Dworkin and Hegel is their different conceptions of the individual's relationship to the state. The second part of this section will examine Dworkin's arguments concerning democracy, and the type of democratic community he thinks allows for the sanctity of individual rights as well as a strong sense of communal obligation. The third division will focus on the second main line of communitarian criticism, the neutrality thesis. This section will look at Dworkin's defense of the neutrality thesis, and the problems that arise for Dworkin in defending the moral principle of equal concern and respect within this context.

The Communitarian Critique of the Liberal Self

The conception of the liberal self (and its relationship to society) is the first major thrust of the communitarian critique, and has been most explicitly made by Michael Sandel concerning the work of John Rawls. Sandel criticizes Rawls' two principles of justice for the following reasons. According to Rawls, the two principles of justice which arise from the original position are (1) that each individual should be guaranteed certain liberties and (2) that economic inequalities are justified only if the least advantaged persons in society are better off with that inequality. The use of an "original position" allows us to formulate principles of justice without recourse to those qualities we acquire either through luck, accident, or fortune. All

rational beings could agree to these principles precisely because they do not know the type of people they will be.

The problem with this view, according to Sandel, is in the second principle of justice (the difference principle). The difference principle emerges as a result of the egalitarian's concern with those morally arbitrary factors, such as talents and genetic good luck, that led Dworkin to establish a hypothetical insurance market. As Rawls puts it:

We see then that the difference principle represents, in effect, an agreement to regard the distribution of natural talents as a common asset and to share in the benefits of this distribution whatever it turns out to be. Those who have been favored by nature, whoever they are, may gain from their good fortune only on terms that improve the situation of those who have lost out.⁵

If we are committed to balancing inequalities such that the least well off member of society benefits from inequality, then Rawls presupposes that the accidental assets of the individual belong to the community. But, as Sandel argues, there is no basis for making this claim:

Simply because I, as an individual, do not have a privileged claim on the assets accidentally residing 'here', it does not follow that everyone in the world collectively does. For there is no reason to think that their location in society's province, or, for that matter, within the province of humankind, is any less arbitrary from a moral point of view.⁶

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Ibid., 101.

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"The Procedural Republic and the Unencumbered Self," in Communitarianism and Individualism, 22. Sandel puts it this way in Liberalism and the Limits of Justice, 178: "But the difference principle requires more. It begins with the thought, congenial to the deontological view, that the assets

Rawls must presuppose that there are moral, communal ties among individuals which justifies the redistribution of individual assets. Otherwise, the difference principle would violate the basic liberties of the individual, i.e., that the individual not be used as a means to further society's ends.⁷

Sandel's argument against Rawls, as it relates to Dworkin, is instructive in that it shows how Dworkin answers the objection. That is, Dworkin will allow for certain moral, communal ties (which will justify a redistribution of resources) in a way that Rawls does not. It is possible to interpret Dworkin's "original position" (though of course he does not call it that) as including within it an argument which would give normative legitimation for a redistribution of resources. He does not, however, give us an adequate description of personality development and the moral bonds with others that are engendered by personality development, though his answer relies on a conception of personality. This is not an insurmountable problem, for presumably such an account of moral personality development could be supplied. Secondly, there exists an ambiguity in the conception of what kind of moral principles bind and sustain a moral community.

I have are only accidentally mine. But it ends by assuming that these assets are therefore common assets and that society has a prior claim on the fruits of their exercise. This either disempowers the deontological self or denies its independence."

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Ibid.

In the earlier Dworkin, those principles are procedural in nature; in the later Dworkin, substantive. This will lead to the final point: a consideration of the kind of community Dworkin defends, its relationship to the individual, and that conception judged from Hegel's perspective.

In attempting to describe a procedure which would ensure the equal respect and concern for all by the state, Dworkin conceives of an auction which would distribute resources such that each individual has an equal share. Dworkin does not begin as Rawls does; his argument explicitly does not rely upon a Rawlsian original position:

First, my arguments have been designed to permit people as much knowledge as it is possible to allow them without defeating the point of the exercise entirely. In particular, they allow people enough self-knowledge, as individuals, to keep relatively intact their sense of their own personality, and especially their theory of what is valuable in life, whereas it is central to the original position that this is exactly the knowledge they lack.⁸

The reasons for Rawls' rejection of those particular and contingent characteristics of a person from the original position are, one, he wants to exclude those things which depend upon fortune from considerations of justice; and two, he wants to ground a theory of justice on a universal basis, which means that particular considerations, like personality, status in society, etc. must be discarded. Dworkin thinks he can still achieve universality and account for luck, but still include the contingent and particular aspects of individual

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Dworkin, Equality of Resources, 344-345.

personality. He does this by formulating an insurance scheme which individuals in the initial auction may purchase. Rather than eliminate luck or handicaps, as Rawls does in the original position, Dworkin allows for each individual to use however much of their initial resources as they wish to purchase insurance against circumstances which arise later in life through the choices that individual has made. The resources which go towards this insurance can then also be used to aid those who suffer from bad fortune through no fault of their own. In this way, individuals who suffer from handicaps or bad luck will receive some sort of compensation for factors not within their control -- factors which are irrelevant to a theory of justice or political morality. As Dworkin states it:

If (contrary to fact) everyone had at the appropriate age the same risk of developing physical or mental handicaps in the future (which assumes that no one has developed these yet) but that the total number of handicaps remained what it is, how much insurance coverage against these handicaps would the average member of the community purchase? We might then say that but for (uninsurable) brute luck that has altered these equal odds, the average person would have purchased insurance at that level, and compensate those who do develop handicaps accordingly, out of some fund collected by taxation or other compulsory process but designed to match the fund that would have been provided through premiums if the odds had been equal.⁹

Hence Dworkin has allowed individuals in the auction to retain a knowledge of their particular circumstances (which Rawls does not allow), while taking into account, via an

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Ibid., 297-298.

insurance scheme, the morally irrelevant factors of luck and handicaps.

How is it that one comes to this self-knowledge, this sense of personality, and a theory of what is valuable in life? Unlike Rawls, who explicitly rejects any reliance upon the particular aspects of the individual (their status in society, what jobs they have, their personal life, etc.), and hence any shared moral values (i.e., any conception of the good) in formulating principles of justice, Dworkin grants them but does not tell us how it is that persons form a sense of personality and develop notions about what is valuable to them. In other words, if Dworkin recognizes that shared moral values can only come from just those particular aspects of an individual's life, he has not yet told us how individuals come to form those shared conceptions of the good.

The point here can be made more explicit by examining Dworkin's "principle of authenticity." Since Dworkin is considering how resources are to be distributed via an auction, the question arises as to the competence of the members participating in the auction: we need "some description of the circumstances in which people's personalities will be taken as properly developed so that auction calculations can proceed."¹⁰ The immediate aim of this

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Dworkin, Place of Liberty, 35. In an opaque footnote, Dworkin defines authenticity as follows: "personalities are authentic, for our purposes, when they have been formed under circumstances appropriate to using an auction among

principle is that the individuals participating in the auction system should have the opportunity to "form, to reflect on, or to advocate convictions, attachments, or preferences,"¹¹ so that they can choose, in the auction, resources which accommodate their desires. The overall aim of the principle of authenticity is to specify what liberties should be protected in an equality of resources. Liberties such as freedom of expression, religious commitment, and association would all be protected in order that personalities be formed.¹² Hence, in a perfect world, we would find that

...ideal authenticity requires the fullest possible opportunity not because people are always more likely to make wise choices with more time but because their choices should not depend on a view of their personality, and of the personalities of others, with whose formation they remain dissatisfied.¹³

Two difficulties arise in this account of the place of personality in Dworkin's theory of justice. First is the question of the origin of authentic needs. How is it that an individual can come to have a personality and then can decide what resources he or she would be willing to forfeit and which

personalities so formed as a test of distributive equality." (Ibid.) This seems to say that personalities are authentic when they can compete in the auction, although that is the very question under consideration (i.e., when are they authentic enough to compete in an auction?).

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Ibid., 36.

¹²

Ibid., 35.

¹³

Ibid., 35-36.

to obtain? Again, as noted above, we need an account of social development, of how individuals are educated, grow, and depend upon their social context, and how that development can sustain an equal distribution of resources. Dworkin does not give us any such account.¹⁴

Secondly, Dworkin seems to suggest in the above citations that the choices persons make in the auction not be dependent upon the personalities that they happen to have. This is so not only in the ideal case (which of course Dworkin recognizes as not approximating conditions in the real world) but also practically, when he states that the purpose of the principle of authenticity is to account for when personality is developed enough so that the auction can proceed. On this view, personality (and the principle of authenticity) is important because it defines when we are competent to participate in the auction, or, alternatively, it is important because our choices should not depend upon our personalities. As we noticed in the first chapter, personality is an accidental trait as it were (much as talent and one's family are when considered as resources), and bracketing it allows

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Dworkin does note in an early work that an account of personal identity is necessary: "I presently think that both of these issues -- the problem of understanding arguments for a conception of a concept and the problem of understanding the connection between equality and autonomy -- will lead legal and political philosophy into a further classical problem of philosophy: the problem of personal identity." Dworkin, Taking Rights Seriously, (Cambridge: Harvard University Press), 292. Unfortunately, it is a problem which he has not examined in any detail since those words were written.

for the most equal distribution of resources despite the personalities involved. But how could the personality of the individual be sundered from the choices that the individual would make? What is important about personality is not that it measures a minimal standard of competence, or that it is an accidental trait which should play no part in the distribution of resources, but that it determines what we would bid on in the auction. In stressing that an account of personality is necessary in order to determine competence, Dworkin has emphasized the least significant thing about personality and authenticity. Given this, it is all the more vital that we have an explanation of moral/personality development and how that development figures into the choices individuals would make in the auction.

Recall that Sandel's argument against Rawls rests on the claim that a distribution of resources assumes that the community has a moral right, some prior legitimate claim, to redistribute resources. The prior claim that the community has a right to redistribute resources in its turn presupposes a certain moral obligation between the individual members of the community. Those moral obligations which bind the members to one another must have a priority over the individual members of the community whose resources are to be redistributed if the act of redistribution has any moral justification. Does Dworkin allow for a presupposed moral,

communal claim to those resources, a claim which Sandel finds lacking in Rawls?

The language Dworkin uses in discussing the principle of authenticity is equivocal: on the one hand, the principle of authenticity is used to further the aims of each individual; it is a strategic device used in order to gain an equal share of resources for myself. On the other hand,

...authenticity has an active and a passive voice: participants to the auction would want both a opportunity to form and reflect on their own convictions, attachments, and projects, and an opportunity to influence the corresponding opinions of others, on which their own success in the auction in large part depends.¹⁵

On this view, the principle of authenticity could be interpreted to mean that individuals, before the auction, can influence others with the aim of educating them, could presumably be swayed by others, and therefore could reflect on and reformulate their chosen plans and lifestyles in accordance with a common good (as expressed by the opportunity costs to others). This would suggest, though it is not made explicit, that there is a moral bond between individuals which would justify a redistribution of resources.

On this reading, the principle of authenticity can be used to formulate and reformulate conceptions of what individuals think good, and thus what they would secure in an auction. This serves a social function, educating the individual and others about what it is they share and how

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Dworkin, Place of Liberty, 35.

their needs and wishes can best be attained equally. In this sense, the liberty to express one's convictions about the good, to influence and educate others, and therefore to determine the common good consonant with the individual's particular good is fundamental in order to ensure an equal distribution of resources.

This interpretation can also be buttressed by the notion of opportunity costs, that bridge strategy between the baseline (the rights and liberties which we assume in making our choices for resources) and the equal distribution of resources. True opportunity costs allow us to achieve an equality of resources in terms of any (abstract) resource's value to another individual. At the least, the value of fungible resources is measured in terms of what another person would forgo. Built into the auction, then, via the idea of true opportunity costs, is a social link with others: our lives are not measured solely by our desires and our success in satisfying those desires, but by the cost of that life to others.

The fact that Dworkin's auction can accommodate an account of personality development, and therefore the communal ties which would justify a redistribution of resources does not, however, immunize it from a more decisive problem. In other words, from a perspective internal to Dworkin's argument, he has merely neglected to explain how personalities develop. Presumably such an account of social and moral

development could be provided by the work of Mead, Habermas, Piaget, et al.¹⁶

But from a perspective external to Dworkin's, the problem is more serious. The salient feature of Hegel's account of the development of freedom is its self-determining

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Although it is of course possible to give an account of moral personality development, as these authors have done, there is still the question as to whether a redistributivist theory such as Dworkin's can in principle sustain such an account. That is, it might be a necessary adjunct of Dworkin's version of redistribution that no account of moral personality development could be given. The auction's purpose is to rectify inequalities of resources, including the talents (because they are morally undeserved and arbitrary) that individuals possess. Therefore individuals in the auction, while having knowledge of their particular characteristics, are not to take into account their personalities: a developed moral personality is important either to determine competence or because our choices in the auction should not depend upon our personalities. Human personality, and especially moral personality, according to this view, is presented in a denuded and degraded form. As Kenneth Minogue writes: "Moral identity, however, seldom appears in the decor of normative political theory, except occasionally in the form of special constraints. Yet all those optimisers, preference orderers, rights bearers, calculators of expected utilities, selectors of cooperative or noncooperative strategies, free riders, and so on are also involved in the game of sustaining a moral identity, which is to say that they share in the burdens and delights of self-construction. Normative theory, in other words, gives us only half the picture. And yet it is out of this half of the picture that serious practical proposals for the entire transformation of society are advanced." Furthermore, moral identity itself may be inherently inegalitarian and thus not compatible with an abstract theory of equality: "Superiority and inferiority, competence or incompetence, these are the polarities between which our moral identity lies...Man is a comparative animal, and we find our sense of ourselves in constantly and often painfully estimating our performances in relation to those of others...Inequality is built into the very structure of moral identity." "Ideal Communities and the Problem of Moral Identity," in Nomos XXXV: Democratic Community (New York: New York University Press, 1993), edited by John W. Chapman and Ian Shapiro: 50-51 & 64.

character. That is, from Hegel's starting point through the various determinations of freedom, the concept of freedom was taken as not determined by anything other than itself. Freedom must be considered in this way; if it is not, it would be determined by something outside of itself, be relative to that external determining factor, and could not provide normative validity. Therefore the universal and unconditional character necessary for normativity cannot be supplied by nature or convention, including the nature of the self. Insofar as Dworkin thinks the personality of individuals necessary when constructing the auction for the original distribution of resources, either as a gauge of competence in order to enter the auction or as a (communal) normative standard which justifies a redistribution of resources, freedom has been determined by something other than itself -- namely, the personalities of the individuals. The term person, for Hegel, signified the conception of the will as determined in abstract right. There, the person was a will undetermined by any factor whatsoever, including its own internal "natural" personality. In order to make itself actual, to be self-determined, the will places itself in an external thing: the will wills itself. Other wills must recognize that right, and hence in abstract right we find the first determination of freedom described in terms of property relations (the reciprocal acknowledgement by two wills of their right to place their wills in things). In Dworkin's

case, it is clear that the terms person and personality denote the "natural" components of the individual, his or her desires, wishes, temperament, goals, etc. If this is what Dworkin means by person (and there is no indication to the contrary), then the person cannot serve as a ground for right, external as it is, naturally given as it is, to the self-determining character of freedom. Even if we are to take the person as a will with a capacity for willing, this would still not circumvent the problem, in as much as the will in this case is naturally given before any of its determinations and acts as the ground for all subsequent normative relations. The will as a natural capacity to choose, as a positer, has the choice of any alternative it wants -- but those alternatives are external to the act of choosing and are not an inherent aspect of its determination. Hence, the will as chooser is not self-determined. As Richard Dien Winfield puts it:

...the ethical problem of freedom arises in terms of this conflation of self-determination and positing, and in this form, it provides liberal theory with its starting point: the will conceived as a given structure, whose character stands defined prior to any actual self-determination, and whose right is to be realized as the first principle of justice.¹⁷

The counter claim might be made that, since Dworkin seems to regard equality as the highest or most important moral value, the requirement that freedom be self-determining

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Richard Dien Winfield, Freedom and Modernity (New York: State University of New York Press, 1991), 92.

does not apply to him. Since he does not accept freedom as the highest moral value, the fact that his conception of freedom does not accord with Hegel's is no reason to abandon equality. Equality would provide the ground of normative legitimation, much as happiness would for the utilitarian. In both these cases, since there is disagreement over the ground of normative legitimacy (equality for Dworkin and happiness for the utilitarian, as opposed to freedom for Hegel), the criticism that freedom requires self-determination, and any other grounding value is therefore normatively illegitimate, is simply misplaced.

The problem with this line of defense is that Dworkin does buy into the notion that liberty is of fundamental value. It is true that Dworkin does say, in his essay about the place of liberty, that freedom is not of transcendental value:

If liberty were valuable the way some people think art can be valuable -- for its own sake quite apart from its impact on those who enjoy it -- then we might be able to understand, if not approve, the view that liberty is of such fundamental metaphysical importance that it must be protected whatever the consequences for people. But liberty seems valuable to us only because of the consequences we think it does have for people.¹⁸

And, further, in discussing the relationship between equality and liberty:

There is a dark side to the issues we are exploring, a shadow hanging over liberty. Any genuine conflict between liberty and equality -- any conflict between liberty and the requirements of the best conception of the abstract

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Dworkin, Place of Liberty, 2.

egalitarian principle -- is a contest that liberty must lose.¹⁹

However, as our discussion of Dworkin's conception of the relationship between equality and liberty in chapter 1 showed, Dworkin argues that equality and liberty, properly understood, are not in conflict. Rather, the relationship between the two is constitutive; liberty is a necessary component of equality, conceived as equality of resources, and **vice versa**. Liberty is not "instrumental to distributional equality" any more than equality is "instrumental to liberty."²⁰ Only when we accept a certain specific formulation of equality and of liberty, a formulation that Dworkin rejects, can the two conflict. So Dworkin does accept freedom, in this way, as being, at the very least, a necessary component of what constitutes normative legitimacy. Since liberty is a necessary aspect of normative legitimacy, it follows that Hegel's argument concerning the self-determining character of freedom does apply to Dworkin, and is not a misplaced criticism.

What we have said so far suggests that Dworkin cannot ground his egalitarian theory, based on the auction and the principle of authenticity (i.e., an account of personality), on what alone can provide unconditional and universal

¹⁹

Ibid., 9.

²⁰

Ibid., 3.

normative validity -- namely, the (self) determination of freedom. But perhaps Dworkin can go another route, and attempt to derive legitimate normative claims of right by describing what follows from the interactions among individuals. For if nature and convention cannot serve as a foundation for right, neither, strictly speaking, can the single self. As we saw in the first determination of freedom in abstract right, the validity of the normative claims in that sphere depends not only upon the will willing itself in an external thing, but also on the recognition by (at least) one other will of that right. So, for example, in the first determination of freedom in abstract right, Hegel says that although property, as an externally existing thing, serves the contingent needs of persons, as the "existence of the will, its existence for another can only be for the will of another person. This relation [**Beziehung**] of will to will is the true distinctive ground in which freedom has its existence."²¹ The legitimacy of the normative claim rests on the interaction of two wills (their mutual recognition and respect of the other's right to place their will in a thing, in the case of abstract right), an interaction required by the self-determination of freedom.²²

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Hegel, Philosophy of Right, §71, 78; 102.

²²

As Winfield puts it, "the free will can will its relation to other free wills only if they concomitantly will that same relation to one another as their own self-determination..."

Does Dworkin, in describing the relationship between the individual and the community, derive valid and legitimate normative claims from that relationship? What is the character of the moral bond between the individual and the community, and how does Dworkin think that bond is produced?

Dworkin does argue, of course, that individuals are educated, formed, gain what personalities they have and what conceptions of the good they believe in via a community, and it is in this way that the community has importance. In Law's Empire he writes:

It is perhaps true that someone who held the bizarre and barely comprehensible view that people are wholly 'independent and self-sufficient'...[but] the world is made up of interdependent and cooperating persons who thrill to the appeals of solidarity and altruism...²³

He obviously does not reject the trivial claim that we are formed by the culture and community we inhabit. But the kind of moral bond between individuals, as theorized in Law's Empire, is one based on procedural fairness. The best defense of political legitimacy is one where individuals see themselves as engaged in a community based on principle:

Members of a society of principle accept that their political rights and duties are not exhausted by the particular decisions their political institutions have

Accordingly, freedom is not a natural or monological potential, but an actual structure of interaction consisting in the interdirected and mutually respected actions of a plurality of wills." Freedom and Modernity, 99.

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Dworkin, Law's Empire, 443.

reached, but depend, more generally, on the scheme of principles those decisions presuppose and endorse.²⁴

He recognizes the attraction of a fraternal community, one where the members share a common understanding about the principles of justice, fairness, equal respect and worth, are willing to sacrifice for the common good, and this even if the members ultimately disagree about what justice and fairness are.²⁵ Based on the argument in Law's Empire, it is the procedural fairness of the political process which results in communal feeling, and not the specific decisions reached in that process.

We should ask two questions here. First, do the components of procedural fairness actually promote fraternity? And, secondly, can the emphasis on the moral bonds engendered by procedural fairness be reconciled with the bonds engendered by substantive results, a view argued for in his later writings on equality?

In chapter 1, we noticed that Dworkin's vision of associative obligations entailed four requirements, all of which were necessary for a community to be "strong." One, the group's obligations are special (they apply especially to the group, and not to those outside it). Two, they must be personal (from individual to individual and not from group to

²⁴

Ibid., 211.

²⁵

Ibid., 213-214.

group). Three, the members' primary responsibility is a concern for the well-being of other members. And four, the group must show an equal concern for all. Justice, fairness, procedural due process and, above all, integrity are the names given to these four aspects of what constitutes a strong community, and they are the principles which Dworkin thinks a community of principle must accept.

