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Does Ronald Dworkin Take Rights Seriously?*

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One of the aims of Ronald Dworkin's recent book, *Taking Rights Seriously*, is to provide a theory of natural rights. His theory is novel and interesting in two respects. First, Dworkin argues that the commonly held belief that liberty and equality are fundamentally opposed to one another is false.¹ Rights to various liberties are themselves derived from a form of a right to equality – what Dworkin calls the right to equal concern and respect. Second, Dworkin thinks that the notion of a general right to liberty, which can be opposed to egalitarian claims, is incoherent.

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1 Ronald Dworkin, *Taking Rights Seriously* [henceforth called *TRS*] (Cambridge, Mass.: Harvard University Press 1977) xiii. Dworkin also emphasizes this point in a recent interview. See 'Philosophy and Politics' in Bryan Magee, ed., *Men of Ideas* (New York: Viking Press 1976) 242-60.

This paper contains a detailed examination and critique of Dworkin's theory of rights. I shall argue that Dworkin's theory of rights is so radically defective that he really has no theory of rights at all. The problem is not that Dworkin has failed to ground his theory; while one would like a grounded theory of rights, lack of completeness is no philosophical sin *per se*. The problems with Dworkin's theory turn out to be much deeper than mere incompleteness. First, Dworkin's fundamental or basic right which is supposed to ground particular individual rights – the right to equal concern and respect – could not be a fundamental right and indeed may not be a natural right at all. Second, Dworkin's argument that the right to liberty is incoherent is a poor one which can be easily refuted. These two points, if valid, show that Dworkin's attempt to overcome the opposition between liberty and equality fails. Third, I shall argue that any theory of natural rights entails a right to liberty. If I am correct in this, not only can't the opposition between equality and liberty be dissolved, but any theory such as Dworkin's which has no room for a right to liberty is seriously flawed.

The paper is divided into four parts. Section I contains an explication of Dworkin's theory of rights. Section II presents the criticisms of the notion of a right to equal concern and respect. In Section III I discuss some replies Dworkin could make to my criticisms and argue that these replies either fail or transform his theory in ways that he would find unacceptable. Section IV argues that the right to liberty is coherent and is central to any theory of natural rights.

I

Before we can begin to set out Dworkin's theory of natural rights, we must understand what Dworkin means by the terms 'natural' and 'right.' The former means pretty much what we would expect: 'they are not the product of any legislation, or convention, or hypothetical contract' (*TRS*, 176-7; see also XI). Dworkin analyzes the notion of a right in terms of its contrast with collective goals or aims: a right is an individuated aim, and a goal is a non-individuated aim. The relevant distinction here is that in a collective goal principles specifying some assignment of some good, resource, or liberty to specific individuals 'are subordinated to some conception of aggregate collective good, so that offering less of some benefit to one man can be justified simply by showing that this will lead to a greater benefit overall' (*TRS*, 91). When we speak of rights, however, an aggregate good is irrelevant; if a person has a right to something, he has it even if it defeats or works against some collective,

non-individuated goal. In accordance with this, Dworkin describes natural rights as *individual* rights and he denies that there could be a 'right' of a majority or society which overrides individual rights. A right of a majority or of society can only be a right of the individuals in the majority or society and they have that right no matter how many there are in the group who also have the right (TRS, 194).

If rights can defeat or work against collective non-individuated goals, then rights exist in the 'strong' anti-utilitarian sense, by which Dworkin means that it is wrong to coercively *interfere* with the exercise of that right, even if exercising the right is detrimental to the general welfare² or is something that ought not to be done.

It should be noted that Dworkin's theory only concerns a *subset* of individual rights – what Dworkin calls *political* rights.³ Unfortunately, Dworkin never defines a political right, but such rights appear to include all rights one has against the state as well as those rights that citizens have against one another which require a political decision of one sort or another.⁴ There is no implication that Dworkin thinks his theory is capable of deriving those rights that may have little to do with political decisions – though what such rights would be is unclear.