But how do these moral principles explain, account for, and foster this strong community? For example, why should accepting procedural due process -- the notion that trial procedures should strike a correct balance between accuracy and efficiency -- imply any one of the four components of a "true" community? To accept procedural due process as a principle does not necessarily mean that the group's obligations are special; they just as well apply to those outside the group. A foreign citizen tried for a crime in the United States retains all the rights of the Constitution and the Bill of Rights; he or she is entitled to a trial by jury, to legal representation, a speedy trial, etc. Nor does it follow that procedural due process concerns only individuals; corporations would be included, class action suits, as well as what the Supreme Court calls "suspect classifications" -- groups who have been discriminated against in the past. The same holds true for well-being: one might argue that procedural due process does not promote the well-being of those victimized by crime. Due process, of course, does

ostensibly protect the innocent who have been wrongly accused -- individuals in a nation which recognizes due process therefore have certain expectations concerning the state's treatment of them. But due process, so some have argued, in the end serves as a protection for the guilty. According to this darker side of due process, due process does not merely serve to protect the innocent when falsely accused, but actually treats one class of persons unequally -- the class of law-breakers. On this account, due process in effect acts as a protection for those who choose not to abide by the law; in other words, due process presupposes that there are certain numbers of persons who do not respect the law and who must be protected in any event. This does not argue for the abolishment of due process; it only points out that it is not as communitatively integrating, in the way Dworkin takes the community to be, as he suggests.

Concerning the second question, we can ask: how does it follow that from an agreement to abide by the political decisions of the community, whether they are decided in my favor or not, that this expresses a fraternal feeling, much less creates one? The history of democracies both ancient and modern would suggest that political decisions against a group -- the numerical minority, the rich, the poor, etc. -- foster animosity, envy, and the feeling that the system has not worked as it ought (i.e., for the 'common good'). It is the substantive outcome of the decisions themselves which either

promote fraternal obligations or exacerbate division, not the process of deciding.

The claim here is that those procedures which ensure the fairness of the process produce associative obligations in the strong sense that Dworkin wants without regard to the political and moral decisions which arise from the procedures. But procedural fairness, while certainly a necessary condition, would not seem to be sufficient for the creation and sustenance of a "strong" community. And if we look at his work as a whole, it would seem to be the case that Dworkin grants this, as his more recent emphasis on the substantive results of the process runs counter to, or is in tension with, his earlier argument which seems to suggest that it is procedural fairness which is most important.

The point can be put in another way if we look at Dworkin's criticism of the relationship between the community and the individual often attributed to Hegel. In his essay on the liberal community, Dworkin characterizes his conception of a community as "integrated," or as the "practice" view.²⁶ The community's communal life is defined only in terms of specifically communal acts: in the case of a political community, those practices would be the political practices. This is opposed to what he labels the "metaphysical" view of the community. He rejects the view that the community is

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Dworkin, Liberal Community, 493-496.

prior to the individual such that the individual members of the community are somehow less than that community: "On the metaphysical view of integration, collective units of agency just exist: They are more real than their members."²⁷ In fact, Dworkin mocks the "metaphysical" conception of community; he denies that "the ultimate mental component of the universe is some spooky, all-embracing mind that is more real than flesh-and-blood people..."²⁸ This view sounds like a caricatured Hegel, though Dworkin does not name him.²⁹ Recall that, for Dworkin, the individual is to be integrated to the community, identify with it, only by the overt political practices of the nation. Those political acts -- legislative, judicial, administrative -- are the only acts upon which a liberal theory of community should rest.³⁰

²⁷

Ibid., 495.

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Dworkin, Law's Empire, 168.

²⁹

Stephen Guest, in his book Ronald Dworkin (Stanford: Stanford University Press, 1991), 98-99, does use Hegel by name: "The monolithic view of community is a Hegelian conception whereby the community assumes a more important and independent role. This monolithic version of community collective action is rejected by Dworkin, obviously, because it denies the importance of the individual." Although Guest's description of Hegel cannot be directly attributed to Dworkin, one may assume, since Dworkin read various drafts of Guest's book (see the Preface, x-ix), that this view is not wholly alien to him.

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Dworkin, Liberal Community, 500.

Properly understood, they are the only "communal" acts of a community per se.³¹

On his characterization, the metaphysical view "anthropomorphizes" the community; it makes of the community an "outsized" person which experiences all that an individual experiences. Although Dworkin is, in this essay, responding to Sandel (at least generally), he does not state who holds this view of a metaphysical community. It is difficult to think of one who has (or does). Certainly those philosophers who have argued for an organic conception of the community -- Aristotle, Plato of The Republic, and, of course, Hegel -- do not think of the community as some sort of super-person.

For Hegel, the community does not have any sort of

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To the objection that in a modern, pluralist, capitalist market society the only possible hope for communal integration rests on a "thin" conception of the good (i.e., the processes and practices entailed by a constitutional, republican democracy), we can say this. As inherently suggested in Dworkin's own work, procedural fairness does not seem adequate to ensure communal integration. Rather, it is the substantive results, the moral character of the community in which individuals live, which bind individuals to one another. There is a tension in Dworkin's work, especially between his two earlier books, Taking Rights Seriously and A Matter of Principle, which emphasize procedural fairness and all that that ideal entails, and his later works, Law's Empire and the various articles on equality, which stress the substantive results of the procedures. The existence of a wide variety of what can loosely be called "fraternal" organizations would also seem to verify this, and suggests that communal integration can and does occur. The various voluntary organizations, religious groups, charitable associations, education/school leagues, et. al. which permeate (American) society point to the fact that a large number of individuals achieve communal integration, an integration not predicated on procedural fairness alone.

existence of its own independent of the individuals who comprise it. It is not like an external object or a natural object which exists whether or not we are conscious of it: "Only when it is present in consciousness, knowing itself as an existent object [**Gegenstand**], is it the state."³² It is not a "super-person," but the awareness of individuals that they identify with one another on the basis of a common membership.

Furthermore, as noted in chapter 2, there are a series of ways in which the individual becomes a communal being in modern society -- or, in Hegel's terms, there are four ways in which the universal operates within ethical life. There is the universality found in the family; individuals here do not exist apart from the family, but are essentially members of a larger unity, though a unity which "has as its determination the spirit's feeling [**empfindende**] of its own unity, which is love."³³ The commonality found in the family is one of feeling, hence its immediacy and limitation. Within the family, one is conscious of one's unity with the other members, but this is "natural" -- i.e., it is not the same unity as found in the state, where the unity is the conscious recognition of the rational system of laws.

The second universality is to be found in civil society. In that sphere, universality consists in the fact that within

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Hegel, Philosophy of Right, §258A, 279.

³³

Ibid., §158, 149; 199.

civil society, each individual satisfies his or her subjective needs within a complex system which contributes to the satisfaction of the needs of everyone. Civil society, as Hegel describes it, is a "formal universality":³⁴ although individuals do not have as their explicit aim the satisfaction of the needs of others, that satisfaction is secured (granting that the corporations and police -- including the public regulatory agencies -- aid those whose freedom is compromised in the economic realm) through the manifold structures within civil society.

Thirdly, there is the universality of the state. This universal is the realm of the **citoyen**, or citizenship (the organizing principle of which is the government, itself divided into three separate functions: the monarch, the executive, and the legislature). Via the corporations within civil society, individuals come to understand, are educated, into the common life of the state; they know that their individual end is identical to the common end. Individuals "pass over of their own accord into the interest of the universal, and on the other, knowingly and willingly acknowledge this universal interest even as their own substantial spirit, and actively pursue it as their ultimate end."³⁵ The relationship between the individual and the state

³⁴

Ibid., §157 & 182, 149 & 165; 198 & 220.

³⁵

Ibid., §260, 215; 282.

is not merely an instrumental one, governed by the claim that the state exists simply to further one's well-being; rather, the interests of the individual have now been harmonized with the interests of the state, such that the two are now one and the same. The state, as a sphere separate from civil society, protects those recognized modes of self-realization, and at the same time allows for individuals to exercise political self-determination. Hence individuals find their end, their complete freedom, in the life of the state; it is, Hegel writes, the individuals "highest duty to be members of the state."³⁶ Furthermore, not only is there the objective, outward identification (the set of institutions and structures which unify the common good of the particular interests and members) but there is a subjective element as well. That subjective element is the attitude (**Gesinnung**) of patriotism, properly understood. Patriotism is not primarily the heroic deeds performed on behalf of the state, but rather the habitual trust that individuals, in their everyday lives, possess, a trust which knows that the interest of the state consists in promoting both my "substantial" (common) interest and my "particular" interest.³⁷

Finally, the dynamic of all three constitutes the fourth universal, or ethical life as such. Here, as we saw in

³⁶

Ibid., §258, 208; 275.

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§268, 218-219; 288-289.

chapter 2, Hegel defends an (expanded) Aristotelian conception of society (or the polis, in Aristotle's terms): ethical life is that sphere which allows human beings to become what they are; within it they attain their fullest and most mature freedom. It is ethical life which allows for the family (in the recognition and sanction of marriage and inheritance) and civil society (in work, the authorization and protection of private property, contractual exchange, education, etc.) to exist in the first place. Ethical life is that universal which brings the particular to a consciousness of its dependence on and identity with the universal.³⁸ Within ethical life the individual "gains protection for his person and property, consideration for his particular welfare, satisfaction of his substantial essence, and the consciousness and self-awareness of being a member of a whole."³⁹

Hegel has not anthropomorphized the community, but rather has described how the individual comes to an awareness of his or her freedom, knows that the state promotes both the common good and the particular good of the individual members, or, what is the same, knows that the interests of the individual and the state are identical. Freedom cannot be

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See §145, 142-143; 190, where Hegel says that "the ethical sphere is freedom, or the will which has being in and for itself as objectivity, as a circle of necessity whose moments are the ethical powers which govern the lives of individuals."

³⁹

Ibid., §261R, 217; 285.

defined solely in terms of property relations, morality, the family, civil society, or the state alone, although each one is a necessary moment in the determination of freedom:

The fact that the ethical sphere is the system of these determinations of the Idea constitutes its rationality. In this way, the ethical sphere is freedom...a circle of necessity whose moments are the ethical powers which govern the lives of individuals.⁴⁰

Human beings cannot be what they are, cannot attain the fullest level of freedom, outside of or apart from the rational structures comprising ethical life.⁴¹

Because of the organic nature of the individual's relationship to the community, Hegel argues that ethical life does not rely upon any sort of contract between individuals. Because the sphere of ethical life is not founded on an original contract, it is not to be judged if it does not fulfill its obligations to its citizens on the basis of some supposed contract. "The nature of the state has just as little to do with the relationship of contract, whether it is assumed that the state is a contract of all with all, or a contract of all with the sovereign and the government."⁴²

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Ibid., §145, 142-143; 190.

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On this, see the Addition to §153, where Hegel criticizes the attempt to educate persons by removing them from society, as, for example, Rousseau describes in Emile.

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Ibid., §75, 80; 105.

It is true that the state has obligations to its members (and vice versa), but these are not contractual in nature. A contract, as discussed in abstract right, requires that two wills unite -- they both agree to the transfer of private property (or the deliverance of services). The contract is the arbitrary decision of two wills -- they both decide, for whatever reason, to enter into a relationship of exchange with one another. If the obligations between the state and the individual were contractual in nature, the individual could or could not decide to enter into a relationship with the state, depending upon his or her whim. (And the same would be true of the state, though Hegel does not make this point in this particular passage, which could or could not decide to do those things which Hegel thinks the state is obligated to do.) It is a misunderstanding, then, to envision the relationship between the two as contractual:

But in the case of the state, this is different from the outset, for the arbitrary will of individuals is not in a position to break away from the state, because the individual is already by nature a citizen of it. It is the rational destiny of human beings to live within a state, and even if no state is yet present, reason requires that one be established...The great advance made by the state in modern times is that it remains an end in and for itself, and that each individual may no longer base his relationship to it on his own private stipulation, as was the case in the Middle Ages.⁴³

In general, the idea that the state is an organic unity is not new -- it has been argued at least since Plato and

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Ibid., §75A, 106.

Aristotle that human beings cannot be human beings apart from, in ancient terms, a polis. What is new is that the limitation of the polis, with its attendant lack of recognition of subjective freedom, is overcome only in modern times. The freedom first theorized and practiced in the ancient polis is only fully realized in the modern world. In other words, Hegel rejects Plato's view insofar as Plato does not recognize the necessity for the subjective freedom of the members of that unity:

The principle of the self-sufficient and inherently infinite personality of the individual, the principle of subjective freedom, which arose in an inward form in the Christian religion and in an external form in the Roman world, is denied its right in that merely substantial form of the actual spirit [in Plato's Republic].⁴⁴

The state is an organic totality, but it must also recognize the individual's right of self-determination.

So Hegel, within the context of the liberalism (or individualism) versus communitarian debate, encompasses both sides of the equation: what was at first considered a contradiction between individual rights (especially a right to self-determination) and the claims for the common good made by the state are resolved within ethical life. Ethical life preserves individual rights (as manifested primarily within the sphere of civil society) but is also that realm where the common good -- the conscious willing of a unity of rational beings -- becomes actual. Within ethical life, individuals

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Ibid., §185, 167; 223.

become citizens: they are conscious of and will the common life of the nation as their own rational end.

In so far as Dworkin has claimed that individuals identify with the community only on the basis of the community's political acts, he has incorporated one aspect of ethical life into his conception of community, namely, the state. But it is a conception of the relationship between individual and state which captures only one aspect of the ethical relationship. From Hegel's point of view, the acts with which Dworkin thinks we should identify (the official political acts of legislation, adjudication, enforcement, and other executive functions of government) are the acts of the organizing principle of the state. That is, Hegel makes a distinction between the "political state proper" and the state as a political and ethical whole.⁴⁵ For an individual to identify only with the political acts of the state, or the acts of government, is, first, to devalue the main importance of the state as an ethical entity, and, secondly, to depreciate as well the other necessary moments which comprise ethical life.

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See §267, 218; 288, where the political structures as a whole of the state are called the "organism of the state, the political state proper [Organismus des Staats, der eigentlich politische Staat]." On the lack of any extensive explication of this distinction see Z.A. Pelczynski, "The Hegelian Conception of the State," in Hegel's Political Philosophy: Problems and Perspectives, edited by Z.A. Pelczynski (Cambridge: Cambridge University Press, 1971), 13-14.

In the first case, the upshot of speaking of the relationship between the individual and the community solely in terms of the political acts of the community is the subversion of the self-determining character of liberty. As described in chapter 2, the unconditional freedom which provides normative validity rests on the claim that right, in order to be universal and unconditional, cannot be determined by anything other than itself. Right must be self-determined. At the same time, right must be self-determined; right must have an objective existence. Accordingly, in order to remain self-determined, right secures objectivity through the mutual interaction of wills, each of which recognizes the right of the other (and therefore each also has a duty to recognize the right of the other). By virtue of the fact that right is not grounded on anything other than itself, and has different normative spheres corresponding to the different modes of interaction between wills, we can speak of property rights, moral rights, family rights, civil (economic) rights, and political rights without grounding those rights on nature, the state of nature, natural differences, or convention. The various determinations of freedom, from abstract right to morality to ethical life, correspond to a different normative mode of interaction between wills and are justified solely in terms of the self-determination of the several wills. Each of the determinations of freedom in the various spheres led to an apparent contradiction, a contradiction which arose entirely

as a consequence of that mode of self-determination, and which was resolved by a further determination of freedom. The final determination of freedom (within objective spirit), ethical life, was itself divided into three moments, each of which in its turn was necessary. The highest moment of freedom within ethical life,⁴⁶ the state, is a distinct normative sphere which cannot be conflated with the subjective (economic) freedom associated with civil society, either in the form of a welfare state, a civil government, or any political order based on class interests. This is so because the freedom of civil society is not political freedom, nor do the institutions of civil society constitute a self-determining government. The state is that mode of interaction which has as its end the realization of self-rule and which integrates all of the various modes of interaction into a self-determined totality. In essence, Dworkin has made the state subservient to the economic interests of civil society (i.e., the subjective freedom of individuals to pursue their own plans), a subservience all the more pronounced given his theory of equality of resources. And this has the consequence of undermining the self-determining character of right. The state does not constitute a necessary and different normative sphere but exists in order to further the ends of individuals within civil society.

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See §258, 208; 275, where Hegel writes that it is in the state that "freedom enters into its highest right."

In the second case, on Hegel's view of the relationship between the individual and the state, it is impossible to take one aspect alone -- the acts of government -- and to accord those acts primacy without distorting the nature of the organism. While Dworkin attempts to account for a "strong" sense of community, and even goes so far as to speak in terms of a community having "its own life to lead,"⁴⁷ he has, from Hegel's organicist perspective, isolated and elevated only one moment of the totality of ethical life, the governmental acts of the state, neglecting the other moments and the way in which the totality of their interaction is the true ground of freedom.

This can also be seen if we take an analogy which Dworkin himself uses. In distinguishing between the life of the community and the life of the individual, Dworkin uses the analogy of an orchestra to explain his reasoning:

An orchestra has a collective life not because it is ontologically more fundamental than its members, but secure of their practices and attitudes. They recognize a personified unit of agency in which they no longer figure as individuals, but as components; the community's collective life consists in the activities they treat as constituting its collective life.⁴⁸

Dworkin grants that the orchestra differs from the individuals who comprise it:

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Dworkin, Liberal Community, 494.

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Ibid.

An integrated community has interests and concerns of its own -- its own life to lead. Integration and community are genuine phenomena, even on the practice view. But on that view they are created by and embedded in attitudes and practices, and do not precede them.⁴⁹

It does not make any sense, on Dworkin's view, to speak of the community as a sort of person with all the wants, desires, and goals of an individual. We can only speak of a community personified in the sense of an integration with the explicit collective acts of the members.

There are difficulties, however, in making an analogy between an orchestra and a community. First, to say that an orchestra is comprised of various individuals who play different instruments, and that these various practices constitute the orchestra, is to say very little. Secondly, individuals choose to join an orchestra; they do not choose to enter society. Individuals train in order that they might join an orchestra; no one trains to join a community. To be sure, individuals are educated in the ways of society, they are taught the conventions, traditions, and laws of society, but that is after they have already "entered" the community; or, more precisely, training in the customs of a community and entering the community are simultaneous events. The orchestra is an entity or an activity consciously created by human beings. No individual consciously decides to create a society; individuals may change society, or found a new

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Ibid.

political order, but this is always done in reference to another (or the same) community. To change a community is to say that the one which preceded it demands and merits changing.

Despite these objections (internal to the orchestral analogy itself), the more important point from Hegel's perspective is the inadequacy of the analogy itself. The relationship between the individual members of the orchestra and the orchestra taken as a whole does not apply to the relationship between an individual and society because of the complexity of institutions and social structures the concept of freedom demands along with the various determinations of freedom and their attendant normative modes of interaction within those spheres. It is of course true to say that individuals should identify with the political acts of the government; this is one essential moment within the overall articulation of freedom. But it is incorrect to claim that this is the only moment of identification, or the most important one. Those who emphasize only one aspect of the relationship, for example the priority of the individual -- as Dworkin does when he states that individual rights trump all other possible competing claims in matters of principle and that the individual is the final judge of what constitutes his or her own good -- do not consider pertinent the way in which individual freedom, whether taken as the freedom to own property, to decide what sort of life one wants to live, or to

participate in the affairs of the community, presupposes the existence of a separate political order which secures and protects property, regulates the market, and educates individuals in order that they may participate in acts of collective self-determination. This is not to de-emphasize the status of the individual, whether in the aspect of property owner or moral subject. We are social beings and require a social context in order to satisfy our needs, secure our rights, and develop, and we are also free individuals who possess rights and can freely choose the ways in which we are to gain satisfaction, a livelihood, etc. The relationship between the individual and society is more properly described as circular: each comes out of the other, so to speak, with neither one in the position to claim precedence:

The essence of the modern state is that the universal should be linked with the complete freedom of particularity [**Besonderheit**] and the well-being of individuals, and hence that the interest of the family and of civil society must become focused on the state; but the universality of the end cannot make further progress without the personal [**eigene**] knowledge and volition of the particular individual [**der Besonderheit**], who must retain their rights.⁵⁰

In conclusion, we can say that the limitations of Dworkin's view of freedom can be seen when compared to freedom as Hegel describes its development into ethical life. Dworkin does attempt to describe the way in which the community is important for the individual and the way in which the

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Hegel, Philosophy of Right, §260A, 283.

individual may correctly be said to identify with the community. But Hegel's description of the concept of freedom, its development from abstract right to morality to ethical life, encompasses all of the various constituent aspects of a community, the ways in which the individual identifies with the community, and the stages of the development of freedom, stressed in their singularity by Dworkin.

First, although Dworkin tries to account for personality in the auction by means of an insurance scheme (and in so doing obviate Sandel's criticism of Rawls' second principle of justice), he does not give us any detailed description of how a moral personality is formed. That matters, because without it we are left with the position that personality is important merely to define competence in the auction and not as an integral factor in the choices individuals would make.

Secondly, we noted that even if Dworkin were to supply us with an account of moral personality formation (and such an account could be supplied), personality so understood (as a natural given) can never be a constitutive aspect of right. This is so because of the necessity for the free will to be self-determining in order to provide a legitimate source of normative validity. In other words, so long as right is determined by something outside of itself, it will always be relative to that outside content. Any attempt to ground right in something other than itself (natural law, natural right, the social contract, the original position, the moral

structures imbedded in communication, et al.) will always commit this same foundational error.

Thirdly, there is an equivocation within Dworkin's work between what principles are adequate to ensure a communal bond among individuals. In the earlier Dworkin, it seems as if democratic procedure (whose principles are justice, fairness, due process, and integrity) was enough to ensure a fraternal bond among individuals. We questioned that claim. But in the later Dworkin, it appears as if it is the substantive outcome which promotes communal ties. On this more recent view, it is the abstract egalitarian principle of equal concern and respect, conceived of as an equality of resources, which creates and secures the bond between individual and individual.

Finally, using Dworkin's criticism of the "metaphysical" view of the community as a starting point, we noticed that he restricts the identification of the individual and the community to the purely political acts of the community. On this count, he rejects Hegel's organicist view of the community. While Hegel does of course include with the identity relationship of individual and community the political acts of the state, this only addresses one aspect of the individual's relationship to the state as well as to the totality of ethical life. The self-determining quality of freedom, for Hegel, demands not only the identification of the individual with the political acts of the state, but the other

moments of ethical life (the family, civil society, the state, and their interrelation), each of which are equally necessary, self-supporting, and required by the development of freedom in order for the individual to be free.

Dworkin on the Democratic Community

It might be useful to look at Dworkin's thoughts on democracy in order to clarify his conception of a political community, the relationship of the individual to the political community, and then see how Hegel might respond to Dworkin. In the essay Equality, Democracy, and Constitution: We The People In Court, Dworkin argues that his theory of liberalism allows for both a strong sense of community and the sanctity of individual liberty. Dworkin wants to situate his theory somewhere between an Hegelian viewpoint and what he calls a purely "statistical" conception of democracy. The latter sees democracy as a numbers' game, where the will of the majority should rule at all times, save for those instances where the democratic majority denies those liberties necessary for a democracy. For example, it would be contradictory for the majority to deny freedom of speech because freedom of speech is what makes a democracy possible. "Most think that the communal reading is at best a matter of Hegelian mystification, and at worst an invitation to totalitarian oppression justified on the ground that the state is more

important than the individual."⁵¹ Dworkin calls the Hegelian conception the "monolithic" view of democracy: the idea that the community is not only responsible for a collective action (rather than the individual in the case of a statistical conception) but also that the community is the unit of judgement. He returns to the orchestra analogy to explain his meaning:

Compare a good orchestra with a theocratic despotism. In the former, musicians are expected to develop and retain their own sense of musical achievement: their pride in what the orchestra has done is based on their own, self-consciously individual, judgments of musical merit. In a theocratic despotism, on the other hand, anyone who claimed an independent platform of conviction would be a revolutionary, even if his independent convictions endorsed the theocracy. Such a community judges itself.⁵²

(Again, the inapt orchestral metaphor: is it not the leader of the orchestra, the maestro, who decides whether an individual's performance is good or bad? It defies imagination that an orchestra could maintain itself if judgements about the interpretation of the music, and hence the performance of the orchestra, were left to the individual members. That is a recipe for cacophony, not music.)

Dworkin thinks the monolithic view wholly untenable, although he does not explicitly offer a reason. Presumably, he thinks that if we allowed for collective judgments, we

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Dworkin, "Equality, Democracy, and Constitution: We The People In Court," 330.

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Ibid., 336.

would be on the slope towards totalitarian oppression: the individual would be denied the right to form his own convictions; such convictions would be the purview of the collectivity and not the individual. (Though if this is his reason, it would neglect to describe how an individual's convictions are arrived at in the first place within a liberal society, a problem previously encountered in his assertion that personality must be accounted for in the auction.)

So, he wants to argue that we must understand our constitutional democracy in the communal sense but not in the monolithic sense: "collective responsibility and individual judgment."⁵³ There is an unrecognized irony here in that Dworkin claims primacy for individual judgement, a claim entirely characteristic and endorsed by American culture -- i.e., the primacy for individual judgement is confirmed by a collective verdict.⁵⁴

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Ibid., 337.

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Dworkin implicitly recognizes this point when he writes: "Again, at least in our culture, the normal or usual unit of judgement for all actions is the individual. It is necessary for my self-respect, I think, that I make my own judgements about what kind of life to lead and how to treat others and what counts as good or bad work at my job. I do not mean I must (or can) make these judgements wholly in private, with no consultation with or influence from other people or my culture as a whole, but rather that I must be satisfied that I am in the end acting on convictions I have formed myself and not just bowing to what others think right for me." Ibid., 336. Italics mine.

Besides the unintended irony of his claim, the notion that the individual should be the sole arbiter of what is right and wrong, that the individual's conscience determines, exclusively, what is good or bad, is reminiscent of the dynamic of conscience and the good as set out in the section on morality in the Philosophie des Rechts. In that section, the "moral" standpoint inevitably leads, according to Hegel, to a breakdown, a contradiction: the will which takes itself to be the sole arbiter of what is good cannot provide a criterion for why 'x' is good and 'y' bad. The fear is that at the heart of the moral point of view lies the darkness of evil. As Stephen Houlgate puts it:

For Hegel, in contrast to Kant, the profoundest danger facing the moral individual is not so much that he might be led astray by his selfish inclinations, but that his very commitment to will the good itself turns into evil at the moment he insists upon the sanctity of his own conscience.⁵⁵

The moral conscience does not recognize that the good must be something objectively realized, that it is not its criterion which is absolute but the criterion of an objectively realized social order. It must give up the claim to be the exclusive and sole judge on moral matters. Although Dworkin does recognize that it is not possible to make those judgments wholly by oneself, that others and one's own culture will influence one's convictions, he does not, ultimately, take the

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Stephen Houlgate, Freedom, Truth, and History (Oxford: Routledge Press, 1992), 99.

necessary, from Hegel's perspective, step of explaining how the limitation of the moral point of view is overcome by finding its expression in an objectively realized social order.

Hegel's views on democracy, as noted before, do not endear him to the defenders of the full, participatory democracy which western nations now endorse. His criticism of democracy rests on its atomistic tendencies:

The question which is most discussed is in what sense we are to understand the participation of private persons in state affairs. For it is as private persons that the members of bodies of estates are primarily to be taken, be they treated as mere individuals, or as representatives of a number of people or of the nation. The aggregate of private persons is often spoken of as the nation: but as such an aggregate it is vulgus, not populus: and in this direction it is the one sole aim of the state that the nation should not come to existence, to power and action, as such an aggregate.⁵⁶

From Hegel's perspective, the question is not whether the individual's conscience or judgement is sacrosanct, but how democracies disrupt, or do not allow for, the organization of the people into organized groups which would allow for the rational organization of the whole. If Dworkin's insistence on the inviolability of individual judgement is taken as prescriptive, it would exacerbate this problem; if descriptive, it portrays a state of affairs much as Hegel described. Furthermore, if the people are not educated and

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Hegel, Encyclopedia 3, ¶544, 341; 272-273.

organized within specific groups, the end result would be the eventual dissolution of the state, for

Such a condition of a nation is a condition of lawlessness, demoralization, brutishness: in it the nation would only be a shapeless, wild, blind force, like that of the stormy, elemental sea, which, however is not self-destructive, as the nation -- a spiritual element -- would be.⁵⁷

Hegel does allow for a limited form of democratic representation: the estates are to elect from their respective bodies representatives to both the lower and upper legislative chambers (though the upper chamber is hereditary, based on land ownership), and these legislative chambers have the responsibility of representing their member's interests and, more importantly, of educating their members on the universal concerns of the state. Hence this form of democratic representation serves the purpose of organizing individuals into a whole: it educates individuals such that they become aware of their unity with everyone else, and thus it negates the atomizing effects of modern society. And there is nothing in Dworkin's defense of the primacy of the individual which would ameliorate this condition.

At this point, we can also step back and ask in a general way about Dworkin's conception of freedom. Is that conception of freedom the same as Hegel's? From the discussion of their conceptions of liberty in the chapters 1 and 2, the answer to this is ambiguous. For the most part, in

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Ibid.

terms made famous by Isaiah Berlin, Dworkin defends a "negative" conception of liberty, while Hegel defends a "positive" conception. Like those concerned with negative freedom, Dworkin is concerned with the limitation of state power on the individual. Dworkin's interest lies in the justification of the coercive power of the state, the areas in which it can encroach on individual liberty, and the proper use of state power. In this respect, the analysis of Isaiah Berlin in "Two Concepts of Freedom" is pertinent, where Berlin shows how the notion of positive freedom became distorted (and ultimately led to tyranny), while for the most part negative liberty, although certainly not free from defects, is to be preferred.⁵⁸

On the other hand, we do find within Dworkin's conception of freedom certain resemblances to a broader notion of Kantian freedom, resemblances more hinted at than explicitly discussed. This can be seen, for instance, in the citations above (footnotes 16 & 52), and in general in his views on the primacy of the individual. Dworkin's conception of liberty includes an element of Kantian self-determination, the absolute primacy of the individual's moral will. This view of freedom manifests itself, in terms of what consequences follow from the absolute primacy of the

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Isaiah Berlin, "Two Concepts of Liberty," in Four Essays on Liberty (London: Oxford University Press, 1969), 118-172.

individual's moral will vis-a-vis the community, as we will see when discussing the neutrality of the state below.

Hegel, while also concerned with the justification of governmental power and the limits of governmental intervention, is, on the other hand, more interested in the variety of conditions which allow for the development of freedom: how individuals develop a free will, how interaction with, and recognition by others is necessary for the development and maturation of freedom, how the various spheres of human interaction support liberty, and what specific set of social and political institutions further that end. These are, for the most part, ancillary concerns for Dworkin. It is not that he thinks, for example, that the community and the ways in which the individual identifies with the community are unimportant. But they are interests which rely upon a prior conception of equality and liberty. And those latter concepts suppose that the state must show an equality of respect and concern for each of its citizens as well as allow individuals the right to decide for themselves what kind of life they are to lead. His concern over the individual's identification with the community comes within the context, and is limited by, the emphasis and priority he places on equality.

The Neutrality Thesis

In the second thrust of the communitarian critique, the argument centers around the consequences of the neutral state.

In remaining neutral towards individual conceptions of the good, and in allowing the individual to pursue whatever they think good (so long as it does not harm others), the state gives a priority to the individual: and that in itself lays the groundwork for the diminishment of individual liberties. The fear is that a state which does not promote some view of the good, which relies only upon the reason of the individual, itself becomes oppressive.

Dworkin counters this claim by saying that the argument for state neutrality towards a conception of a good does not undermine or preclude the state from advocating some good per se. That good is, of course, state neutrality -- or a "thin" conception of the good. We encountered this earlier, in a different context, when we noted an equivocation between communal ties being fostered by democratic procedural fairness in the earlier Dworkin, and the substantive outcomes determining the fraternal bonds in the later Dworkin.

Now, however, we are concerned with the criticism that state neutrality towards the good results in a diminishment of individual liberty. Hence the claim that state neutrality is not an absolute neutrality is not simply a semantic ploy:

Its [liberalism's] constitutive morality provides that human beings must be treated as equals by their government, not because there is no right and wrong in political morality, but because that is what is right. Liberalism does not rest on any special theory of personality, nor does it deny that most human beings will think that what is good for them is that they be active in society. Liberalism is not self-contradictory: the liberal conception of equality is a principle of political

organization that is required by justice, not a way of life for individuals.⁵⁹

If the good the state should advocate is neutrality about the good, certain practical consequences follow. For one, the state furthers equal concern and respect for its citizens only if it remains neutral towards the good; if the state determines what good or goods its citizens should pursue, it diminishes the dignity of the individual; it treats them paternalistically, and does not believe that as rational human agents they can decide for themselves what is good. This argument springs from Kant -- his formulation of the categorical imperative stating that humans are to be treated as ends and not merely as means -- and the value placed upon the dignity of human beings in so far as they possess reason. For Kant, the logical implication of the "humanity as an end" formulation of the categorical imperative is a society of rational beings, a "kingdom of ends" where individuals are joined by common duties and obligations -- i.e., where individuals exist under a "systematic union of rational beings through common objective laws."⁶⁰ Kant's common bond is

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Dworkin, Matter of Principle, 203. It is worth noting again that the tension between democratic procedural fairness and the substantive outcome of the procedure manifests itself here. In his later work, neutral procedures seem to be unsatisfactory and therefore he defends the necessity of substantive results in the form of equality of resources.

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Kant, Grundlegung zur Metaphysik der Sitten, Volume 4 of Kants gesammelte Schriften, 433. Foundations of the Metaphysics of Morals, 52.

grounded on the (universal) rationality of the individual agent, is an obligation demanded by reason, and is not predicated on the desire to allow each of us to decide for ourselves what the good is, or on need satisfaction. The kingdom of ends "is nothing short of a moral community (**ethische Gemeinschaft**) of freely self-legislating agents."⁶¹ (Here, we should note, Dworkin's conception of freedom approximates Kant's. Although he mentions Kant only once in Law's Empire, Dworkin's notion of integrity includes within it the communal implications of the categorical imperative: "a citizen," Dworkin writes, "cannot treat himself as the author of a collection of laws that are inconsistent in principle."⁶² We will return to the Kantian element in Dworkin's theory when we discuss equality of resources.)

Dworkin's other response concerns the fear of state power. If the state does not remain neutral towards the good, what would prevent the state from curtailing individual liberties for the sake of that good? It seems to those who advocate state neutrality a slippery slope from government advocacy of a good to fascism or totalitarianism.

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Steven B. Smith, "Defending Hegel from Kant," in Essays on Kant's Political Philosophy, edited by Howard Lloyd Williams (Chicago: The University of Chicago Press, 1992), 292.

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Dworkin, Law's Empire, 189. Dworkin's reference to Kant occurs earlier in the same paragraph, where he writes that "Kant and Rousseau based their conceptions of freedom on this ideal of self-legislation."

In Charles Taylor's terms, Dworkin is a liberal who advocates and defends a "procedural" liberalism.⁶³ Dworkin proceeds from the premise that the function of a society ought to be the facilitation of the desires of the individual members of the society, without discrimination -- i.e., by the institutionalization of a principle of equality. As we have seen, the principle of equality that Dworkin favors is an equality of resources (others, like Rawls, defend an equality of welfare; some defend an equality of opportunities, or results). The point here is not the principle of equality that one chooses to defend, but rather the view one takes of society and the individuals who comprise it and the institutional arrangements which will promote equal concern and respect. What does the argument for the neutrality of the state mean for Dworkin's claim that the law and morality are intimately connected?

Recall that Dworkin rejects both the conventionalist approach to the law (the view that says law is the past social conventions designated legal conventions) and the pragmatic conception (the law as that judicial decision best for the community, precedent or no precedent). In large part, he rejects them because they offer no explicit account of how moral principles constitute the law. Conventionalism and

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Charles Taylor, "Cross-Purposes: The Liberal-Communitarian Debate" in Liberalism and the Moral Life, edited by Nancy L. Rosenblum (Cambridge: Harvard University Press, 1989), 164-165.

pragmatism fail because, in the case of the former, if no right exists in past judicial decisions, the judge must pluck a moral criteria from somewhere outside the law; in the case of the latter, the pragmatist rejects the idea that he or she is bound by any past legal or political precedent and instead must make the law as he or she thinks fit. Both of these views argue against any inherent relationship between the law and morality. Against this, Dworkin argues instead for a view of the law as integrity. On this interpretation, the law is best understood as following from the moral principles of justice, fairness, and procedural due process. To be sure, both conventionalism and pragmatism can have a moral component; they both agree that the law could contain moral judgements. But law as integrity does not only allow for legal morality, as conventionalism and pragmatism do, it insists that the law be interpreted as moral in its very character. The law is determined, constituted by, the principles of justice, fairness, and procedural due process.

Can Dworkin consistently argue that the law has an essential connection to morality and yet advocate what is in effect, as John Gray has pointed out, the legal disestablishment of morality?⁶⁴ The neutrality thesis means nothing less than the privatization of all moral views, a view which was mentioned when we discussed the difference between

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John Gray, "The Virtues of Toleration," National Review, 5 October 1992, 30.

a monolithic conception of the community, which posits a collective unit of judgement, and an integrated conception, which leaves judgement up to the individual. Morality, in this context, consists in the private decisions of individuals and we have already discussed Hegel's criticisms of it. But the problem is also more than this. The moral principle of justice demands an equality of resources; this entails the common use of what is private; and this is a moral view the state should implement. At the same time, the principle of neutrality dictates that the state be neutral towards its members; state neutrality means no conception of the good be foisted on citizens; and this results in the sundering of legality from morality. If these two claims are not contradictory, there is at the least a tension between advocating a moral neutrality on the part of the state towards individual conceptions of the good and the execution of a distributional scheme (itself a particular conception of the good) on all individuals.

Furthermore, liberal democracies do, of course, have a conception of the good life beyond advocating neutrality: they cannot help but make judgements concerning what makes a citizen commendable, ignoble, worthy of honor, etc. Liberal democracies pass laws which punish those whose behavior does not comport with its view of what is good; liberal democracies confer benefits upon those who behave in accord with its conception of the good life. African-Americans, women, and

other minorities receive legal benefits through quotas, preferred hiring standards, etc.; smokers receive censure (through taxation, public information campaigns, etc.); polygamy is declared illegal. The state does decide what it considers morally good and it has no compunction about punishing or praising as behavior merits. We can in general say, then, that there is a question concerning the viability of those regimes whose conception of justice is procedural.⁶⁵

For example, in defending affirmative action programs, Dworkin argues that those programs do not violate the injunction of equal concern and respect, and hence the neutrality principle. Dworkin does not see affirmative action programs as bestowing (unequal) benefits upon one group or class of persons so much as he sees such programs as furthering a desirable social goal (an increase in the number of minorities in a given profession or school and, in the long term, a reduction of the degree in which America is a race conscious society) without prejudice to other groups. He thinks, for example, that one could have justifiably excluded Bakke from medical school, not on the basis of his race (Bakke was white), but for various other factors (low score on the admission test, age, the impression he made in his admission interview, etc.). The point is that the law did not treat

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Charles Taylor, in "Cross-Purposes: The Liberal-Communitarian Debate," 165-181, argues for the non-viability of procedural republics.

Bakke unfairly or prejudicially and that admitting an African-American, one who admittedly performed worse on the admission test, was not an instance of the laws showing an unequal concern and respect for one group of citizens.⁶⁶

Does Dworkin's justification of affirmative action programs serve as an argument that the state does not affect a stance towards its members about the good? Although Dworkin does justify quotas by arguing that they do not show an unequal concern and respect for the individual and group who are denied admission, the fact remains that they are denied admission. Dworkin never denies that the state is favoring certain groups; he just denies that this is a violation of equal concern and respect. In this way, his justification for affirmative action seeks to have it both ways: he wants to further the social goal of minority inclusion (and ultimately a less race conscious society) while at the same time denying that this is prejudicial towards the excluded group or individual. But this is not to argue that the state remains neutral in the matter; even if we accept Dworkin's claim that in not admitting Bakke the state showed no prejudice (no unequal concern and respect) towards him, it is true that the state favored the minority student it admitted. The state remains neutral vis-a-vis the one it excluded, not the one it

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For Dworkin's discussion of the Bakke case and affirmative action programs, see "Bakke's Case: Are Quotas Unfair?" and "What Did Bakke Really Decide?" in Matter of Principle.

included. We can put it in this odd way: the state favored one person or group even though it did not disfavor the other.

According to Dworkin, the difference between the liberal and the conservative lies in their belief in what the government ought to do in respect to its citizens. Liberals, in his view, are those who believe the government should remain neutral towards whatever conceptions of the good life its citizens choose to pursue. This is so because, first, there are many different competing visions of the good life, and the state has no criteria by which to recommend one over another. In choosing and enforcing one view of the good, the state necessarily excludes others, denigrates and marginalizes them, perhaps to the detriment of society. The other, more powerful argument, is that the state, in promoting a view of the good, treats its citizens with less than equal respect; citizens, on this view, would not be considered morally capable of determining for themselves what their good is, if the state decided, in effect, what is good for them. A state which promulgated a certain good would not only be acting paternalistically towards its members, but it would be denying them their human dignity. This is much the same argument against censorship or for freedom of expression that Dworkin has written about in a number of essays. If we are to treat human beings as rational and moral beings, then we cannot tell them what is good for them. This argument also springs from

Kant and his emphasis on the moral dignity of all rational beings.

But as we have seen, Dworkin's thesis that the government should practice a policy of neutrality, or, at the most, a thin conception of the good (i.e., neutrality as procedural fairness, which entails a defense of individual liberty and the rights associated with individual liberty), does not account for the fact that no government remains neutral towards its citizens, which Dworkin tacitly acknowledges when he advocates policies of affirmative action, though he of course defends those policies on the ground of equal concern and respect. This has the consequence of erasing the distinction between liberal and conservative, on Dworkin's terms. What would be the difference, in principle, between the two if they both believe that the state enforces some version of the good life (the conservative self-consciously and the liberal unaware)? We would then disagree over what the good life entails, but not that the state actually remains neutral towards the good. In that case, liberalism and conservatism would be a distinction based on specific policies and not one of principle.

Equality

Dworkin's Justification for Equality

Dworkin makes much of equality, and we have touched on some of the issues concerning that idea both in the first

chapter and at the beginning of this chapter when considering the relationship of the individual to society from Dworkin's and Hegel's perspective. Before commenting on the specific conception of equality which Dworkin endorses, it will be worthwhile to go back and look in more detail at the possible justification for thinking we should begin a political, moral, and legal theory with the foundation of equality. What justification does Dworkin give for taking equality to be the primary moral value that he does? Why should we take equality as the foundational principle? What reasons does Dworkin offer for beginning with that concept?

Scattered throughout Dworkin's writings, we find a repeated justification for accepting equality as our guiding moral and political ideal. We should begin with equality because most Americans believe in this ideal as a fundamental moral and political principle. They might believe this because the idea of equality is axiomatic, self-evident in the way that Euclid's axioms are self-evident and therefore does not admit of formal proof. The reason for beginning with equality, then, is that the idea of equality is a pervasive moral intuition, an intuition which seems to a large majority of us correct and which is pervasive in our political and legal institutions and practices.

Although he does not give a sustained and explicit argument about why it is we should accept equality as the guiding moral principle, the preceding reasons can be found,

though not in any systematic way, throughout his work. Dworkin does, however, offer a defense of equality in a very brief paper.⁶⁷ I will comment on this brief defense before considering the other possible justifications for beginning with equality and examining whether it is plausible from Hegel's perspective.

Individual Worth and Equality

In a five page section in the paper mentioned above, Dworkin gives a negative defense of the abstract egalitarian principle. That is, he rejects as implausible any alternatives to that position, and concludes that we must therefore accept it.⁶⁸ What are the alternatives and why must we reject them? Dworkin gives three. First, any justification for political action (or for non-action) assumes that it is important what happens in people's lives. In other words, the interests of individuals matter, and those interests matter equally. If we reject that view, we are saying that "it does not matter, from a political standpoint,

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"Comment on Narveson: In Defense of Equality," Social Philosophy and Policy 1, No. 1 (1983): 24-40. The section giving his answer as to why we should begin with equality runs from 31-35.

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Ibid., 32, where he states that "the best, perhaps the only, argument for the egalitarian principle lies in the implausibility of denying any of the components that make it up..."

how anyone's life goes."⁶⁹ Because the interests of individuals matter vis-a-vis political action or non-action, Dworkin will then claim that it follows that the government should treat each of those various interests as worthy of equal concern and respect. This is so because those interests are, from the point of view of the individual, not capable of being distinguished or ranked by any morally relevant criteria. Or, to put it positively, each individual thinks that their life has an intrinsic worth, and because each thinks that, there is no morally relevant way of distinguishing between the intrinsic worth of lives -- each must be considered as worthy of equal respect from the government's perspective.