The basic political right to equal concern and respect is 'abstract' (TRS, 180, 273) (it contains no specification of how the right 'is to be weighed or compromised in particular circumstances' [TRS, 93]) as well as being 'axiomatic' (TRS, xii). To treat people with 'concern' is to treat them as 'capable of suffering and frustration,' while to treat them with 'respect' is to treat them 'as capable of forming and acting on intelligent conceptions of how their lives should be lived' (TRS, 272). This vague right is made more specific by Dworkin so that we know that the abstract right to equal concern and respect can refer either to a right to be treated as an *equal* or to the right to *equal treatment*. The first is 'the right to equal concern and respect in the political decision about how goods, opportunities [and also liberties] are to be distributed' (TRS, 237), while the second is a right to the *same* distribution of goods, opportunities, or liberties as anyone else. Everyone will grant, says Dworkin,

2 TRS, 188-91. Dworkin only says that it is wrong to interfere, but I am sure he intended 'coercively interfere.' After all, it is permissible to reason, beg, plead etc. with a person that he not exercise his right, or to use forms of social pressure to stop him; what is prohibited is the use or threatened use of force or violence, which I shall call coercion.

3 Ronald Dworkin, 'Seven Critics,' *Georgia Law Review*, 11 (1976-7) 1260-1

4 In TRS, 94, footnote 1, Dworkin does make a distinction between rights against citizens and rights against the state.

that the former is primary and only sometimes implies the latter. Dworkin provides three examples of what he presumes to be unproblematic cases in which the right to treatment as an equal does not entail the right to equal treatment. The first concerns two children; one is dying from a disease which is making the other uncomfortable. One does not show equal concern if one flips a coin to decide who should get the remaining dose of a drug; the right to treatment as an equal demands you give it to the dying child (*TRS*, 227). The second case involves a particular economic policy (e.g., fighting inflation) which might damage a certain class of citizens such as long-term bondholders. Treating them as equals means taking their prospective loss into account when deciding if the policy is a good one; it does not mean that their share of the burden of fighting inflation must be identical to everyone else's (*TRS*, 273). The third example is that of a certain amount of emergency relief which is available to two equally populous areas damaged by floods. The right to treatment as an equal means one must give more flood relief to the more damaged area.⁵

Notice that in all three cases the right is only of a *distributive* character. In each case the person or institution has a certain decision it is going to make concerning *distributing* a certain good and the only question is how this should be done. Questions of how one first got the good or was in the position to make the decision are shunted into the background. I make this observation now because it will be important later.

The method by which *particular* individual rights are derived from the axiomatic basic right is described by Dworkin as follows. The basic right to equal respect and concern is first used to justify certain institutions – specifically democracy and some form of a market. But these institutions are not perfect and in practice will contain internal processes which deny citizens the basic right. To rectify this, a scheme of 'corrective devices in the form of individual rights' (*L*, 137) is added to both political democracy and the economic market. Exactly which sorts of particular rights are added, and the content of these rights, will depend on one's justification of the basic right and on one's view of the institutions these particular individual rights are supposed to correct. And one's justification of the basic right will in turn depend on what one takes to be the *meaning* of the right to equal respect and concern. Dworkin therefore believes most of the disagreements concerning rights stem from different interpretations of the basic right, as opposed to the method by which one derives rights.

5 'Liberalism,' in Stuart Hampshire, ed., *Private and Public Morality* (Cambridge: Cambridge University Press 1978), 126 (henceforth called *L*)

Modern liberals, for instance, are interpreted by Dworkin as holding the belief that if the state treats people as equals, then its decisions should be as neutral as possible on the question of 'any particular conception of the good life or of what gives value to life,' while modern conservatives allegedly believe 'treating a person as an equal means treating him the way the good or the truly wise person would wish to be treated' (L, 127). In order for the reader to grasp Dworkin's views concerning the justificatory procedure for particular individual rights, a brief sketch of his reconstruction of liberalism and conservatism is necessary.

Democracy is justified by liberalism because it treats people as equals by not giving any person's vote or voice more or less weight because he or she is more or less worthy of respect or concern. But this neutral weighing of the wishes of each citizen is disrupted by the democratic political process' unavoidable weighing of people's *external preferences*; that is, people's preferences not for their *personal* enjoyment of goods, opportunities etc., but for how *others* should enjoy some goods or opportunities, make it difficult for a democratic government to be neutral on the question of the good life. Whenever there is an antecedent probability that a government will decide that a certain way of life is more or less worthy of respect or concern because of this non-neutral registering of external preferences, then the liberal will justify particular individual rights so as to prevent the government from acting in a certain way. Dworkin believes that liberals will justify, e.g., right to free speech and free choice in sexual matters on the grounds that any decision to restrict free choice in these cases is likely to be due to a non-neutral weighing of external preferences vis à vis some way of life (TRS, 235-7; See also 275-7).

Conservatives, on the other hand, will be less likely, according to Dworkin, to see the need for individual rights in these areas. If a democratic legislature in a virtuous society e.g., criminalizes pornography, then it is reflecting the preferences of virtuous citizens which is precisely to respect the right to be treated as the good person would want to be treated. For the conservative, the flaw in democracy occurs, and hence specific individual rights are needed, in the economic realm, as democratic legislatures have a tendency to expropriate those who are successful in the market. The conservative believes the market is the paradigm of 'fairness in distribution' (L, 137), because it allocates rewards to those who are more industrious and successful in serving virtuous citizens' wants. Accordingly, a specific set of property rights is needed to prevent democratic procedures from running afoul of the basic right to be treated as a virtuous person would wish to be treated.

The liberal will not have the same view of the market, since for him the market will treat people as equals if and only if it neutrally weighs people's preferences about the good life. The price system could in prin-

ciple do this *if* everyone had the same talents and everyone began life on an equal footing; but since these conditions aren't fulfilled, the liberal will want the government to intervene in the market so as to rectify those inequalities that do not exemplify the right to be treated as an equal (those due to superior talents, inheritance, etc.) while keeping those inequalities that do exemplify the basic right (those arising from different views of the good life). Accordingly, the liberal, as reconstructed by Dworkin, will place less stress on property right and will concentrate on rights of redistribution (welfare rights) (L, 129-32).

The structure of Dworkin's theory of natural or individual rights can be summarized as follows. People have a basic right that those institutions which make political decisions treat them as equals, that is, in a fair manner. Institutions are justified if they exemplify the basic right; but since those institutions may not be self-correcting, specific individual rights enter into the picture so as to rectify any strong tendencies of the institutions to distribute goods, liberties, opportunities etc. in a way that violates the basic right.

II

A successful theory of natural rights requires that the basic right from which all other particular individual rights are derived must not presuppose all sorts of rights. However, Dworkin's three examples which are supposed to exemplify the right to be treated as an equal raise obvious questions concerning the *right* of the agency or person to distribute certain goods (drugs, flood relief) or to make certain decisions (fight inflation). And since two of Dworkin's examples – the flood relief and the inflation case – involve political decisions, then Dworkin's basic political right raises questions about other background political rights.

Of course, Dworkin's examples were meant to demonstrate that the right to treatment as an equal doesn't always entail equal treatment, and I am not denying that. My point is rather that his examples don't help us to see how the right to treatment as an equal is a basic right. In fact, such examples suggest an argument against the notion of a basic right to a fair distributive share of a good, resource, or just a 'share' of consideration vis à vis a political decision. Quite simply, if Y is some governmental body, X is some fair share of a good, resource, or consideration, and A is some citizen(s), then A can have a right to receive X from Y if and only if Y *violates no rights* in having the authority to distribute X. A cannot demand a right to a fair distributive share of X from Y if Y's authority to distribute X was achieved through some rights violation.

If Y violates no rights in having the authority to distribute X, there are two possibilities: (1) Y *had the right* to acquire authority over X, or (2) Y was at *liberty* to acquire such authority. Clearly, unless the second alternative can be supported, the right to a fair distributive share, i.e., the right to equal concern and respect cannot be a basic right. But the second alternative is unacceptable.