Secondly, one might say that there are other things which matter as well and which might override the abstract egalitarian principle. For example, it might be claimed that culture matters, and if we redistribute resources according to the abstract egalitarian principle we are taking away from culture the resources necessary to sustain it. Dworkin's response to this possible alternative is to claim that the other considerations -- in this case, culture -- depend upon individual interests. The value of culture, and the reason why we should sustain it, is because of its contribution to individual interests. The same can be said of rights:

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Ibid., 33.

"Presumably people have rights because it matters how their lives go; and if this matters equally, any scheme of rights must be one which recognizes and respects this fact."⁷⁰

Finally, the third alternative is to argue that it matters how some persons' lives go more than others. Dworkin rejects this alternative on two grounds: one, no society has taken it with respect to its own members. (Even caste-based societies think that all lives matter equally, via re-incarnation, as do cultures which think a hierarchy a manifestation of God's will).⁷¹ Secondly, and more importantly, we cannot

...conceive how any of us could think that it matters more, from any kind of objective standpoint, how his life goes than anyone else's, if I am right in supposing that each of us thinks that the course of his own life has intrinsic importance.⁷²

Since each of us does think that our life has an intrinsic importance, there is no basis for saying that one life is more important than another. This is not a new or different objection but the application of the argument used to rebut the first alternative.

These, then, are the three possible alternatives to abstract equality and Dworkin's reasons for rejecting them.

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Ibid., 34.

⁷¹

Ibid., 35.

⁷²

Ibid.

In essence, the reason for accepting the abstract egalitarian principle rests on the foundation of individualism: each individual's interests matter to him and they matter in an intrinsic way. Intrinsic here means objective: we do not want our lives to go well because of some other interests that we happen to have, but rather it is

...the ground of at least a great many of those other interests. You think it really does matter how you lead your life, that it would be a shame for you to have a bad or wasted or inconsequential life, that this is something you cannot bring yourself to deny.⁷³

Because of this, there is no way in which we could differentiate between the competing claims of intrinsic worth (e.g., what sense would it make to say that my life has more intrinsic value than somebody else's? How could we measure intrinsic worth?). Therefore, we are to be treated as though our lives mattered equally. This can be put another way: Dworkin does not want to fall into the trap of relativism, and therefore wants to claim that individual lives have an objective value. And that objectivity comes from the intrinsic worth each life has.

But what does "intrinsic" signify here? What is the basis by which we judge our lives to have intrinsic value? Is it the success of the life? This is partly so: a life can be measured in terms of the success of that particular life's ambitions, goals, and plans. But we do not think this is the

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Ibid., 32-33.

whole (or the most important aspect) because a life which is not entirely successful, or successful in some things and not in others, still has intrinsic worth. This is because the intrinsic worth of the life depends not only on success (or a measure of success), but foremost on the ability to create and choose those ambitions, goals, and plans in the first place. We think our lives intrinsically valuable because we are, at the least, part authors of our lives. One would not think one's life intrinsically valuable if one were not able to determine the path and the outcome, at least to some extent, of one's life.⁷⁴ What Dworkin calls the intrinsic worth of a life, and upon which he makes the claim for the abstract egalitarian principle, is itself grounded upon the value of autonomy.⁷⁵ Without that measure of autonomy, it does not make sense to speak of a life having intrinsic worth, since no

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Although we are not here considering Hegel's possible rejoinder to Dworkin's position, it should be noted that for Hegel both aspects are necessary for what Dworkin calls an intrinsically valuable life: freedom consists both in the self-determination of the plan and goals of one's life as well as their actualization, the success in carrying out one's choices.

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I take this definition of autonomy from Raz, where an "autonomous person is part author of his own life. His life is, in part, of his own making." J. Raz, The Morality of Freedom (Oxford: Clarendon Press, 1986), 204.

individual who was not autonomous would think their life intrinsically valuable.⁷⁶

If the intrinsic worth of a life depends upon a prior determination of autonomy, autonomy itself depends upon an acceptable range of options within which one exercises that autonomous choice. As Joseph Raz has put it:

A person is autonomous only if he has a variety of acceptable options available to him to choose from, and his life became as it is through his choice of some of these options. A person who never had any significant choice, or was not aware of it, or never exercised choice in significant matters but simply drifted through life is not an autonomous person.⁷⁷

It follows from this that the cultural environment is a constitutive aspect of autonomy and not an instrumental one. Without that range of choices, autonomy would have no value in the first place. If that is the case, then it also makes sense to say that it is the kinds of lives that are available within a culture which give value to an autonomous life. Again, as Raz points out, one can only be a lawyer or a doctor in a society where the institutions which those professions

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It is certainly possible that autonomy itself is not a universal value. That is, there may be modes of human well-being which are not autonomous; autonomy may be a necessary ingredient for well-being only in modern societies (and perhaps not all modern societies) for example. But we can accept that point and the present objection still holds, since it is clear that for Dworkin -- and for American society -- autonomy is a necessary ingredient for an intrinsically valuable life.

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Raz, Morality of Freedom, 204.

presuppose, as well as the professions themselves, exist.⁷⁸ On this view, it is the activities, the forms of life, within a particular society which vouchsafe the possibility of individual autonomy. These forms of life are equiprimordial in import with individuality; what is equally of ultimate value is the choice of worthwhile options, the forms of choice-worthy life, which make possible the autonomy of individuals. The intrinsic worth of individual lives rests on autonomous choice, and that in turn depends upon a culture which has a variety of options, activities, and forms of life available for the individual.

According to this argument, the reasons that Dworkin gives for accepting the egalitarian principle -- that the alternatives are implausible -- fails. Each of the three alternatives is rejected for much the same reason: Dworkin takes as foundational something that cannot be an exclusive, primordial ground. First, individuals matter, but they are not of sole foundational importance in political morality. Of at least as great an importance are the social conditions which allow individuals to be autonomous. It follows from this that Dworkin's second rejected alternative should itself not be rejected. Other things do matter -- i.e., culture, ways or modes of life -- and they matter because they allow individuals to be autonomous in the first place. Again, the

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Ibid., 205.

third alternative does not fall to Dworkin's objection, and not because there is no way of distinguishing between the intrinsic value of individual lives, but because the individual is not the only determining criteria. This is not to say that individuals or their interests do not matter, only that the abstract egalitarian principle, which Dworkin justifies on the basis of individuality, cannot be the only ground of a political morality.

The objections noted to this defense of the abstract egalitarian position have a similarity to certain aspects of Hegel's philosophy, especially concerning the ways in which the normative validity of each sphere of right entails the mutual recognition of a plurality of wills. As we noted in the discussion in the first section of this chapter and in chapter 2, Hegel justifies each sphere of right by considering what the self-determination of freedom requires. While he started with what we might loosely call an "individualistic" position in abstract right, in the sense that we begin with the free will, Hegel argues that the determination of freedom in this sphere entailed the recognition of another will of the will's right to place itself into a thing. Therefore it is more precise to say that the determination of freedom in abstract right is one based not upon the individual, but upon

the interaction of two wills who recognize and respect each other's specific right.⁷⁹

This determination of freedom within abstract right led to an apparent contradiction, a contradiction which was resolved by sublating the position of abstract right into that of morality. The moral point of view could also loosely be characterized as "individualistic," although, again, it is not a determination of freedom, a normatively valid sphere, premised on a strictly monological relation: the will, whose freedom now consists in the autonomy of the subject, must also recognize and respect the autonomy of others. The standpoint of freedom considered as morality is also a reciprocal relation, a sphere of right which derives normative legitimacy from the intersubjective process of interaction between wills: throughout the section on morality, from purpose and responsibility, intention and welfare, and the good and conscience,

...moral subjects always stand in relation to one another through actions they have respectively intended. Without acting towards others they have not determined themselves

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As Richard Dien Winfield writes: "Free willing is not the action of a single will alone, but rather a self-determination by one will bound up with the self-determination of another. In order to will itself in a particular manner, the free will must engage in a reciprocal relation to other wills, a relation in which each determines itself as an individual by willing its relation to others in virtue of these others simultaneously willing their own particularization and having it voluntarily establish the same interrelationship." Freedom and Modernity, 99.

morally, whereas without intending what they do, their behavior has no morally accountable character.⁸⁰

The moral point of view, in its turn, underwent the same developmental process, where the apparent contradiction between the good and conscience was sublated into the determination of freedom in ethical life.

In ethical life, both the individual and the objective social structures are of equal importance; both serve as a foundation for the other and are equiprimordial. The lives of individuals do matter; their subjective freedom (to find satisfaction and fulfill their needs as they see fit, in work, in their overall life plans, etc.) must be acknowledged and protected by the state. On the other hand, the individual, through the various institutions within ethical life, will come to know that individual subjective freedom and property rights cannot be made actual unless concretized within social institutions.

Insofar as Dworkin claims that the individual, and the intrinsic value of individual life, is the only factor which matters in determining the state's behavior towards individuals, he has neglected other, equally foundational, aspects of the individual's relationship to the state. He has also undermined the normative validity of right, so long as he

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Ibid., 122. See also Philosophy of Right, §112 & A (104; 139-140), and §113 (105; 140), where Hegel says that action, as the moral expression of the will, "has an essential relation to the will of others."

takes the relationship of the individual and the state to be something external to the self-determination of freedom. If the reason for the state to treat each of its citizens as having equal worth is the fact that each life has an equal intrinsic value, the normative legitimacy of that relationship rests not on the basis of the mutual recognition of a plurality of wills, but on the basis of the state's capacity as a facilitator of individual interests. For Hegel, the state, through a variety of institutions, allows for political self-determination, a form of self-determination which cannot be found in civil society. For Dworkin, the normative legitimacy rests on a factor external to the structure of interaction arising from self-determination.

As noted above, Dworkin's most explicit defense of equality as the foundation of political morality is found in a short section in a short paper, devoted to a response to an article by another author, and not a systematic defense of the idea of equality. The reason for beginning with equality is not, in Dworkin's other writings, as clearly elucidated as it is in the above response. Rather, it has to be culled from within his various works.

Equality as an Accepted American Ideal

Dworkin often begins by noting the normative force of equality within (American) society and then developing his theory of equality of resources from that point. In this

sense, he is communitarian (and Hegelian): the common understandings of a particular, historical culture provide him with a starting point for deriving a moral principle. This is how Dworkin puts it in an earlier work, Taking Rights Seriously:

I presume that we all accept the following postulates of political morality. Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect.⁸¹

And this is how he puts it in the somewhat later work, A Matter of Principle:

I assume (as I said) that there is broad agreement within modern politics that the government must treat all its citizens with equal concern and respect. I do not mean to deny the great power of prejudice in, for example, American politics. But few citizens, and even fewer politicians, would now admit to political convictions that contradict the abstract principle of equal concern and respect.⁸²

The reason for starting with equality, for using equality to fashion an intertwined and coherent moral, legal, and political theory is tied to his interpretative claim that the best theory is one which portrays and accounts for existing practices in the best light. We discussed this idea in chapter 1, and the importance placed upon it by Dworkin.

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Dworkin, Taking Rights Seriously, 272-273.

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Dworkin, Matter of Principle, 191.

In the context of a legal theory, that interpretation is best which both fits the existing legal institutions and which places those practices in the best moral light. For this reason, he rejected conventionalism and pragmatism as legal theories: their interpretative framework neither fits with what lawyers and judges do nor do they portray the law in its best possible light. The reason then, for citing the (apparent) fact that Americans do now accept the idea of equality, is that it serves as a basis on which to determine whether an interpretative theory fits with the practice (the practice which, to a greater or lesser degree, the government now enacts in treating citizens with equal concern and respect).

Can the fact that most Americans share this intuition concerning equality serve as a justification for equality? In general, Dworkin holds that we must give reasons for our moral positions and theories. In Taking Rights Seriously, he denies that a moral position or claim can rest on "prejudiced views," on "emotional responses," on "reasons based on mistakes of fact," or on "parroting."⁸³ Moral positions must be justified by reasons and those reasons must be of a certain character.

Despite the need to offer reasons for our moral positions, ultimately the moral position one takes does rest

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Dworkin, Taking Rights Seriously, 252.

on what one believes to be 'self-evident,' and is capable of no further justification. Dworkin writes:

Yet there is an important difference between believing that one's position is self-evident and just not having a reason for one's position. The former presupposes a positive belief that no further reason is necessary, that the immorality of the act in question does not depend upon its social effects, or its effects on the character of the actor, or its prescription by a deity, or anything else, but follows from the nature of the act itself.⁸⁴

Although Dworkin is here referring to specific moral acts which one takes to be self-evidently immoral (or moral) and not of the abstract and general concept of equality, he does seem to appeal to the self-evident aspect of equality to justify his political theory. (The evidence for this is found in the citations given above, where he appeals to the fact that in America we all accept the idea of equal concern and respect as a guiding principle in political life.) Dworkin implicitly makes, in other words, a distinction between the ontological status of self-evident claims and the epistemological grounds of proof for that ontological status. It may well be that the specific acts to which Dworkin refers are immoral or moral in themselves -- but that cannot be the basis of justification for the ontological status of the claim.

From Hegel's perspective, this is an inadequate justification of a full theory of equality. It is to Dworkin's credit that he attempts to fashion from the law and

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Ibid.

in our legal practices a systematic and coherent moral theory (in this he is far superior to positivism and pragmatism). Nevertheless, he cannot give an adequate and coherent justification of what he takes to be the over-arching moral principle on the basis of what most Americans are likely to (or do) accept. From Hegel's point of view, such a justification would have to take into account the development of the concept of freedom itself, and proceed according to what that concept demands, as we saw when we examined the concept of freedom in the "Introduction" and the "Abstract Right" sections in the second chapter. It is certainly possible that Hegel's attempt to ground the universality of his own claim is flawed; it may well be that we can no longer speak of "the" concept of freedom or a telos of human history, and that the critiques of essentialism, rationalism, and Hegelianism are correct -- but that is not a reason for accepting Dworkin's justification.

Secondly, equal concern and respect cannot be justified by an appeal to most Americans' intuition concerning equality because: (1) Dworkin might be wrong about most Americans; the moral intuition which counts here, and which cannot be used to justify equality as understood as equal concern and respect, can just as easily be said to be Dworkin's, not most Americans'; and (2) an argument which appeals to what most Americans think proves at most only a fact of consciousness, and not that the consciousness is right. Hegel might accept

Dworkin's starting with equality if Dworkin had proved that it came from an essential aspect of the determination of right. But Dworkin does not show how our (American) understanding of equality is a necessary determination of right. Dworkin does not use the fact that most Americans believe in equal concern and respect to prove his argument, but rather to show how his theory fits with a practice already, whether incompletely or imperfectly, to a lesser or greater extent, performed by the government.

Indeed, Hegel criticizes precisely this sort of method in the "Introduction," where he states that it is not really philosophy when

Ideas in general, and hence also the Idea of right and its further determinations, are taken up and asserted in immediate fashion as facts of consciousness [**Tatsachen des Bewusstseins**], and our natural or intensified feelings, our own heart and enthusiasm, are made the source of right. If this is the most convenient method of all, it is also the least philosophical...the mode of immediate consciousness and feeling makes the subjectivity, contingency, and arbitrariness of knowledge into its principle.⁸⁵

As noted in chapter 2, the method of contrasting the concept of right with prevailing opinion only tells us whether the definition of right is in agreement with current opinion and does not give us a rational reconstruction of the necessary development of the concept of right itself.

Despite the problems with justification, there can be little doubt that Hegel would accept the abstract formulation

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Hegel, Philosophy of Right, §2, 21; 27-28.

that the government should treat citizens with equal concern and respect. The difficulty is in determining with specificity what this means. Two passages will illustrate this point, one taken from "Abstract Right," the other from "Ethical Life." In the context of a discussion of the justice of an equality of property, Hegel writes:

For while human beings are certainly equal, they are equal only as persons, that is, in relation to the source of their possessions. Accordingly, everyone ought to have property. If we therefore wish to speak of equality, it is this equality which we should consider.⁸⁶

In the section on "the Administration of Justice" within ethical life, Hegel claims that when we are educated (i.e., when thinking is "consciousness of the individual in the form of universality"), we understand that "I am apprehended as a universal person, in which [respect] all are identical. A human being counts as such because he is a human being, not because he is a Jew, Catholic, Protestant, German, Italian, etc."⁸⁷

As these two passages indicate, the abstract formulation of equal concern and respect is not the problem: taken in the abstract, persons are equal. On the one hand, in respect to their equal ownership of all property (the earth), all persons are the same; on the other hand, in relation to the law and the administration of the law, persons again are to be taken

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Ibid., §49A, 80-81.

⁸⁷

Ibid., §209R, 180; 220.

as equals. Difficulties arise when the attempt is made to transfer that conception of equality from the abstract to the concrete; indeed, in the concrete, abstract equality does not apply. In the first passage an equal amount of property for each is not justified because the amount each has is a particular determination and "particularity is the very condition to which inequality is appropriate and in which equality would be contrary to right."⁸⁸ In the second case, the attempt to rationally determine exactly how the universal is to be applied to the particular (what specific fines for certain crimes -- \$100?, \$101? -- for example) fails: reason "recognizes that contingency, contradiction, and semblance have their (albeit limited) sphere and right, and it does not attempt to reduce such contradictions to a just equivalence."⁸⁹

In general the problem does not concern the abstract formulation of equal concern and respect but the attempt to derive from this abstract formulation a substantive theory of equality (namely, equality of resources). The claim that equal concern and respect means an equality of resources will be considered when we examine Dworkin's theory of equality of resources. Before we do that, though, we should look at a claim related to the argument that equality is the accepted American political and moral ideal.

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Ibid., §49A, 81.

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Ibid., §2149R, 184-185; 245.

Equality as the Spirit of the Age

It might be thought that Dworkin's possible justification for beginning with equality could be appropriate on Hegelian grounds. Dworkin's justification comports with the Hegelian notion that each culture or people has its own specific spirit and has developed the idea of freedom in its own particular way. Dworkin's answer -- that American culture has embodied a conception of equality from its beginning, and that the idea of equality has animated American history -- makes practical good sense and presents the strongest argument for taking equality as the foundational principle of his moral and political/legal theory. On this count, Dworkin is doing, in a general way, what Hegel is doing -- that is, attempting to give an account of the principles and ideas which are inherent in our social, legal, and political practices.

Hegel could take Dworkin to be representative of the self-consciousness of a particular culture at a particular stage of development. As Hegel writes in the Vorlesungen über die Philosophie der Geschichte:

Thus it is with the Spirit (**Geist**) of a people: it is a Spirit having strictly defined characteristics, which erects itself unto an objective world, that exists and persists in a particular religious form of worship, customs, constitution, and political laws -- in the whole complex of its institutions -- in the events and transactions that make up its history.⁹⁰

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PH, 99; 74.

On this count, while acknowledging that the American acceptance of equality as a foundational principle, in the specific form that Dworkin insists (i.e., that the government treat its citizens with equal concern and respect) does not constitute a justification for equality, it does represent the spirit of this particular culture. America in the late 20th century is to be characterized as a nation which takes egalitarianism (at least in an abstract sense) as its animating principle. This abstract egalitarianism was present in our nation at its inception, suffered its greatest victory in the civil war, and now infuses the entire character of American life. Dworkin is valuable, from this Hegelian perspective, because he gives a comprehensive account of that animating principle, and how it can be put into practice, within American culture. We can learn from Dworkin how America defines itself and how that definition practically plays itself out in American society.

However, we should also note that there are problems in the attempt to characterize the American regime, throughout its history, as essentially a culture which has accepted and does accept an egalitarian principle. There are many, of course, who would argue that the animating principle of American society is not egalitarianism but liberty, and a liberty which precludes the kind of equality Dworkin writes about. How are we to determine which principle is the animating one? What is Dworkin's evidence that egalitarianism

constitutes the essential nature of American society? What proof could be given for this assertion? Furthermore, even if we accept that claim, it is certainly possible that some other interpretation of equality is the animating principle, and not Dworkin's.⁹¹ It would seem that there are considerable

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Dworkin relies most heavily on the 14th Amendment and its injunction that all citizens are entitled to "equal protection of the laws" to substantiate the claim that Americans do accept the principle of abstract egalitarianism. But why should we rely upon the 14th Amendment (which has surely been subject to many conflicting interpretations)? Since the 14th Amendment is a Civil War Amendment, why wouldn't he look to the founding of the United States, specifically the Declaration of Independence? Is it not odd that, in Law's Empire, he does not mention the Declaration once?

There are three possibilities why Dworkin does not appeal to the Declaration of Independence to buttress his claim concerning egalitarianism. (1) The Declaration does not have the force of law (although this did not prevent Lincoln from using that document to interpret the Constitution) and thus has no relevance when considering what interpretation we should give to equality. (2) The Declaration cannot now add to our understanding of equality -- not that it is irrelevant, but that our subsequent interpretations of equality have subsumed all prior interpretations contained in the Declaration. (3) The Declaration and the best interpretation of it would run counter to Dworkin's own understanding of equality and American acceptance of that interpretation.

The first possible explanation is ruled out on two grounds. By the dictates of Dworkin's own interpretative theory, he has to take it into account because what makes a theory good is that it be best consistent with past precedent, and the Declaration is one of the direct forbears of the 14th Amendment. Secondly, if we are considering the character of American society, we are not constrained by examining only laws. The Declaration pertains to how Americans understand their culture -- indeed, one would have thought it an obvious choice.

The second possibility must likewise be rejected, since (at least) two competing interpretations of equality are possible, and one of them is Dworkin's (which does not appeal to the Declaration), hence the idea of equality as presented in the Declaration cannot have yet been subsumed by all subsequent interpretations. Now, it is possible that Dworkin could incorporate the Declaration's view of equality into his

difficulties in determining the spirit of an age (which would apply to Hegel as well): the problem of evidence for one particular claim, as well as the standard to be used given divergent and incommensurable claims.⁹²

own theory; but since he has not yet done this, the objection stands.