To say that Y is at liberty to acquire the authority to distribute X is to say that it is permissible to engage in such actions, i.e., Y is not obligated to abstain from these actions. This means that the *only* justificatory principles that concern what decisions or activities the government has the authority to engage in are (i) non-political rights and correlative obligations and/or (ii) moral principles which do not involve rights and correlative obligations. But if this is so, it is mysterious how a political right and obligation should suddenly enter the picture with regard to the *manner in which* government makes its decisions or conducts its activities. In political philosophy questions concerning what the government can legitimately do – the limits of its coercive power – are logically *prior* to questions concerning the way they should do it – distributive and procedural matters. If political rights and obligations are not needed at the former level, why should these be needed at the latter level? Dworkin's category of a political right becomes arbitrary if it only has relevance at the latter level.

We are therefore left with the first alternative, which means the political right to a fair distributive share, i.e., the right to equal respect and concern, presupposes other political rights and is therefore not fundamental.

As damaging as the above argument is, a deeper criticism emerges when one reflects on the following question: what is the *point* of individual rights? What sorts of values underlie the notion that individuals have moral rights prior to any act of government? Dworkin himself has provided a beginning of an answer to these questions. Rights based theories, he writes, 'place the individual at the center, and take his decision or conduct as of fundamental importance... [They are] concerned [primarily?] with the independence rather than the conformity of individual action. They presuppose and protect the value of individual thought and choice' (*TRS*, 172). We can flesh out Dworkin's account by paying close attention to the crucial features of natural rights we have already noted: first, they are always *individual* rights, and second, the concepts of coercion and consent play a central explanatory role. Coercion is central because if an individual has a natural right to do something, it is wrong to interfere coercively with his exercise of it, and consent is vital because one can only influence or direct his activities and goals within the scope of the right by the individual's consent or cooperation. This means that an individual right sets up a certain sphere

wherein an individual's choices, decisions, and actions are free from coercive interference. Within that sphere he can do what he want with his own life so long as he doesn't violate any other individual's rights. Natural rights, then, at their source, contain what, for lack of a better term, one might call *individualistic values*: each individual has his own moral boundary which cannot be crossed by others except under unusual circumstances. In particular, these moral boundaries cannot be coercively broken down and gathered into the undifferentiated mass of a *collective goal*.

Dworkin's basic right to equal respect and concern does not presuppose and protect the value of *individuals' leading their own lives*; rather it revolves around the government treating *fairly* the *community* or *majority* its decisions affect. For the liberal (as reconstructed by Dworkin) this means that the government can't single out and may prevent social practices from singling out any particular way of life as especially worthy or unworthy, while for the conservative (as reconstructed by Dworkin) this means the state must assist majorities in promoting a good way of life or may correct practices which do not reward virtue. In both cases the values are decidedly non-individualistic. The liberal is concerned with 'what the community as a whole has to distribute' (*L*, 132; see also 130-1) (to quote from Dworkin's discussion of the liberal's view of economic matters), or with the majority following fair procedures; the focus is on the individual as a *recipient* of some majoritarian or community procedure. The conservative's concern is that citizens treat 'the lives of other members of the community as part of their own lives' (*L*, 137) either in the sense that any non-virtuous activities someone's life partakes of becomes the community or majority's concern, or in the sense that an economic distribution is justified if the people rewarded within it are providing virtuous others' with what they want; the focus is on the individual only to the extent that he fits the virtuous scheme.

It is quite clear, then, that in two senses the values underlying Dworkin's fundamental right are radically at odds – indeed, virtually contrary to – the individualistic values that underlie the notion of an individual right: (1) Rather than emphasizing moral boundaries which mark off individuals from one another, the emphasis is on the impermissibility of the government singling out some individual or group for special attention or failing to do so when this is warranted; and (2) notions of consent and coercion do not appear to play a major role. The consequences of this are quite serious. Dworkin has claimed to provide a *theory of rights*, or as he puts it, a *rights-based political theory*. A *rights-based political theory*, according to Dworkin (*TRS*, 170-2), doesn't just contain particular individual rights which cannot be overridden in the name of the general welfare; the essential feature is that these particular individual rights are derived from a more basic or fundamental

right than, say, a basic political goal. But individual rights must have a *point* or purpose if they are not to be mere polemical or figurative devices; just as one lacks a right-based political theory if one lacks a fundamental right at the root of the theory, so similarly one lacks a rights-based political theory if the values embodied in and protected at the root of the theory are fundamentally at odds with the purpose of particular individual rights. And that is precisely what occurs in Dworkin's theory. Individual rights come into the picture as a sort of strategic device which helps prevent the non-individualistic value of equal concern and respect from being demolished by inegalitarian or unfair majoritarian or social decisions. A theory which views individual rights in this manner really has no claim to being a theory of natural rights at all.