Finally, the last possibility. Foremost among those who believed the Declaration gave expression to the foundational principles of America was Abraham Lincoln. Does Lincoln's understanding of the Declaration comport with Dworkin's view of equality? Judging from his response to the Dred Scott decision ("The Dred Scott Decision: Speech at Springfield Illinois, June 26, 1857," in Abraham Lincoln: His Speeches and Writings, edited by R. Basler, preface by C. Sandburg, Da Capo Press, Inc., 1946, 360-361) the answer would be no. For Lincoln's understanding of equality, see Harry Jaffe, Crisis of the House Divided (Chicago: University of Chicago Press, 1959), especially 320. See also George Anastaplo, Amendments to the Constitution: A Commentary (Baltimore: Johns Hopkins University Press, forthcoming 1995), chapter 12.

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Incommensurability among values poses another problem for Dworkin's theory. In short, the problem is this: the values which Dworkin defines, defends, and argues for (integrity, fairness, liberty, and especially equality), are ultimate values. They are objectively good, and not just within our particular society. However, as Isaiah Berlin has forcefully noted, "There are many objective ends, ultimate values, some incompatible with others, pursued by different societies at different times, or by different groups in the same society, by entire classes or churches or races, or by particular individuals within them, any one of which may find itself subject to conflicting claims of uncombinable, yet equally ultimate and objective, ends." "Alleged Relativism in Eighteenth-Century European Thought," in The Crooked Timber of Humanity: Chapters in the History of Ideas, edited by Henry Hardy (New York: Alfred A. Knopf, 1991), 79-80. Berlin's account of (objective) value pluralism destroys the notion, not limited to Dworkin, of the rationalistic claim that a set of values (or a single value) can be preferred over other values and against which other values can be judged deficient, wrong, or incoherent.

In a chapter entitled "Two Concepts of Liberty," in Isaiah Berlin: A Celebration, edited by Edna and Avishai Margalit (Chicago: University of Chicago Press, 1991), 100-109, commemorating Berlin's famous essay of the same name which

There is a second problem with Dworkin's response that we should take equality as the guiding principle of the

distinguished negative from positive liberty, Dworkin does note that this theme has been present throughout most of Berlin's writings, when he says that "he [Berlin] insists on the complexity of political value, and the fallacy of supposing that all the political virtues that are attractive in themselves can be realised in a single political structure." (101.) Although Dworkin recognizes here the Berlinian theme of value incommensurability, he does not take its lessons to heart, preferring instead to argue for a single correct, universal morality. His argument rests on the claim that "freedom of speech, conceived and protected as a fundamental negative liberty, is the core of the choice modern democracies have made." (107.) This follows from his reading of the consequences of Berlin's value incommensurability, namely, that "we must, as individuals and nations, choose among possible combinations of ideals a coherent, even though regrettably limited, set of these to define our own individual or national way of life." (107.) But the upshot of value commensurability does not result in the need for a single moral theory which delineates once and for all a set of rights (or values); indeed, it is Berlin's argument that there is no rational way, no mode of philosophic argumentation, no moral theory which would allow us to chose between two incommensurable values. At most, it argues for a political solution to the clash of incommensurable values, the creation of a sphere where incommensurable values can peacefully co-exist. Dworkin implicitly acknowledges this when he argues that the attempt to defend the censorship of pornography on the grounds that it silences women (i.e., makes them unequal) assimilates the idea of physically drowning out their voices with the bad consequences pornographic speech might have. This assimilation "obscures the true political choice that must be made" (109) between competing values. But if it is a political choice that must be made, there is nothing necessary about grounding that decision in a definitive moral theory, or in specifying a set of liberties which cannot be altered politically.

Finally, we should note that Hegel would almost certainly not endorse value incommensurability of the Berlinian type. It is true that, throughout history, values conflict, and are in themselves incommensurable. Therefore, in Antigone, we have a conflict between the laws prescribed by the gods and the laws of the polis (or Creon). But their incommensurability leads either to a resolution and a new determination of the social/political order within that society or the conflict leads to a new stage in world history.

American polity, and that is the scope of Dworkin's endeavor. The response might -- save for the problems in ascertaining in truth that it is Dworkian equality animating our regime -- be satisfactory if that comprised the limit of Dworkin's project. Unfortunately, his philosophic aims are more hubristic. Unlike Rawls, who, since A Theory of Justice has scaled back the applicability of his theory of justice (it now applies, apparently, only to Western democracies),⁹³ Dworkin's theory of equality pretends (as most liberal theories do)⁹⁴ to universality: that is, it has a normative force that is not historically or culture restricted. While Rawls has moved to a more historicist and culture-dependent view of political justice, Dworkin still claims for the abstract egalitarian

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See John Rawls, Political Liberalism (New York: Columbia University Press, 1993), Lecture II, § 6, 79, where Rawls says that "We have yet to say why the original position is regarded as fair. Here we appeal to the fundamental idea of equality as found in the public political culture of a democratic society just as we did with the three ways in which citizens regard themselves as free persons." And this: "In particular, it [a political conception of justice] applies to what I shall call the 'basic structure' of society, which for our present purposes I take to be a modern constitutional democracy." Lecture I, § 2, 11. Not only does Rawls repudiate the universalism of his earlier work (which Dworkin still clings to), namely, the conviction that his liberal theory of justice is a comprehensive world view and account of the human good, but he also implicitly offers a justification for equality which is in agreement with the Hegelian point that particular cultures evince a certain spirit. The question still remains open, as it does with Dworkin, as to whether our particular culture can be characterized in this way.

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On this point, see John Gray's Liberalism (Minneapolis: University of Minnesota Press, 1986).

principle universal applicability. While claiming that his theory best fits our practices might be true, it fails as an explanation because, on Dworkin's own premises, he thinks it not normatively bound to a particular set of institutions or political framework.

We should note that Dworkin does not explicitly claim universal applicability for his theory of equality; and he does discuss it, above all in Law's Empire, in terms of the context of American and British society. But neither does he deny its universality. For the claim that it is indeed a universally normative theory, we can offer two arguments. First, the argument put forward in his monograph A Bill of Rights for Britain, while not explicitly advocating the universal applicability of his theory, does suggest that the historical traditions of a nation do not preclude the employment of his theory. In that work, Dworkin argues that despite the centuries old common law tradition within Great Britain, Great Britain should nevertheless institute a bill of rights which constitutionally fixes a set of liberties.⁹⁵

Secondly, in an essay written in response to a series of articles on his jurisprudential theory, Dworkin says the following concerning the legal theory of positivism:

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A Bill of Rights for Britain (London: Chatto & Windus, Ltd, 1990). Dworkin argues in this work that the infringement upon rights by the government of Great Britain (i.e., the Tory government led by Margaret Thatcher) necessitates an explicitly legal remedy, the safeguarding of individual rights by constitutional means.

I concentrate on the details of a particular legal system with which I am familiar, not simply to show that positivism provides a poor account of that system, but to show that positivism provides a poor conception of the concept of a legal right...This conception [Dworkin's theory] makes the institutional practice and history of each jurisdiction relevant to the truth of propositions about legal rights, though not necessarily decisive.⁹⁶

While acknowledging that the history, customs, and inherited social practices of a community must have a bearing on the "truth of propositions about legal rights," rights are not dependent on, gain their "truth" from, those specific cultures and practices. That is an effect of the universalizing character of rights -- it would be strange to say that someone who has a right to privacy in New York, for example, does not have that right in Florida. Again, there is nothing to argue against the claim that his theory is not of universal range. On the contrary, the historical and cultural practices of a society are not in the end decisive for the truth of a moral/legal theory. This can be seen as well in his review of Walzer's Spheres of Justice, where he accuses Walzer's attempt to define justice in terms of the different social spheres with their sphere specific rules and moral practices as relativistic. In that review Dworkin implicitly argues for a universal conception of justice and equality (namely, his theory of equality):

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"A Reply by Ronald Dworkin," in Ronald Dworkin and Contemporary Jurisprudence (Totowa, New Jersey: Rowman & Allanheld, 1984), 252.

If justice is only a matter of following shared understandings, then how can the parties be debating about justice when there is no shared understanding? In that situation no solution can possibly be just, on Walzer's relativistic account, and politics can be only a selfish struggle...In the end, however, political theory can make no contribution to how we govern ourselves except by struggling, against all the impulses that drag us back into our own culture, toward generality and some reflective basis for deciding which of our traditional distinctions and discriminations are genuine and which spurious, which contribute to the flourishing of the ideals we want, after reflection, to embrace and which serve only to protect us from the personal costs of that demanding process.⁹⁷

The reason for claiming universality for a moral or political theory is clear enough: without universality, without the claim that the legitimacy of normative principles does not rest on convention or nature, we succumb to some version of relativism, where the validity of the normative principle is placed in question precisely because it is grounded on competing claims of right. So it would be odd for Dworkin to not claim universality for his moral and political theory (and jurisprudential theory as well, as far as the law relies on morality).⁹⁸

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"To Each His Own," New York Review of Books, 14 April 1983, 4 & 5.

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In 1982, Dworkin responded to being labelled a "natural lawyer" in the essay "'Natural' Law Revisited." (University of Florida Law Review 34, No. 2 (Winter 1982): 165-188.) In that article, what he means by natural law is this: "Natural law insists that what the law is depends in some way upon what the law should be...If the crude description of natural law I just gave is correct, that any theory which makes the content of the law sometimes depend on the correct answer to some moral question is a natural law theory, then I am guilty of natural law." (165.) Dworkin is,

Hegel, too, of course, has a universal theory of **recht**. However, the universality of Hegel's theory comes not from some outside source, as Dworkin's does (either by default, by recourse to an accepted American ideal, etc.), but rather from the self-determining character of freedom. In this, Hegel differs from Dworkin on his account of how the concept of freedom has necessarily manifested itself in particular cultures in particular ways in history, a manifestation determined by the development of the concept of freedom itself. Hegel's universality derives from the self-determination of the concept of freedom, the severity with which he does not allow for any external contamination; for if there were, freedom would not be freedom, but a structure, norm, or moral principle determined by something outside of itself. For this reason, the attempt to create a universal (liberal) theory which determines and fixes once and for all, at least in principle, the liberties (and, in Dworkin's case, the equalities) applicable to human beings everywhere, without attempting to derive those principles from the essential development of the concept of right, cannot possibly have a

in this article, not concerned, as he explicitly states (ibid.), with the historical correctness of this definition of natural law. Nevertheless, natural law means a great deal more than this, although it would have no objection to what Dworkin has written. For our purposes, it is enough to note that Dworkin does not here address the claim that if right is determined by something outside of itself, including nature or the laws of nature, it can have no universal normative validity. So, while Dworkin does ascribe to a natural law theory, it is not yet clear whether his version of natural law would succumb to that objection.

universal and unconditional normative validity. This is not to say that Hegel advocates some sort of cultural relativism concerning the idea of freedom. He does not. What matters is the concept of right and what is entailed necessarily in its development. Although Hegel can claim that Dworkin's theory elucidates the spirit of the age, Dworkin cannot make the same claim without renouncing the hubristic scope of his project or by making the same sort of move that Hegel makes.

We might also say, in comparing Dworkin with Hegel, that it is no more objectionable for Dworkin to presuppose equality than it is for Hegel to presuppose freedom. As noted before, Hegel explicitly presupposes the idea of freedom in the Philosophie des Rechts. The difference, again, is this: Hegel does attempt to prove, give a justification for, the idea of freedom in the Enzyklopädie. Whereas Dworkin does not try to justify the idea of equality (or even attempt to justify that it is the animating American principle), Hegel does, and in this respect provides a more solid foundation for his philosophic edifice.

Although this might not provide comfort if we seek a more certain foundation for equality, it does not mean that we should reject Dworkin's conception of equality or that it has been shown to be substantively deficient. It is to a consideration of the substantive argument for equality, its own internal coherence and Hegel's possible criticisms of that conception that we will now turn.

The Substantive Argument for Equality: Hegel's Response to Equal Concern and Respect & Equality of Resources

The preceding would be the initial reservations and comments Hegel might have about Dworkin starting with the concept of equality. We now have to look at that specific conception of equality and what reasons and arguments Dworkin gives as to why we should accept equality, as equality of resources, as a political and moral value, and what Hegel would say about that argument.

To summarize: equality in its broadest sense means, for Dworkin, "equal respect and concern." That formulation is given substance and specificity when Dworkin argues that it means an equality of resources. From the rather bland and abstract injunction that the government must show an equal concern and respect for its citizens, Dworkin wants to claim that it therefore follows that a redistribution of resources is required, such that there will be an equality of resources. This can also be put in the negative: equality does not mean equality of welfare or equality of treatment because those two conceptions of equality rest on a prior determination of persons as equals. To say that human beings are equal as human beings does not commit one to treat them equally or to supply them with an equality of welfare, even if we could

determine with any precision a way to measure welfare, well-being, or happiness.⁹⁹ On the contrary: to treat human beings

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A well-known objection to a political theory based upon utilitarian principles is the claim of incomparability. On this view, the utilitarian has no way of comparing and coming to an objective decision concerning competing claims of happiness and therefore no determinate way of deciding which governmental policy or action should be pursued. This is true of competing claims of happiness between individuals as well as different conceptions of happiness within an individual's life. By what measure are we to say that the happiness of one is lesser than, equal to, or greater than the happiness of another and hence what political policy should be implemented? Or, within an individual, how are we to determine one particular happiness in an individual's life compared with another? Mill's "competent judges" hardly provides an answer, for even if we grant the distinction between higher pleasures and lower pleasures, judgements within the higher pleasures would still have to be measured. Furthermore, how are trade offs between the higher pleasures and the lower pleasures to be decided? Dworkin's abstract egalitarian principle is subject to the same problem; indeed, any political/moral philosophy which attempts to set out a rubric for meting out justice, or attempts to determine once and for all a specific set of liberties, such as Rawls' or Dworkin's theories, will encounter the problem of indeterminacy.

For example, Dworkin's abstract egalitarian principle is indeterminate in at least two ways. First, the principle cannot tell us what the content of equality is with the kind of precision Dworkin demands from the principle. Even if we grant that the government should treat us with equal concern and respect, and this means that each individual should have an equality of resources, how are we to determine competing claims about the same resource? Even in Dworkin's hypothetical auction (which has no bearing on the way resources would be distributed in the real world), competing claims about the same resources would occur. This is so because certain resources are either scarce, unique, or non-reproducible. In that auction, we are to bid on resources, taking into account the opportunity costs to others. But surely it is possible that two individuals would desire the same limited resource? Or a "one of a kind" resource. There is nothing in the abstract egalitarian principle that can possibly determine who is to receive a resource of this type or how the resource should be split (if the auctioneers even agreed to such a division).

Secondly, not only will there be competing claims over the same resource which the theory has no way of deciding, but

as equals means that in certain situations we would have to treat persons unequally (e.g., the sick would receive medicine first or historically discriminated-against minorities would receive preference for employment). As he puts it:

If I have two children, and one is dying from a disease that is making the other uncomfortable, I do not show equal concern if I flip a coin to decide which should have the remaining dose of a drug. This example shows that the right to treatment as an equal is fundamental, and the right to equal treatment, derivative. In some circumstances the right as an equal will entail a right to equal treatment, but not, by any means, in all circumstances.¹⁰⁰

In order to determine how an equality of resources could be achieved, Dworkin devised an auction which would ensure that all the members of society would receive an equal amount of resources, based on what resources each was willing to bid for given a set and equal amount at the beginning. We have examined this auction and market and noted its important features. We now have to look at Hegel's conception of equality, and what Hegel might say about Dworkian equality.

there will be competing claims between different specifications of the equality principle. For example, the liberties which Dworkin thinks flow from his abstract egalitarian principle, such as the liberty of expression and the freedom of privacy, are often in conflict. How can the egalitarian principle adjudicate between these conflicting claims? There is nothing which equality can say about the conflict of the liberties.

This point about indeterminacy, in the context of a discussion of John Rawls' work and Rawls' attempt to specify a basic set of freedoms, comes from John Gray's essay "Mill's and Other Liberalisms," in Liberalisms: Essays in Political Philosophy (London & New York: Routledge, 1991), 217-238.

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To cull any sort of comprehensive account of equality from Hegel's writings is difficult, despite the systematic nature of his work. Hegel does not specifically discuss equality as such in the Philosophie des Rechts; the concept itself is mentioned very few times and then mostly in the context of a discussion of matters not directly pertaining to equality. He does devote several pages to equality in ¶539 of the Enzyklopädie, but even here the discussion centers around the concepts of liberty and equality taken together and his criticism of those terms taken in the abstract. The reason for so little extended discussion of equality, of course, is that his preoccupation centers around freedom, and with the various determinations and meanings of that concept. One will search in vain for an extended deliberation on the development of equality either in Hegel's own works or in commentaries about him.

However, despite a lack of extended analysis on the subject, equality does have a place in Hegel's political and moral thought. As he puts it in the previously mentioned section of the Enzyklopädie:

Liberty and equality are indeed the foundation of the state, but as the most abstract also the most superficial, and for that very reason naturally the most familiar.¹⁰¹

Some commentators have not been prevented from ascribing a substantial place for equality in Hegel's thought, or, even

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Hegel, Encyclopedia 3, ¶539, 332; 265.

more, a strong egalitarian strand running throughout his work.¹⁰²

Hegel on Equal Concern and Respect

In its most abstract formulation, the injunction that the state should show its citizens equal concern and respect does not seem terribly controversial, and it hardly likely that Hegel would object to it. There is no doubt that the state must protect certain individual rights; as a citizen, the individual "gains protection for his person and property, consideration for his particular welfare, satisfaction of his substantial essence, and the consciousness and self-awareness of being a member of the whole."¹⁰³ There is no reason to think that this would not apply equally to every member of the state.

However, its deficiencies as a principle reside in the fact that it is abstract. For example, when Hegel writes in the Enzyklopädie "that the citizens are equal before the law

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Steven Smith, for example, writes: "It is Christianity, according to Hegel, that for the first time introduces the idea of universal recognition. The archaic struggle for prestige culminated in a world rigidly divided into masters and slaves, superiors and inferiors; it knew nothing of the universal and fundamental equality of mankind as such...Hegel saw in it [Christianity]...a powerful movement towards egalitarianism and freedom. "Hegel and the Problem of Slavery," Cardozo Law Review 13, No. 5 (March, 1992): 1800.

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Hegel, Philosophy of Right, §261R, 217; 285.

contains a great truth..., "¹⁰⁴ he immediately qualifies the statement by noting that such a phrase is a tautology. It is an abstract expression which simply says that the rule of law means equal application and that laws are designed to cover, account for, and mitigate inequalities (e.g., in skill, physical strength, property, talent, etc.) found outside of the law. But it remains an indeterminate injunction which tell us little, if anything, of substance.

There is further evidence in the Philosophie des Rechts that the perspective assumed by Dworkin concerning equal concern and respect rests on a mistaken view concerning the relationship between the individual and society, and would not for that reason fit within Hegel's overall conception of the relationship between the individual and society. In other words, even if we grant that the indeterminate principle of equal concern and respect is compatible with Hegel's theory of freedom, it is not absolutely or always the case. This is because that abstract principle rests on a mistaken view of the relationship between individual and society. In his discussion of the state, Hegel writes:

If the state is confused with civil society and its determination is equated with the security and protection of property and personal freedom, the interest of individuals [der Einzelnen] as such becomes the ultimate end for which they are united; it also follows from this that membership of the state is an optional matter. -- But

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Hegel, Encyclopedia 3, ¶539, 333; 266.

the relationship of the state to the individual [Individuum] is of quite a different kind.¹⁰⁵

Since the state, for Hegel, comprises an entirely different ethical determination of freedom (is not synonymous with civil society), the relationship between the individual and the state is not one where the individual's interest as such is the ultimate end. That is the view point of liberal thinkers like Locke, who makes no distinction between civil and political society, and who are therefore concerned only with the limit and justification of state/governmental authority. It is not that the satisfaction of the desires of the citizens, their well-being or happiness, is unimportant, for Hegel, to the state -- quite the contrary, as the above quotation shows. The state should regulate and secure those institutions and relations in civil society in order that personal interests find satisfaction. But this does not constitute the state's ethical determination. What makes the state a separate ethical realm, and a necessary one, is both the demand for a unity of the various particular interests found within civil society as well as the need for a form of self-determination which is not economic. That normative mode of interaction is political self-determination; it is not economic, or the mode of the interaction appropriate to need satisfaction, but it does arise out of the economic sphere. And this would seem to suggest, at least in principle, that

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Hegel, Philosophy of Right, §258R, 208; 276.

the state could treat some individuals or classes of individuals with something less than (or something more than) an equal concern and respect, depending upon the particular circumstances at that particular time. Hegel's point, however, is that if we take the grounding and legitimation of society to be the safeguarding of the property and personal freedom of individuals, then we have made the individual's relationship to society contingent, based on the desires of the individual. On this view, the state exists only so long as it protects property and secures personal freedom. But this only expresses one aspect of the relationship between the state and civil society. The state does secure property and personal freedom, but it also serves as the condition for the possibility of property and personal liberty. The dynamic between the two is such that there is an identification between communal life and individual life and therefore neither side can be elevated over the other.

Despite the fact that Hegel has a different conception from Dworkin of the relationship between the individual and the state, the injunction that the state treat its citizens with equal concern and respect seems harmless and uncontroversial. How does Dworkin's argument that the abstract egalitarian principle means, when specifically determined, an equality of resources jibe with Hegel's analysis of freedom?

Hegel on Equality of Resources

Does Hegel's account of freedom entail or imply any systematic conception of equality as equality of resources? As we said above, the injunction that the state treat its citizens with equal concern and respect would not, taken in that abstract way, and therefore because of its superficiality, be something that Hegel would reject. But what about Dworkin's further claim, that equal concern and respect means, when interpreted correctly, an equal distribution of resources? Can Hegel's theory of freedom be interpreted to mean an equality of resources?

Dworkin's theory of equality of resources shares features with the perspectives found in Hegel's analysis of freedom in all three spheres analyzed in the Philosophie des Rechts, though not as immanently developed from the concept of freedom itself. Let us examine the idea of equality of resources from each of those three points of view.

What would it mean, for Hegel, to allow the state to redistribute property (or wealth) on the scale and in the manner which Dworkin's redistribution of resources demands? Recall that the concept and justification of private property undergoes a transformation from abstract right to morality to ethical life. From the essentially negative determination within abstract right, where property serves as the embodiment of one's free will (and hence the negative injunction not to infringe on another's right to place his will in property), to

its positive determination in morality, where property is the means whereby the subjective freedom of the individual is fulfilled (i.e., property is the expression, as it were, of the individual's subjective intentions, the realization of the individual's intentions via action, and is, as well, a freedom which must take into account the moral freedom of other individuals), property within ethical life is transformed into a communal resource which serves, on the one hand, the satisfaction of needs within the complex matrix of civil society, and, on the other hand, as a resource which the state may regulate to secure and promote the common good. What ramifications does the development of freedom through each successive phase have for Dworkin's theory of equality of resources?

In the analysis of freedom in the abstract right section, abstract right was seen as the logically first, and minimally necessary articulation of the concept of freedom. In abstract right, the individual (the "person") has a right to possess private property, the right to alienate that property, and the right to have that right acknowledged by others.

If a redistribution of resources occurred such that property into which my will had been placed was taken from me without my consent, the principle of freedom associated with the sphere of abstract right would be violated. In Dworkin's hypothetical example of the auction, this would not constitute

a problem because presumably everyone would agree to that method of distributing resources.¹⁰⁶

Dworkin detours the problem of consent much as Rawls does, though without explicitly stating it: presumably, any rational being would agree to the auction as a just way of distributing resources, or, more abstractly, as the best interpretation of the injunction of equal concern and respect. Rawls, of course, explicitly excludes from the original position any knowledge of the talents, desires, or place in society an individual occupies; it is therefore easier to see why we would be inclined to agree on the two principles of justice Rawls deduces from the original position. Dworkin rejects the original position as misconceived and allows individuals, in the auction, knowledge of their circumstances, capacities, and preferences.¹⁰⁷

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We should note that Dworkin simply assumes private ownership without offering a justification for it: "I shall assume, for this purpose, that equality of resources is a matter of equality in whatever resources are owned privately by individuals...In the present essay, however, I shall for the most part assume that the general dimensions of ownership are sufficiently well understood so that the question of what pattern of private ownership constitutes an equal division of private resources can be discussed independently of these complications." Dworkin, Equality of Resources, 283-284. Unlike Hegel, Dworkin does not attempt to derive the justification for private property from the self-determination of the will.

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See *Ibid.*, 345, where Dworkin states that the idea of starting with the original position "is misconceived, because some theory of equality, like equality of resources, is necessary to explain why the original position is a useful device -- or one among a number of useful devices -- for

In the real world, of course, it is safe to say that an agreement as described by Dworkin remains outside the realm of the possible. Even if we take the auction as an ideal standard -- "a fully developed description of an equal auction, adequate for a more complex society, might provide a standard for judging actual institutions and distributions in the real world,"¹⁰⁸ resources would have to be taken from the individual without or against the individual's consent, if we were to determine that the distributions in the real world did not measure up to the ideal. We could say that the auction does serve only as a guide, but if we are not actually going to redistribute resources in accordance with the auction, but merely point out that our present distribution of resources is unequal (but because unequal, unjust, and because unjust, subject to redistribution?), the auction seems a rather impotent device.¹⁰⁹

considering what justice is."

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Ibid., 291.

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Dworkin gives three reasons for devising the device of an auction. The idea of the auction could be used as a "test of the theoretical standing and power of the political ideal [equality of resources]." It could also provide a standard for judging, as noted above, institutions and distributions in the real world. Thirdly, the auction "might be useful in the design of actual political institutions," although perhaps only under limited circumstances. Ibid., 291. The last two reasons for devising the auction clearly suggest that Dworkin has more on his mind than a purely theoretical exercise. And if the auction is to have a practical component, it seems likely that not everyone would agree to such a redistribution.

Since Dworkin does allow, as Rawls does not, the individuals in the hypothetical auction knowledge of the specific characteristics they possess, it is not true to say that Dworkin's position can be subsumed under the normativity operative within abstract right alone. Indeed, Dworkin sees the auction as a process whereby the interests of others must be taken into account:

Equality of Resources...[is] a process of coordinated decisions in which people who take responsibility for their own ambitions and projects, and who accept, as part of that responsibility, that they belong to a community of equal concern, are able to identify the true costs of their own plans to other people, and so design and redesign these plans so as to use only their fair share of resources in principle available to all.¹¹⁰

Dworkin's auction attempts to reconcile the resources needed for the fulfillment of the life plans of the individual consonant with the fulfillment of the life plans of others. The auction allows for each individual (because they are aware of their specific circumstances, talents, and proclivities) to satisfy their goals, consonant with every other individual having the resources to achieve their goals. Put in this general way, Dworkin's theory of equality of resources would not seem to be very Kantian (or at least not accord with Hegel's interpretation of Kant). It would, rather, seem to embody a form of the classic view of negative liberty, where each individual should be allowed to pursue whatever ends they

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Dworkin, Place of Liberty, 3.

desire (consonant with everyone else having the same right).¹¹¹ However, if we look, first, at the morality section in the most general way, and then at several specific features of the auction, we can see that equality of resources does comport with certain features not only of morality in general but of Kant's moral position.

Private property, of course, is not the exact same thing as resources in general, and Dworkin might object that we are conflating two different things. Indeed, as discussed later in this section, resources in the auction must be taken as abstractly as possible, and this in itself might argue against conflating resources with private property (perhaps wealth, as

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I refer to this as the classical view of negative liberty, rather than associating it with any one particular author, on the grounds that it is contestable whether any single author espoused a "classical view of negative liberty." So, for example, while Isaiah Berlin thinks Mill primarily an exponent of negative liberty, he also notes that Mill's conception of freedom in On Liberty derives as much from Humboldt, and a concern with the autonomy of the agent, as it does with the limits of political authority. The same can be said of Locke, who, while concerned with the boundaries of authority, also saw liberty as the submission to a rational law. I take this point from John Gray's Liberalisms, 62-63. Rather, I follow Isaiah Berlin's general characterization of the classical view of negative liberty as something like the non-restriction of options available to an individual: "The extent of my freedom seems to depend on (a) how many possibilities are open to me... (b) how easy or difficult each of these possibilities is to actualize; (c) how important in my plan of life, given my character and circumstances, these possibilities are when compared with each other; (d) how far they are closed and opened by deliberate human acts; (e) what value not merely the agent, but the general sentiment of the society in which he lives, puts on the various possibilities." Berlin, Four Essays on Liberty, 130. Given this definition, Dworkin's auction provides an answer to each of these criteria. In this sense, the auction is the incarnation of negative liberty.

the most abstract determination of resources, would be better?). Nevertheless, and this point is made at the end of this section as well, most resources are owned either by private concerns or the government. The comparison will, if we keep in mind that resources and private property are not always or necessarily the same, still shed some light on whether Dworkin's equality of resources accords with Hegel's discussion of private property.

The concept of private property, like the concept of freedom, undergoes a metamorphosis in the section on morality in the Philosophie des Rechts, although the transformation of private property is not explicitly discussed by Hegel in this section. Nevertheless, we can infer from the self-development of freedom what the status of private property, in a general way, would be in this, and the succeeding, normative spheres. In the most general terms, private property, which in the first determination of freedom served as the embodiment of the free will (the will wills itself in an external thing), is now the means which permits individuals to express their subjective freedom in their choices. Because freedom in morality is concerned with the intention of the moral subject, and the actions of the subject in so far as the action expresses the intention, private property as transformed from abstract right serves a dual function: it secures the individual's right to embody his or her will in an external thing and is the manifestation of the individual's intention

in action. This means that private property now serves as the means whereby individuals provide for their welfare through their freely chosen and intended actions. Welfare, however, in the sphere of morality, should be taken as welfare as such, and not merely as the satisfaction of any (or all) particular desire(s). That it is not the satisfaction of particular desires which constitute welfare, but welfare as such, follows from the concept of freedom as self-determining: in the moral sphere, the only right to welfare is welfare conceived of as universal, as what any free, self-determining individual can will.¹¹²

It is of course true that the discussion of freedom in the morality section considers purpose and responsibility, intention and welfare, and the good and conscience successively: that is, while the concept of freedom at first is discussed in terms of the purposes and intentions of the subject, and their right to find satisfaction or well-being through their free actions, it is ultimately modified into a discussion of the good and conscience, or a Kantian moral position. Thus, through the **Kollision** of the right to property and the welfare of the individual in the case of

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As Stephen Houlgate puts it, "I do not have the right to satisfy each and every desire which may happen to arise from the contingencies of my nature or my circumstances, but only to further my welfare and happiness as such, since only this follows from the form of free self-determination and is thus due to me simply by virtue of my being a free individual." Freedom, Truth and History, 93.

distress, both the right and welfare are seen to be not absolute in themselves, but, taken together, the good. The unity of welfare and right is the good, and the good alone now has absolute value from the moral standpoint. Hence morality, by the end of the section, is concerned with the will willing the good, acting from duty (the good, as what is essential, obliges the will to will it because it is the goal of free action; it is therefore our duty to will it simply because it is the good), and the sanctity of the conscience in determining what the good is.

But even here the concern is with the intention of the subject, as it is throughout this section, however transformed the concept of freedom as morality becomes. In general terms, what distinguishes morality as a normative sphere from the spheres of abstract right, the family, civil society, and the state is the fact that moral subjects interact with one another in terms of their own determinations of their purposes and intentions in action.¹¹³ It is not unreasonable to suggest, then, because Hegel does not discuss it in the morality section, that the role of private property, in general, is to serve as the expression of the moral subject's intention through action -- i.e., as a means whereby the welfare of the individual, understood in a universal sense, is

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Richard Dien Winfield, Freedom and Modernity, 67.

secured.¹¹⁴ In this most general sense, there is no discrepancy between Dworkin's theory of equality of resources and the moral point of view.

As noted above, within the section on morality freedom does not mean simply that the subject has the right to subjective freedom; freedom is transformed into a Kantian position, where the good must be willed because it is the good ("duty should be done for the sake of duty"¹¹⁵). Freedom, in its final determination within morality, is not primarily concerned with welfare satisfaction, but with persons as

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Even if we place private property within the context of Kant's moral theory, private property is still conceived of as a means whereby the individual expresses his or her free choice. In the Rechtslehre, Kant defines property as follows: "An external object that in terms of its substance belongs to someone is his property (dominium), in which all rights in this thing inhere (as accidents of a substance) and which the owner (dominus) can, accordingly, dispose of as he pleases (ius disponendi de re sua)." The Metaphysics of Morals, Introduction, translation, and notes by Mary Gregor (Cambridge: Cambridge University Press, 1991), 90; Kants gesammelte Schriften, Volume VI, 270. It is true that in order for there to be a condition where the choice of one individual is compatible with the outer freedom of every other individual there must a civil society. Ibid., 120-121; 306-307. But this has no bearing on the point made here, namely, that property serves as the means whereby individuals exercise free choice. That it occurs in civil society, for Kant, makes no difference (see 82-82; 261) -- nor does it for Dworkin, we might add, since the notion of an equality of resources entails a social context. See also Mary Gregor's "Kant's Theory of Property," Review of Metaphysics 41 (June 1988): 757-787.

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Hegel, Philosophy of Right, §133, 119; 161.

rational agents.¹¹⁶ Freedom, from the perspective of the Kantian moral position, consists in the capacity of the rational subject to act according to a self-legislated law (which takes the form of the categorical imperative). And although Hegel does reject the Kantian moral position as the final determination of freedom, he does say that "Kant's philosophy is sublime inasmuch as it asserts the conformity of duty and reason."¹¹⁷

What would a redistribution of resources mean for the concept of freedom from the moral point of view? In other words, to ask about equality of resources from the moral point of view is to ask if there is a Kantian element within Dworkin's theory of equality of resources. Can Dworkin's position vis-a-vis equality of resources be interpreted such

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Hegel differs from Kant on this point by claiming that the attainment of happiness, while not the final or complete good, does, through a process of rational education, become one essential aspect of freedom. Hegel, Philosophy of Right, §122-125, 110-113; 150-153. In other words, Hegel disagrees with Kant's depiction of human beings as divided between reason and inclination. As Smith puts it: "According to Hegel, Kant had operated with an unduly restrictive understanding of the desires as a kind of brute force in the soul urging individuals towards some end. In Hegel's view our desires and appetites are not mere animal urges but are shot through with reason. Thus desires and appetites are never psychological givens but are always, to some degree, shaped and determined by reason. Consequently, Hegel believes it is wrong to regard reason and inclination in a state of perpetual conflict, with the one seeking to obtain mastery over the other. Rather they are two mutually supportive aspects of the whole moral personality." Steven Smith, "Defending Hegel From Kant," 277. See also Wood, Hegel's Ethical Thought, 71.

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Hegel, Philosophy of Right, §135A, 163.

that it accords with the discussion of Kantian morality, freedom, and rationality, though Dworkin does not couch it in Kant's (or Hegel's) language? The problem in attempting to ascertain whether Dworkin's theory of an equality of resources is Kantian comes not only from the disparate language, but from the equivocation within Dworkin's own theory. Sometimes Dworkin uses the language of negative liberty, speaking of the auction in terms of its ability to ensure that we can satisfy our life plans and goals, that it provides for us the means whereby we can choose whatever it is we would like to choose in order to satisfy our preferences (although with several caveats and within the larger context of producing a just society). This view, or this interpretation of Dworkin, has little to do with the Kantian conception of freedom and morality.

On the other hand, there can plausibly be seen an element of Kantian morality in Dworkin's position. This Kantian element can be seen in two aspects of the auction that we have considered: the principle of authenticity and opportunity costs. The principle of authenticity, on the expansive interpretation, allows individuals to formulate and reformulate conceptions of what they think good. As noted, this serves a social and educative function, allowing individuals to come to an awareness of how resources in the auction can be parcelled out so that the good of all is secured. Even more strongly, the idea of opportunity costs

explicitly provides for mutual consideration on the part of individuals, demanding that we take into account the welfare of others (their interests, plans, goals, etc.) when deciding on what sorts of resources we would bid for.

Again, Dworkin does not put this into Kantian language: he does not express opportunity costs in terms of willing the freedom of others as an essential aspect of my own freedom. Nor does he speak of a kingdom of ends, or an ethische Gemeinschaft, or a community of free, self-legislating beings. Nevertheless, the principle of authenticity and opportunity costs, at least on the generous reading, do entail a Kantian position. These two aspects of the auction allow us to come to an intersubjective agreement concerning the universal (common) good. The two aspects are designed to ensure that universal welfare is achieved, and not simply the satisfaction of individual desires. In other words, the auction is not solely comprised of self-interested actors who demand that their freedom to choose not be violated and that their choices be accommodated. Rather, authenticity and opportunity costs build into the auction in a constitutive way a concern for the universal good. While not phrased in terms of my having to will the freedom of others, authenticity and opportunity costs nevertheless produce just that: having to take into account the concerns of others, having to reformulate my interests in concert with others, having to bid on resources in terms of the opportunity costs to others, and having to come to an

intersubjective agreement with others through the vehicle of the auction -- all mean nothing other than the individual must, if he or she is acting in conformity to the rules of the auction, will the universal good.¹¹⁸

Furthermore, these two aspects of the auction can be interpreted along the lines of Kant's formulation of the categorical imperative as an injunction to "treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end."¹¹⁹ For if we have to formulate and reformulate our own interests by taking into consideration the interests of

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Despite the Kantian moral overtones of the auction, there are two ways in which this view is not Kantian. First, insofar as the auction, via the principle of authenticity and opportunity costs, forces us to will the common good and the freedom of others, the moral position is not Kantian. For any deontological view such as Kant's, where morality consists in willing what is right for its own sake, and never for some other (heteronomous) reason, acting morally can never be a matter of coercion. Such moral coercion would be counterproductive, destroy the very basis of morality, and treat others as means and not ends in themselves. If individuals are compelled to bid on resources in accordance with the opportunity costs of others, the project is apposite Kant's. Secondly, Dworkin, like Rawls, treats something that is not an end in itself as if it were -- namely, resources (in Rawls' case, primary goods). Dworkin imbues resources, which are non-moral, with a moral value, and considers them as if we desire them for their own sake. Resources (or wealth, or primary goods, or the accumulation of any of these) are not desired for their own sake, an attitude which is appropriate only to an end (i.e., a rational being). See Steven Smith, where he discusses this in terms of Rawls' primary goods, in "Defending Hegel from Kant," 270.

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The Foundations of the Metaphysics of Morals, 52; Kants gesammelte Schriften, Volume IV, 428-429.

others, and bid on resources in terms of the cost to others, we are saying in effect that the interests of others matter as much as my own and that I have to treat those other individuals as if they mattered equally. Authenticity and opportunity costs ensure that others will be treated as ends, and not merely as means for the satisfaction of my desires (by allowing me to get what I want in the auction).

On the more expansive reading of the principle of authenticity, coupled with opportunity costs, an equalization of resources comports with at least this aspect of Kantian morality, namely, the view that morality consists in willing the freedom of others and the injunction that we must treat others as ends in themselves.¹²⁰

Dworkin's theory of equality of resources also contains a communal aspect, as the above discussion concerning the auction indicates. The auction works in such a way that an equality of resources is met only when we take into account the cost of the resources -- the opportunity costs -- to others. How does the communal aspect of Dworkin's theory fare

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See Charles Taylor's Philosophy and the Human Sciences: Philosophical Papers 2 (Cambridge: Cambridge University Press, 1985), 336-337, where he says that "Kant's definitions of freedom have made him one of the most important thinkers in the development of modern culture. On one level his grounding politics on freedom, on respect for the agent as originator of his own life-plan, remains one of the most powerful formulations of the liberal ideal, and is plainly central to influential contemporary theories, such as those of Rawls and Dworkin."

when confronted with Hegel's discussion of property in ethical life?

In ethical life, private property takes on an overtly communal aspect, in the family, in civil society, and in the state. In general, private property, within ethical life, is private property in civil society, and allows individuals to satisfy their needs within an increasingly complex system which allows for the satisfaction of the needs of everyone. (Private property within the family and from the state's perspective is communal: either the property is seen, in the case of the family, as a communal resource, though it is still private property and the state recognizes it as such. Or property is, as belonging to the state, strictly communal -- it is public property.) This is distinguished from the primarily individualistic character of property in abstract right and morality.¹²¹ A redistribution of resources would not limit individuals from satisfying those needs consonant with the satisfaction of the needs of others. The auction, after all, is designed to take into account the desires and welfare of others. Dworkin's equality of resources does not violate the analysis of private property in civil society in so far as

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Though there is, again, what we might call a minimal social element in both spheres. In abstract right, we find a relationship between two wills arises because of the necessity to recognize that the other will has a right to embody itself. The normatively legitimate form of this interaction is the contract. In morality, the determination of that form of freedom means that the will must recognize that other wills also have the right to subjective autonomy.

resources are divided such that they attend to the needs of all.

The problem lies not in the argument that a limitation would be imposed on individual liberty when resources are redistributed per se, but rather that a redistribution of resources would disrupt the system which allows for the satisfaction of everyone's needs -- and would, as a consequence, limit the ability of each to fulfill his or her life goals.¹²² In general, the view point of an equality of resources is, in Hegel's terms, one of the "empty understanding": civil society is that arena where "differences manifest themselves,"¹²³ and to demand from civil society an abstract requirement like equality of resources (or any other type of equality) is to demand milk from the bee. In the Philosophie des Rechts, Hegel says that:

The spirit's objective right of particularity, which is contained within the Idea, does not cancel out [**nicht aufhebt**] the inequality of human beings in civil society -- an inequality posited by nature, which is the element of inequality -- but in fact produces it out of the spirit

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A disruption of the system can be taken in two ways. First, the system could be disrupted in that a redistribution of resources, in the real world, along the lines that Dworkin suggests, would create disincentives in the market. The disincentive effect of an egalitarian "controlled" market is discussed at the end of this section. This would be a specific instance of disruption. More generally, the system could be disrupted in the sense that the demand for an equality of resources does not comport with the nature of civil society. That sense of disruption is the one under examination here.

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Hegel, Philosophy of Right, §200, 175; 233.

itself and raises it to an inequality of skills, resources, and even of intellectual and moral education. To oppose this right with a demand for equality is characteristic of the empty understanding, which mistakes this abstraction and obligation of its own for the real and the rational.¹²⁴

While it is true that Dworkin does think some sort of a market necessary for an equality of resources,¹²⁵ this does not

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Ibid., §200R, 175; 233-234.

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As Dworkin puts it: "I argue that an equal division of resources presupposes an economic market of some form, mainly as an analytical device but also, to a certain extent, as an actual political institution." Dworkin, Equality of Resources, 284. But his acceptance of an economic market is qualified; in the same article, he contrasts his approach with Nozick's, and claims that "under equality of resources the market, when it enters, enters in a more positive but also more servile way. It enters because it is endorsed by equality, as the best means of enforcing, at least up to a point, the fundamental requirement that only an equal share of social resources be devoted to the lives of each of its members...But the value of actual market transactions ends at just that point, and the market must be abandoned or constrained when analysis shows, from any direction, that it has failed in this task, or that an entirely different theoretical or institutional device would do better." Ibid., 338.

Furthermore, he does not discuss what he means by a resource, except to say that "natural resources be auctioned in as undifferentiated a form as is feasible -- that iron ore be auctioned rather than steel, for example, and undeveloped land rather than fields of wheat." Dworkin, Place of Liberty, 28. In other words, in the hypothetical auction those resources which individuals bid on are assumed to simply exist. This may hold for exclusively natural resources (those resources which require little or no human labor in order to be valuable to us), but that would cover only a small fraction of the resources that individuals in a society could use or would desire, if any at all. (How do we get the iron ore? Whose mine is it? Where do the machines come from that extract it?) Hence Dworkin does not explain, though he probably would not disagree, an important point concerning equality of resources: Resources are always already socially determined within civil society. This is even more so in the case of wealth and wealth creation. Social cooperation, and

mitigate Hegel's criticism. Indeed, Hegel explicitly says that it is the nature of civil society to "necessarily result in inequalities of resources and skills [**Ungleichheit des Vermögens und der Geschicklichkeiten**] of individuals."¹²⁶ Civil society for Hegel is that aspect of ethical life which is particular and rife with contingency, a sphere in which differences (in skills, talents, resources, etc.) necessarily arise. The rationality of civil society lies in its being a sphere which allows for the subjective freedom of individuals, a freedom characterized as "boundless extravagance."¹²⁷ Civil society, therefore, "affords a spectacle of extravagance and misery as well as of the physical and ethical corruption common to both."¹²⁸ There is no doubt, of course, that Hegel advocates aid, through various institutions (though primarily the corporations), be given to those with little or no

a government which regulates and enforces the conditions for the production and transfer of goods, is the sine qua non of property. On this see Anselm Min's "Hegel on Capitalism and the Common Good," Philosophy and Social Criticism 11 (Winter 1986): 49, where he notes that "property is not simply a thing found or given in raw nature but a product of social mediation. To be actual as property, it must be produced, which can be done only in a system of interdependence in which my labor depends on the labor of all to be productive."

¹²⁶

Hegel, Philosophy of Right, §200R, 175; 233-234.

¹²⁷

Ibid., §185A, 223.

¹²⁸

Ibid., §185, 166; 222.

resources -- but that is a considerable distance from a full scale demand for an equality of resources.¹²⁹

Insofar as Dworkin thinks the state should mitigate the inequalities found in civil society, he and Hegel are in agreement. But insofar as he thinks that inequalities could or should be entirely eliminated -- or insofar as he does so for a reason other than that inequality impinges on the liberty of the individual to pursue his or her own interests -- then he is at odds with Hegel.

The difference between Dworkin and Hegel on an equality of resources rests, then, not on the fact that these inequalities arise as individuals attempt to pursue their interests, but on the extent to which the state may intervene to correct or mitigate the inequalities which arise in civil society. It is to that issue that we turn.

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This also illustrates a previous point concerning the relationship between the individual and the state. It is of course true that Dworkin's theory of equality of resources attempts to rectify what he considers to be an injustice within the economic sphere, or within civil society. But the way in which the injustice is to be eliminated would be through the government. The solution to the problem of economic inequality lies not within the economic sphere (and hence Dworkin's desire for a market of some sort), but within the political sphere. But this is one of the reasons for considering the state as a distinct ethical entity. As one commentator notes: "However broad its aims may be, civil activity never involves determining the total structure of justice as the end of its action." Richard Dien Winfield, The Just Economy (New York: Rutledge, Chapman & Hall, Inc., 1988), 92. This leads to the necessity of an organizing principle, a "sphere of freedom whose function does consist in ordering the whole framework of right of which it is a part," -- i.e., the state. Ibid.

Two Further Issues Concerning Equality:
Hegel on State Intervention and Taxation

Hegel recognizes that industrial nations create a rabble (**pöbel**), and they do so precisely because industrial nations have the capacity to produce more than consumers can consume (leading to fluctuations in unemployment, and, in pre-Keynesian capitalist societies, boom and bust economies). Like Marx after him, Hegel recognizes that it is because economic production in industrial society works as it should, that it creates wealth and the desire for wealth maximization, that leads to the development of poverty. And he also foreshadows twentieth-century economists in realizing that an ever expanding consumer base (the need for new markets, foreign or domestic) is necessary to mitigate crises of overproduction and hence satisfy the needs of that class of persons who are unemployed or otherwise adversely affected by those crises.¹³⁰

The question here is just how far Hegel is willing to allow the state to intervene within civil society in order to mitigate the conditions which create poverty. At certain points within the Philosophie des Rechts, because "deprivation and want are likewise boundless, and this confused situation can be restored to harmony only through the forcible

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Hegel, Philosophy of Right, §244-248, 201-203; 266-269.

intervention of the state,"¹³¹ he seems willing to allow for not only the regulation of the prices of daily necessities, but the taxation of certain goods and the control of the money supply in order to dampen (or stimulate) demand. For example, in speaking of the duties the citizens have toward the state and the benefits which the state allows the individual to enjoy, Hegel writes:

The justice of equality, however, can be achieved far more effectively by means of money. Otherwise, if the criterion were concrete ability, the talented individual would be taxed much more heavily than the untalented. But the very fact that people are now required to deliver only what they are able to deliver is a sign that public freedom is respected.¹³²

Here, Hegel indicates that a system of taxation which asks of its citizens to pay only what they are able to pay is a sign of equality. Such a "progressive" scheme of taxation might be an indication that equality demands an equality of resources. To pay what one is able, 'from each according to his means,' as it were, signifies that the government demands an equal obligation, based on ability, from all. This does not mean that resources will be parcelled out equally, but that our resources should be taken from us in proportion as we are able to pay. However, this does imply that our resources will be more equal in the end since the government will take from the better-off more in taxation and from the less well-

¹³¹

Ibid., §185A, 223.

¹³²

Ibid., §299A, 338-339.

off less. Does Hegel think, then, that a system of taxation means that an equality of resources is necessary as an aspect of the modern state?

The context of the above citation occurs within the broader discussion of the duties individuals' owe to the state. In ancient and feudal societies, the state demanded particular services -- e.g., Plato in the Republic has the guardians allot specific services to be performed by the various classes, in feudal society the vassals were required to be judges.¹³³ The modern state still requires duties from its citizens, but these duties take the form either of mandatory service in time of war or a single universal duty, namely, the requirement that we pay the state a certain amount of money in the form of taxes. In the ancient and medieval cases, there was not a conception of a subjective will; individuals performed the duty required of them and they had no hand in determining the duty according to their own particular abilities and desires. In modern societies, the individual now has subjective freedom and as a result the right to determine his actions according to his will. To pay taxes, instead of performing specific actions, is to recognize that the demand for services has been made into a universal value (i.e., money) and that in this way the subjective freedom of the individual is respected.

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Ibid., §299, 260; 338.

Does this mean that equality of resources is demanded by the modern state? No. The demand that we pay taxes by some "progressive" scheme follows from a conception of equality which has been transformed through the structures of morality and ethical life from its original determination in abstract right. Equality has been transformed in the same way that liberty has been transformed throughout the **Philosophie des Rechts**, because the equality of each individual is nothing less than the freedom of the individual. Freedom, as originally defined, is the freedom each person has to place his will in an external thing. Our equality in abstract right is the same: we are equal in so far as we are free in this way. In morality, freedom becomes the freedom of subjects; we are free, in general, in so far as the individual's actions express his or her subjective intentions. This is specifically expressed in the Kantian moral dictate that our freedom depends upon our rationality, the requirement that we act in accord to a universal law (i.e., the categorical imperative) which we ourselves have legislated, and that the conscience of each individual is the sole criterion of what is good. Likewise, we are equal in that respect: each subject's equality rests on that determination of freedom (we are all equally rational and capable of acting in accord with a universal law). In ethical life, which is itself divided into three moments, the equality of individuals is also dependent upon the way in which freedom is determined. As we

have seen, the freedom of the second moment of ethical life, civil society, consists in the freedom of the individual to satisfy his life's plan in the economic arena (though that freedom will be further developed by the institutions within civil society towards its highest determination).

Taxation, on this account, allows us to perform a duty for the state without infringing upon our right to determine for ourselves our actions. Duties and rights are correlative for Hegel, required by the demand that the normative validity of right rests on the recognition of another of that right and hence the respective duty to recognize that right. While in the spheres of the family and civil society "the relation lacks actual necessity, so that...what is right for one person ought also to be right for another, and what is one person's duty ought also to be another person's duty,"¹³⁴ in the relationship between the individual and the state that "ought" has become actual. Right and duty have an objective existence within the state, where the individual's duty to the state serves the particular choices of the individual:

The individual, whose duties give him the status of a subject, finds that, in fulfilling his duties as a citizen, he gains protection for his person and property, consideration for his particular welfare, satisfaction of his substantial essence, and the consciousness and self-awareness of being a member of the whole.¹³⁵

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Ibid., §261R, 216; 284.

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Ibid.

Taxation does not flow from a desire to redistribute resources. Hegel's concern, in other words, is not with the real or apparent inequalities in wealth engendered in modern society per se, but with inequality insofar as it prevents individuals from participating in the economic sphere and therefore realizing their freely chosen ends. Taxation serves a dual purpose, recognizing the individual's subjective freedom (by respecting the taxed person's particularity, his or her right to choose what to acquire and what to relinquish, as well as by enabling those who are destitute to enter the market) while at the same time bringing the individual to an awareness of the requirements of the state, of how the state's requirements are his or her requirements, and of his or her membership in the state.

The claim that taxation, according to Hegel, does not comport with an equality of resources, based as it is on a different conception of the state and of the individual's relationship to the state, feeds into the larger question of state intervention. As Hegel is aware, it is the fluctuations in production and demand which are the true causes of deprivation and the state should take steps to curtail the amount of production (when necessary) as well as ensure that we are not left to the vagaries of productive efficiency or demand. The preceding has the effect of making Hegel look like a forerunner of Keynes, someone who envisioned that the government would become, in Robert Heilbroner's words, "a

permanent stabilizing and growth-promoting agency for the market economy as a whole."¹³⁶ There is no doubt that Hegel does advocate direct state intervention, in the form of subsidies and welfare, in order to abolish crises of overproduction. But how much state intervention would Hegel allow, and is that intervention consonant with an equality of resources?

The difficulty in thinking that Hegel would recommend state intervention on the massive scale of modern welfare societies lies in those other passages within the Philosophie des Rechts, where he offers suggestions which seem to contradict the necessity of state intervention. First, welfare and charity -- direct subsidies to the poor -- may alleviate immediate economic want but they are "contrary to the principle of civil society and the feeling of self-sufficiency and honour among its individual members."¹³⁷ He thus points out what commentators along the entire range of political beliefs have said about welfare programs in this country: charity, or welfare, fosters dependency and a

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Robert Heilbroner, The Making of Economic Society (Englewood Cliffs, N.J.: Prentice Hall, Inc., 1972; revised edition, 1980), 159.

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Hegel, Philosophy of Right, §245, 201; 267.

consequent diminution of self-respect, contributing, in the United States at least, to a welter of social pathologies.¹³⁸

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It might be said that the pernicious individual and social consequences of charity and welfare argue for a right to work: the surplus value created by a market system could be used to make more time available for other kinds of work, obviating the need for welfare. The problem with this solution is the same problem which confronted all socialist systems which attempted to control surplus value. By eliminating surplus value, the incentives found in a market economy disappear. Not only do underground markets arise, but productivity, directly linked to the economic well-being of individuals, necessarily declines.

Furthermore, who is to decide how the capital -- the confiscation of surplus value -- is to be used? The government -- i.e., a centralized state entity? If so, the arguments put forward by Hayek in Individualism and Economic Order (Chicago: University of Chicago Press, 1948) would be pertinent: economic planning by the state is not feasible on epistemological grounds. According to Hayek, the knowledge necessary to make the sorts of decisions concerning the economy is local knowledge of specific and constantly changing circumstances, a knowledge which is too costly to collect (and out of date once gathered). But more fundamentally, the knowledge is not only local but tacit: it is embodied in the practices and skills of the economic practitioners, is not articulable, and hence is in principle impossible to gather in a theoretic form by the state. As Hayek puts it: "The peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form but solely as the dispersed bit of incomplete and frequently contradictory knowledge which all the separate individuals possess...Or, to put it briefly, it is a problem of the utilization of knowledge which is not given to anyone in its totality." Chapter 4, "The Use of Knowledge in Society," 77-78.

Although this argument explicitly concerns the problem of setting prices by a centralized authority, it would apply to the attempt by a central authority to determine what kind of jobs are needed, how many in the different fields, and the wages to be paid. In essence, the problem identified by Hayek is epistemic: the capitalist market acts as an epistemic device, allowing for the transfer and use of local knowledges imbedded in local practices. Hence, it is impossible for a central organization to perform the epistemic function of the market; or, if it attempts to do so, cannot help but produce maladroitness or detrimental consequences. I take this line of

Secondly, since one aspect of freedom within civil society is the freedom of particularity (i.e., the freedom to fulfill one's goals and plans, and therefore the freedom to engage in economic activity), regulation by the state encroaches upon that freedom. This is crudely put, but the tension between individual economic freedom and the common good is clear enough. How much regulation is too much regulation? Hegel does not directly answer this question, because he thinks that a further feature of civil society -- the corporation -- will ensure that the individual members of society will be educated, have their wills formed (or transformed), in such a manner that they will recognize their dependence both upon others and the system for the satisfaction of their needs, as well as recognize the common good and their dependence upon it. It is also clear enough that in modern American society, no such institution or institutions have had the mediating effect Hegel claimed for the corporation.

Despite Hegel's minimal suggestions, and their possible minimal relevance to our situation (their potential efficacy or possible failure regarding poverty, and their ability to annul privation in modern society), we can say several things. One, the measures which Hegel approves of -- taxation of goods, control of the money supply, regulation of industry --

argument from John Gray's Liberalisms: Essays in Political Philosophy, chapter 10.

are all measures which western nations agree, to lesser or greater extent, are necessary to ensure a more or less stable and smoothly functioning national economy. Two, these measures fall far short of the Marxist recommendation that the entire sphere of production, and capital, should be taken out of private hands and placed into state control.¹³⁹ Hegel thinks that civil society makes possible certain freedoms and that the maximization of wealth is not necessarily destructive of freedom, though it is not, in itself, a moral good. Three, we must also conclude that Hegel would not advocate a strict equality of resources, like Dworkin (or of welfare, for that matter, like Rawls). This conclusion rests, in general, on the different conception Hegel has of the relationship between the individual and the state, and specifically in the relationship between civil society and the state. From Dworkin's perspective, there are two reasons for advocating an equality of resources: the role resources play in satisfying our needs and the role they play in allowing us to fulfill our life's plans. Because he does not see the necessity for a normative sphere separate from civil society, the role of the state consists solely in furthering the aims of individuals in

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See The Manifesto of the Communist Party, in The Marx-Engels Reader, edited by Robert Tucker (New York: W.W. Norton & Company, 2nd Edition, 1978), 490, where Marx advocates "Centralisation of credit in the hands of the State, by means of a national bank with State capital and an exclusive monopoly," as well as an "Extension of factories and instruments of production owned by the State."

society (as can also be seen in his identification of the individual with the political actions of the state). An equality of resources is justified, then, because it best allows individuals to both meet their needs and fulfill their life plans.

It is true that civil society, for Hegel, does have the same end as it does for Dworkin, namely, as the arena which allows individuals to exercise their subjective freedom. But because Hegel argues that the state represents a necessary and separate normative sphere from that of civil society, a sphere which allows for the freedom of political participation, he argues that the character of civil society is such that an equalization of resources is not a necessary requirement in order to ensure that individuals can exercise their subjective freedom and find satisfaction in their choices. The state is not an adjunct of or an appendage on civil society, whose only aim is to further the ends of the mode of interaction proper to civil society (in general, well-being through exchange relations). Some sort of welfare intervention is needed, of course, in order that individuals can exercise that subjective freedom (there is a minimal level where human beings cannot attempt to fulfill their goals and plans), but it is for that reason alone, and not a demand for equality, that intervention should be undertaken.¹⁴⁰ There is nothing in Hegel's

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We can also put the point this way: Dworkin's emphasis on the comparative wealth (or resources) of individuals is not,

rechtsphilosophie which would argue for the scale of intervention required by Dworkin's equality of resources.¹⁴¹

Hegel on Democratic Equality

We can further see Hegel's de-emphasis on equality if we turn to his thoughts on democracy and the notion that a democratic political process is one which treats citizens equally, in so far as they have an equal opportunity to govern themselves. In the discussion above concerning the

according to Hegel, of fundamental concern. What is of concern is the individual's autonomy, the ability of the individual to construct the life they wish to lead. Insofar as the state intercedes in civil society in order to equalize wealth, it is not doing so for normatively valid reasons. If the state intercedes in order to ensure the ability of individuals to be autonomous, then it is acting in a normatively valid way. Of course the argument will be made that the equalization of resources or wealth is the means whereby individual autonomy is secured, but this is a red herring. The provision of the conditions necessary for individual autonomy does not involve a concern with the equalization of wealth or resources. On this view, autonomy is a satiable need; on Dworkin's egalitarian view, it is insatiable. John Gray's example of two disabled persons is illuminating: "If, let us say, we consider two people with the same, severe disability, where one is a millionaire and lives in the Ritz Hotel and the other lacks resources and is provided for by disability benefits, but where both persons enjoy the conditions necessary for a dignified, meaningful and autonomous life, then in my view the difference in the level of resource-provision of the two disabled persons has no moral significance. If both have good lives, why should the difference between them in terms of wealth concern us at all?" John Gray, Beyond the New Right: Markets, Government and the Common Environment, 84-85.

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Nor, for that matter, does he think anything like a modern welfare state necessary. See Hegel, Philosophy of Right, §258R, 208-211; 276-279. See also Richard Dien Winfield, Freedom and Modernity, 253.

relationship of the individual and society, we noted the main objection Hegel makes to democracy in modern societies -- namely, its tendency to create aggregates, or atomistic individuals, who have no organized, rational relationship to the community at large. A few more remarks are in order concerning the relationship of equality to Hegel's view of democracy.

Democracy plays only a limited role for Hegel within the modern state. The estates may elect representatives to the legislative branch (the upper and lower houses), but that is all; universal suffrage is nowhere to be found.¹⁴² If we think of democracy as not only allowing each person the right to choose who will represent him or her but also as an indication of the equality of all (we are all equal in that no one should be governed unless they give their consent to be so governed; and so we should have an equal voice and vote in selecting our leaders), then there would seem to be a link between equality and democracy. Here is Hegel on the idea that all have a right to participate in the affairs of the state:

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Representation through the estates is not universal suffrage for several reasons. First, Hegel says nothing about extending the vote to women. Secondly, there were almost always property qualifications attached to the vote. See the editor's note on 469-470 in Philosophy of Right. Thirdly, and this is pertinent for our situation in that the first two exclusions to voting have been eliminated, is the question of what happens to those who are not members of estates. Are all occupations represented? (Are a minimum number of persons necessary? If there were 3 professional yodellers in the nation, would they elect a representative?) Do the unemployed vote for representatives? The homeless?

The idea [Vorstellung] that all individuals ought to participate in deliberations and decisions on the universal concerns of the state -- on the grounds that they are all members of the state and that the concerns of the state are the concerns of everyone, so that everyone has a right to share in them with his own knowledge and volition -- seeks to implant in the organism of the state a democratic element devoid of rational form, although it is only by virtue of its rational form that the state is an organism.¹⁴³

This suggests that participatory democracy does not secure those rights, at least not as well as a constitutional monarchy. And this is so for two reasons. First, a democracy by definition is rule by the demos, and the demos do not know what is best for the state. "The idea [Vorstellung] that everyone should participate in the concerns of the state entails the further assumption that everyone is an expert on such matters; this is also absurd, notwithstanding the frequency with which we hear it asserted."¹⁴⁴ But more importantly, individual voting has the effect of sequestering each individual in his or her private sphere; it isolates individuals, does not allow them to cohere, and thus renders them incapable of integration within the organized whole of society. The simple right to vote, taken as the sole act of political self-determination, is, at least in large nations,

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Hegel, Philosophy of Right, §308, 267; 347.

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Ibid., §308R, 268; 347-348. See also §309, 268; 348, where Hegel states that "...the aim of such elections is to appoint individuals who are credited by those who elect them with a better understanding of such matters than they themselves possess."

meaningless (as is heard relentlessly when non-voters explain why it is they do not vote). It is only within the context of a larger group, a group that has enough power to participate in the process of self-government, that the individual's vote matters (through representation in the government, as in the case of Hegel's corporations, or, perhaps, through some other voluntary association which lobbies on behalf of its members). Hegel writes:

The concrete state is the whole, articulated into its particular circles. Each member of the state is a member of an estate of this kind, and only in this objective determination can he be considered in relation to the state. His universal determination in general includes two moments, for his is a private person and at the same time a thinking being with consciousness and volition of the universal. But this consciousness and volition remain empty and lack fulfillment and actual life until they are filled with particularity, and this is [to be found in] a particular estate and determination. Otherwise, the individual remains a generic category...¹⁴⁵

We must conclude that for Hegel equality taken as equality of resources is not a necessary aspect of freedom. It is important for Hegel, but not in the foundational way Dworkin thinks it important for American society. Does this mean that Dworkin is simply wrong to stress equal concern and respect? Not necessarily. Although equality as equal concern and respect cannot be used as a self-evident axiom in order to justify equality, Dworkin's contention that it would be little debated (and is accepted, at least by politicians) in American society seems right (although "equal concern and respect" will

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Ibid., §308R, 268; 347.

probably amount to "equality under the law" for most). Whatever we think of his conception of equality and the possibility of reforming or reconstituting our political institutions accordingly, the fact that equality, taken in its most general form, will have to be one ingredient in any plausible political and moral theory. Furthermore, if our concern is with negative liberty, and the main issues raised concerning politics are the demarcation of the boundaries of state power, then it makes sense to stipulate that the government must treat all its citizens with equal concern and respect. Dworkin's theory of equality occupies a significant force within the current debates over Constitutional law, political practice, and moral theory, and will have to be taken seriously even if we find it deficient or impractical as a theory of justice.

But, as Hegel points out, this tells only half the story (and for that reason is, for him, an inadequate political philosophy). If we are concerned about the ways in which freedom develops both in the individual and within society, how that freedom demands certain rights and institutions, and how those institutions both constitute and safeguard the free subject, then equal concern and respect is not an adequate foundation. That it is not follows from the different normative spheres of civil society and the state, the necessity of certain inequalities of resources and wealth which arise in civil society, and, ultimately, from the

different conception of the relationship between individual and state which Hegel advocates.

Before concluding, I would like to make several further comments about Dworkin's theory of equality, comments which are not Hegelian in nature.

Further Considerations on Dworkin's Conception of Equality

In the preceding section, I noted the possible responses Hegel might make regarding Dworkin's theory of equality, and argued that Hegel would find that conception of equality, as a foundation moral and political principle, deficient. There are, however, several reasons of a non-Hegelian type which pose difficulties for Dworkian equality as it is presently formulated.

It might be objected that the market Dworkin thinks necessary (either in a socialist form or on a capitalist model) does not act as an impartial mechanism to allow us to achieve our desires, but actually influences and molds our personalities, such that decisions about what resources we would bid for are created by the market itself. Because Dworkin has not given us an account of personality development (which was discussed in another context in the first section of this chapter regarding the prior moral bonds between individuals which would justify a redistribution of resources), he is all the more vulnerable to this criticism. In calling for a market in order to redistribute resources

according to our preferences, Dworkin has not taken into account the fact that the market determines what our preferences would be. As Gerald Postema has argued:

Markets, then, through structuring options and choices, may have an impact on the 'personalities' of participants. Any theory that holds as its first principle that governments must respect the authentic personalities of its citizens must also worry about the way in which the market mechanism itself influences the development of the personalities of its constituents.¹⁴⁶

In response, we can say that there is no reason why the effects of the market on the personalities and hence the choices of individuals could not be mitigated, if not eliminated -- in principle. Awareness of the effects of the market, and regulation of the market, could render that arena more impartial or neutral, allowing us to freely choose what resources we would bid for without the influences of the market itself. That this is so we could grant in principle. Furthermore, can a personality ever not be influenced in its development by the sphere where voluntary exchanges occur?

It is, of course, a far more difficult task to imagine how the non-influence of a market could be practically effected. Would limiting the amount and extent of advertising, or requiring that advertisements be always accompanied by scientific data concerning the product, for example, allow us to make more rational choices about what we desire, or would it be an infringement both upon economic

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Gerald Postema, "Liberty in Equality's Empire," Iowa Law Journal 73, No. 55 (1987): 88.

liberty and freedom of expression? (This would not entail the obvious criminal cases of fraud, but the currently accepted practice of marketing a product based not on its merits but on some other supposed benefit the consumer would receive.) Would a more vigorous and encompassing regulation of the market, through tax policy, administrative oversight, in short, governmental intervention, lessen the ability of the market to dictate and create our personalities and desires, or would it produce an inefficient economy, mismanaged resources, and favoritism towards the politically connected, and all in all a diminishment of freedom? Nevertheless, in theory Postema's objection could be met, however difficult it would be in practice to mitigate the influence of the market on our preferences.

The aporia of how we are to practically resolve the issue of market created preference reveals the more general problem with Dworkin's theory of equality. Dworkin's theory does not give us the necessary specificity to implement his conception of equality. As stated earlier, Dworkin's egalitarianism is indeterminate, incapable of both providing a means whereby incommensurable values could be hierarchically ranked¹⁴⁷ as well as deciding ownership of a resource desired

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We should expect a political theory to hierarchically rank values because otherwise there would be no rational way for us to determine why we prefer one over the other. This is all the more true in Dworkin's case, since he does not allow, for example, a democratic decision on matters of principle.

by two or more individuals. And the indeterminacy of the egalitarian principle points to a further problem: how, given its indeterminacy, can the abstract egalitarian principle ever be applied satisfactorily in the real world?

In his discussion of the auction, Dworkin does address the issue of how it is to be considered vis-a-vis the real world. He makes two points about its application to practical affairs. One, it may be used as an ideal, as a standard against which we would judge existing political arrangements and institutions. Two, the auction "might be useful in the design of actual political institutions."¹⁴⁸ He recognizes that this will have only a limited application, but nevertheless thinks that even if we cannot carry out an actual auction over resources, it may be

...possible to design an auction surrogate -- an economic or political institution having sufficient of the characteristics of a theoretical equal auction so that the arguments of fairness recommending an actual auction were it feasible also recommend the surrogate.¹⁴⁹

Recognizing that it may be possible to create an economic or political surrogate is a far different matter from actually creating one, about which Dworkin is, understandably, silent. Does he envision a redistribution of resources on the magnitude of what he thinks an equality of resources to be? The problem with fitting the practical to the theoretical, the

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Dworkin, Equality of Resources, 291.

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Ibid., 392.

real to the ideal, is not only theoretical itself, as we have seen in discussing how Hegel envisions his own methodology. The problem also lies in the danger of forcing 'reality', whether it be political processes or economic institutions, into the 'mold' of Dworkin's universal ideals of equality. The testimony of a generation of citizens of former communist countries, nurtured on talk of egalitarianism and little else, convincingly demonstrates how well social and political institutions adapted to the universal claims of equality. The notion that an egalitarian redistribution of resources would ever in the world have the consequences Dworkin thinks (i.e., an actual equality in the redistribution of resources) is a dystopian delusion.

This utopianism can be seen when we ask about the consequences for liberty when we either have to redistribute resources or create and design political institutions which preserve an equality of resources? Dworkin has claimed, as we noted, that the values of liberty and of equality are not competing, are not in fact separate and distinct at all, but are two sides of the same coin. This is so because when we are speaking of an equality of resources we are speaking of a process by which individuals measure the true opportunity costs of their plans to others in order to use only a fair share of resources. Liberty is an essential aspect of this formulation of equality (and equality of liberty) in order that we may arrive at a true estimation of the opportunity

costs to others and bid on resources with that knowledge. The concern with liberty here is not to the formulation that equality and liberty are integrally connected values. It is, rather, about the practical ways in which we are to either reallocate resources or to formulate policies which bring us closer to his egalitarian ideal. Even if we grant that there is no tension between liberty and equality in principle, in the thought experiment or theoretical account (in Dworkin's terms, in the "ideal ideal world" or the "ideal real world"), there must be in fact (in the "real real world").¹⁵⁰ To be fair, in making the distinction between the "ideal ideal world," the "ideal real world," and the "real real world," Dworkin is trying to obviate the charge of utopianism. He understands that the conditions which he posited and which allowed him to formulate an ideal distributional scheme do not hold in the real world. Nevertheless, he does use an ideal formulation to critique our present practices and does argue that those present practices be reformed, curtailed, or extinguished to bring them in line with the ideal, albeit a tempered ideal. As he writes:

We can use the idea we formed in the ideal real world, of a defensible distribution, to judge our performance so far in the real real world. We criticize ourselves, not because we have not achieved an ideal egalitarian distribution, as we might have done in some fantastic

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Dworkin, Place of Liberty, 46.

comprehensive action, but because we have not achieved, nor even approached, a defensible distribution for us.¹⁵¹

Liberty must be infringed if we are to re-allocate resources or allow the state to exercise control over the market as conditions now stand. This may or may not be desirable: but the degree of re-allocation and state intervention will have an impact on the freedom of individuals to satisfy their needs, enter into voluntary contractual arrangements, and exit those agreements as they see fit.

This point is reinforced by Dworkin's vague descriptions and explanations of both resources and economic markets. Does he see a state controlled economy as a hindrance to liberty, or does he see it as the only means available to ensure an equality of resources? What does he mean by resources? And what kind of market does Dworkin envision when he speaks about an auction and an equality of resources?

Let us begin with the idea of private ownership of resources. If he does not explicitly advocate, or give a justification of, the private ownership of resources, he does assume it: "I shall assume, for this purpose, that equality of resources is a matter of equality in whatever resources are owned privately by individuals."¹⁵² He does not differentiate between private ownership of what he terms "resources" from

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Ibid.

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Ibid., 283.

the means of production, for example, as Marx does, or from any other type of ownership of resources (a joint state-individual ownership, for example, or corporate ownership). Nor does he distinguish between resources as means of production and other types of resources. So this tells us very little about private ownership and whether he thinks private ownership a necessary aspect of individual liberty.

Similarly, he assumes that some kind of economic market is necessary: "I shall try to suggest, on the contrary, that the idea of an economic market, as a device for setting prices for a vast variety of goods and services, must be at the center of any attractive theoretical development of equality of resources."¹⁵³ But this does not tell us what kind of market, socialist or capitalist, his theory of equality of resources would demand, nor does it tell us how far he is willing to allow the state to intervene, direct, and regulate the market in order to ensure his egalitarian ideal. This is how he puts it in Law's Empire: "Government must constantly survey and alter its rules of property, radically if necessary, to bring them closer to the ideal of treating people as equals under the best conception."¹⁵⁴ Again, what is a "radical" alteration of the rules of property?

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Ibid., 284.

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Dworkin, Law's Empire, 310.

Dworkin obviously recognizes the tired arguments against a capitalist market economy, i.e., that they produce extreme inequalities, both in wealth and property.¹⁵⁵ Despite this, he believes some sort of market necessary to ensure an equality of resources. As we noted above, just exactly how the market will either redistribute resources or create institutions which preserve an equality of resources, in the real world, Dworkin does not say.

Finally, there is a further feature concerning the abstract egalitarianism which renders it implausible as a principle of distributive justice. In formulating the idea of the hypothetical auction, Dworkin attempts to account for the "unfair differences...traceable to genetic luck, to talents that make some people prosperous but are denied to others who would exploit them to the full if they had them."¹⁵⁶ In order to equalize those resources gained by these arbitrary means, Dworkin proposes an insurance scheme to compensate those who are less well off through no fault of their own. It is not necessary to explain how a hypothetical insurance scheme enhances equality in this situation,¹⁵⁷ because the problem

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Dworkin, Equality of Resources, 284.

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Ibid., 314.

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Dworkin discusses the hypothetical insurance market in Equality of Resources, 314-334.

here concerns the idea that we should equalize genetic luck and talents in the first place.¹⁵⁸

The problem for egalitarianism is this: to say that we should equalize resources gained through good genetic luck or talents is to say that what is important in political morality

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Besides this general point, there are specific instances where egalitarian principles would seem to be either impossible or morally grotesque. For example, both Nozick and Hayek have noted the decisive influence of families -- a condition not chosen by the individual and hence subject to redistribution according to egalitarian principles -- upon the success or failure of individuals in life. Why shouldn't the effects of this institution be equalized as well, since it confers a morally arbitrary advantage to some individuals but not to others? How could the hypothetical insurance market possibly work as far as families are concerned? See Friedrich Hayek, The Constitution of Liberty (Chicago: University of Chicago Press, 1960), 89-90 and Robert Nozick, Anarchy, State and Utopia (Oxford: Basil Blackwell, 1974), 167-168. Although Hegel does not speak of the family in this way, we can note that the institution of the family is a necessary normative sphere within an articulated society. Families are the first way in which children (and adults through marriage) become members of a group (Philosophy of Right, §158, 149; 199), are raised from their "natural" state into a consciousness of the universal (Ibid., §'s 174 & 175, 158-159; 211-212). Hegel even goes so far as to say that since marriage is an objective determination of freedom, to marry is an "ethical duty." Ibid., §162R, 150; 201. Furthermore, as John Gray points out, the logic of egalitarianism leads to morally reprehensible consequences. As he writes: "If one person is blind and another fully sighted, why not transfer one eye from the sighted to the blind person, so that both are then partially sighted?...The standard, conventional answer to these pertinent questions is that the pursuit of equality is reasonably constrained by other values, such as individual liberty and respect for human personality...[But] policies which forcibly redistribute estates that have been in the hands of families for generations may have as injurious an impact on the liberties and personalities of the family members as any hypothetical policy for the redistribution of bodily parts might be expected to have." John Gray, Beyond the New Right: Markets, Government and the Common Environment, 87.

is the relationship between those with good genetic luck or good talents and those with bad genetic luck or poor talents. But that cannot be what matters, ultimately, for politics or morality. As Joseph Raz has written:

But wherever one turns it is revealed that what makes us care about various inequalities is not the inequality but the concern identified by the underlying principle. It is the hunger of the hungry, the need of the needy, the suffering of the ill, and so on. The fact that they are worse off in the relevant respect than their neighbors is relevant. But it is relevant not as an independent evil of inequality. Its relevance is in showing that their hunger is greater, their need more pressing, their suffering more hurtful, and therefore our concern for the hungry, the needy, the suffering, and not our concern for equality, makes us give them the priority...

...Our concern for the suffering, the unhappy, the unfulfilled is greater the greater their suffering or unhappiness. We have no reason to stop and ask whether the gap between this unhappy person and the rest of humanity is great to justify or to quantify our concern for him. His suffering or unhappiness matter in themselves, and the greater they are the more they matter. There may be many other equally unhappy, or unfulfilled, or suffering. It does not diminish the reason for helping that person, except inasmuch as it indicates that we have equal reason to be concerned with others.¹⁵⁹

Raz here argues that theories of justice based upon egalitarian principles take as fundamental what is not, namely, the relational character of resources, wealth, etc., instead of the well-being of the individual. It is not the wealth or poverty of an individual in relation to the wealth or poverty of others which is of primary concern, but the well-being of the individual, measured in a variety of ways depending upon the constituent factors which comprise well-

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Raz, Morality of Freedom, 240-242.

being (factors which may well be incommensurable in themselves).

The argument concerning the non-foundational character of equality applies as well to the claim that social equality is decisive because without social equality individuals cannot exercise positive self-determination. Here the claim for equality is tied to the value of democratic freedom: the poor, the less educated, the dispossessed, because of their lack, are not as likely to participate politically and hence do not have a say in the determination of their own lives.

But what does this argument come down to? X cannot make of his life what he wants because he does not have the resources he needs to be a political participant. What is important is that X doesn't have something which he needs (in order to participate politically), not that Y has more than X. Again, it is the well-being of X which matters, and which affects his ability to participate politically, and not that he has less in relation to others.

Because Dworkin does not give us a reason why he begins with equality (i.e., why is it the fundamental value in political morality), he cannot tell us why inequality is an evil in itself (or equality a good). Dworkin's egalitarian focus on the relational aspect of resources distorts and

redirects us from concentrating on what is of ultimate significance in political and moral matters.¹⁶⁰

Conclusion

The limitation of Dworkin's egalitarian liberalism stems from those features which, in general, characterize most justifications of liberalism. As complex and different as the various defenses of liberalism are, certain substantive similarities do permeate its forms.¹⁶¹

As individualistic, Dworkin's liberalism centers primary concern around the individual, and insists that moral primacy accrues to the individual, as expressed in rights, against society. Despite Dworkin's insistence that he wants to account for a 'strong' sense of community, and that in fact a liberal theory is the best theory to account for strong communal ties, we have questioned the claim that the principles Dworkin thinks create a strong community -- justice, fairness, due process, and integrity -- do in fact create a strong community or foster such ties. This pointed to a possible strain between the early Dworkin's concentration on a thin conception of the good, or procedural justice, and

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In addition to Raz, John Gray has made the same point in chapter 3 of his book Beyond the New Right: Markets, Government and the Common Environment.

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See John Gray's Liberalism. I take the categories which liberal theories share from that work.

the later Dworkin's reliance on substantive results as embodied in the dictum equal concern and respect. This is so because Dworkin ultimately relies on a distinction between our public selves and our private selves by insisting, first, that individuals identify only with the political acts of the government, and, secondly, that the ultimate judgement concerning moral matters resides in the individual alone. His individualism can also be seen in his concern, shared by almost all liberal thinkers, of the state's coercive power, and the subsequent possible infringement upon individual (negative) liberty.

From Hegel's point of view, this way of understanding the relationship between the individual and society is misconceived, and states only a partial truth. It is true that individual rights, as theorized within the sphere of abstract right, morality, and civil society, must be protected and preserved; it is the state's duty to maintain these rights. But the protection and maintenance of individual rights expresses only one aspect of the relationship between the individual and the state, the one-sidedness of which can be seen in Hegel's argument that rights and duties are correlative (and duties are something about which Dworkin says little). Furthermore, the relationship between the individual and the community is comprised by the four ways in which commonality -- universality -- manifests itself within modern society. Those four ways (the family, civil society, the

state, and the relationship between all of them) are all necessary and normatively valid insofar as they are derived from the self-determination of freedom. Those spheres, taken as a totality, do argue for the protection, at least to a degree, of the liberties Dworkin thinks important -- but they are also the ground for those liberties. Or, to say the same thing differently, the relationship between the individual and community is not instrumental, for Hegel, but is rather one of identity.

Dworkin's theory can be characterized as universal in several ways. First, the abstract egalitarian principle seems to be applicable to all societies (though the evidence within Dworkin's writings for this is ambiguous). Although he does discuss the specific institutions, culture, laws, and values of America and Great Britain, especially in Law's Empire, on questions concerning matters of principle the moral concepts which he defends are not bound by or limited to those particular societies. This can be seen as well in Dworkin's argument for a unified morality expressed by the idea of integrity. The principle of integrity demands that we interpret the law as a principled and coherent whole, resting on the moral concepts of equality and liberty. The correct interpretation of matters of principle does not depend upon shifts in values within communities, or shifts in values over time. This does not mean that Dworkin is insensitive to the history of America, and especially judicial history; indeed,

his conception of integrity maintains that we must interpret the law not only in a principled way according to a conception of morality, but we must take into account past case history as a part of our interpretation. However, this does not entail that our decision is based upon, is determined by, or receives ultimate sanction from, past historical judgments. The ultimate and final judgment rests on moral principles and our interpretation of the law in light of those principles.

From Hegel's perspective, Dworkin's general claim that the law is to be understood as a coherent and principled whole is correct: when right is posited "as what it is in itself" it is the law.¹⁶² The law, within ethical life, is a rational expression of the concept of freedom.

Nor would Hegel argue over the need for a moral theory (political and legal as well) to be universal. Only a universal and unconditional moral theory can have normative validity, commanding what we should do. It is for this reason that Hegel argues that only a self-determining relation of wills can fulfill the requirement that they be determined by nothing outside of themselves.

The universal character of Dworkin's theory, on the other hand, goes astray from the Hegelian perspective. He takes a moral theory and applies it to existing conditions (or formerly existing conditions); he attempts to mold the theory

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Hegel, Philosophy of Right, §217 & A, 187; 249-250.

to fit the facts. Such an attempt, besides encountering methodological problems, does not consider the matter itself; it does not ask how the idea of freedom itself develops. It is necessary to do this, on Hegel's view, because by admitting into the determination of freedom external determinants, we are undercutting any claim for normative validity. Freedom must be taken as self-determining and must be explicated in terms of what that self-determination requires. Theories like Dworkin's which attempt to ascertain principles of justice or right do so by recourse to an outside factor, an attempt which destroys any necessity the theory might have. As a consequence, the relationship between theory and practice will always remain contingent, external to the theory, as it were, and therefore conditional and unable to provide us with normative validity.

As an egalitarian theory, Dworkin confers upon all persons the right to equal concern and respect; this is manifested in the government's relation towards the citizens, individuals who must be considered as persons capable of, and responsible for, choosing what kind of lives they will lead and who therefore must be considered as possessing an equal worth and dignity. Dworkin's egalitarianism also plays itself out in his theory of equality of resources: what he argues to be the best interpretation, consonant with liberty, of the idea of equality.

Hegel rejects egalitarianism, at least in this form, because the injunction "equal concern and respect" cannot be foundational to political morality. The stricture "equal concern and respect," although harmless and unobjectionable, is too abstract a formulation to provide us with any concrete determinations within society. Furthermore, the concept of freedom does not entail a re-allocation of resources. In the context of abstract right, there is no objection to the theory of equality of resources in principle, because each individual would, presumably, agree to the auction beforehand (though this is not explicitly stated by Dworkin and it is a question as to whether agreement to conditions can confer normative legitimacy). Practically, however, a redistribution of resources in the real world would inevitably violate the freedom of the individual to place his will in property, because property would be taken away from individuals without their consent. As far as freedom taken as morality goes, Dworkin's equality of resources recognizes that everyone's welfare be taken into account (hence the redistribution of resources according to their opportunity costs, or costs to others), and therefore fulfills the general aim of morality, the requirement that the intentions of the subject, via his or her actions, be taken into account. Equality of resources also comports with at least one dimension of the final determination of morality, namely, the Kantian position that human beings must be treated as ends in themselves and never

as means. Although Dworkin does not put it in the language of Kant and Hegel, it is not farfetched to argue that Dworkin's requirement that each individual should be allowed to formulate and fulfill his or her own goals and ends (which an equalization of resources allows) embodies this Kantian moral element. It is in ethical life, specifically within the sphere of civil society, that an equality of resources fails to meet the demands of freedom. From the perspective of ethical life, the demand for an equality of resources is an one-sided and abstract claim, a partial truth, which does not recognize the nature of civil society and the relationship between the normatively distinct spheres of civil society and the state. Civil society is the sphere of differences, of contingency, and of particularity. Hegel argues that the state is a normatively distinct realm from civil society, a normative realm which allows for political self-determination (as civil society does not, although there are institutions within civil society which lead to the standpoint of the state) and which integrates all of the other normative spheres into a self-determined whole. Dworkin places the state on the same normative par as civil society, and hence undermines its distinct ethical character. In short, Dworkin defends a welfare state, while Hegel does not.

Other objections to the egalitarian position, though not Hegel's, were raised. This consisted, first, of the failure of egalitarianism to focus on the true matter of political

morality, namely, individual well-being, and its tendency to divert our attention to the relationship between goods, or welfare, or resources. Secondly, egalitarian injunctions such as Dworkin's are indeterminate: the abstract egalitarian principle when applied through the hypothetical auction cannot in principle decide between a resource that two individuals may each equally desire. It also cannot provide us with the means to adjudicate between the conflicting claims concerning rights that arise from the egalitarian principle. Finally, we made the more general point concerning the applicability of an egalitarian redistribution of resources in practical terms. The conclusion concerning the practical consequences of the implementation of Dworkin's egalitarian theory resides in its utopian character. Far from being benign, or serving as an ideal to which we may aspire, the utopianism of Dworkin's egalitarianism is dangerous, and, perhaps, in so far as the attempt has been made to implement egalitarian theory in practice, anti-egalitarian in its effects.¹⁶³

Hegel presents us with an alternative argument concerning the nature of freedom and the particular foundational role it must play in any moral, social, and

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It has been plausibly argued that egalitarian policies destroy the very culture they seek to cure of its "ills." This is so because "egalitarian policies invariably generate a corrupt, inefficient and often exploitative parallel economy, in which human responsibility survives only in a compromised and degraded form." John Gray, Beyond the New Right: Markets, Government and the Common Environment, 92.

political theory, the way in which it manifests itself within modern societies, the various social and political institutions required by the concept of freedom in modern society, and the relationship between the individual and the community. His theory is one which is at odds with Dworkin's in essential respects. It is outside the scope of this work to argue in any detail what aspects of the Hegelian **Rechtstaat** or Hegel's **Rechtsphilosophie** as a whole could be appropriated for our situation. Hence it remains to be seen if a Hegelian philosophy of right can preserve its vitality when confronted with one form of the dominant ideology of the time.

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The dissertation is therefore accepted in partial fulfillment of the requirements for the degree of Doctor of Philosophy.

12-01-94
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