In this regard it is quite revealing that Dworkin's rhetoric of 'taking rights seriously' *never* occurs at the level of the fundamental right. The phrase 'taking rights seriously' only occurs in Chapter 7 of Dworkin's book and it means that an individual who is exercising a particular right must be left free from coercive interference when pursuing his goals within the confines of that right. But since the fundamental right has nothing to do with these individualistic values, it is not surprising that Dworkin never talks about taking *that right* seriously. But if one doesn't take the fundamental right seriously, and this right grounds all other rights, then Dworkin can't be said to take rights seriously.

It might be thought that the above argument is irrelevant. Since there is still a natural right at the base of Dworkin's theory, what does it matter that it is of a fundamentally different nature than the rights it grounds? The reason it matters is that the notion of 'a right' is supposed to mark off certain moral/political concepts from other ones (in particular, as Dworkin pointed out, the notion of a collective goal). But if a certain right lacks essential features that serve to distinguish rights from other concepts (e.g., individualistic values), and this 'right' plays the key role in a theory by grounding other particular rights, then it is not playing with words to declare that such a theory is not a genuine theory of natural rights. In fact, since Dworkin's fundamental right points to values so radically at odds with the values usually associated with natural rights, it is up to him to demonstrate that the right to equal concern and respect is even a natural right at all. I am not arguing that it isn't, but clearly the burden of proof falls on Dworkin since it is of such a radically different character than other individualistic natural rights.

Thus, our two criticisms in this section dovetail nicely. A right to a fair distributive share cannot be a basic political right because it presupposes another political right. It follows that if it is a right at all, it can only be a derived right. If it is a derived right, it will have to be carefully explained how the non-individualistic values it protects can be made compatible with the individualistic values which individual rights protect.

III

In this section I discuss two responses Dworkin might make. The first is that I have neglected to mention a certain passage in the Introduction to *Taking Rights Seriously* which would show that he was aware that his basic right to equal respect and concern was of a fundamentally different character from other rights. This passage reads:

... the right to concern and respect is fundamental among rights in a different way, because it shows how the idea of a collective goal may itself be derived from that fundamental right. If so, then concern and respect is a right so fundamental that it is not captured by the general characterization of rights as trumps over collective goals, except as a limiting case, because it is the source both of the general authority of collective goals and of the general limitation on their authority that justify more particular rights. (*TRS*, xv)

I take it the above means that the moral appeal or justifiability that collective goals have for us is that they seem to embody the right to equal concern and respect.⁶ Dworkin might explicate this claim in the following manner. It is true that the right to equal concern and respect is fundamentally different from other natural rights, but this doesn't invalidate the theory of rights presented. As noted earlier, the right to equal concern and respect is in effect a right to egalitarian or fair consideration when the government is in pursuit of a collective goal. From this basic right to egalitarian or fair consideration vis à vis a collective goal comes the appeal or justifiability of collective goals *in general*, some of which may not be so egalitarian or fair in that they don't treat all citizens with equal concern and respect. Particular individual rights are then needed to correct those collective goals which have these defects and thus to preserve concern and respect. It is, therefore, not surprising that the stress on 'taking rights seriously' only occurs at the level of particular individual rights, for it is only there where the idea of a collective goal may not embody equal concern and respect, and thus a right in the 'strong' (anti-collective goal) sense is needed.

This reply has three flaws. First, it still does not meet the objection that the right to equal concern and respect presupposes other rights. If the right is fundamental and axiomatic, as Dworkin says, how could its invocation presuppose a background of other (political) rights? Second, we still lack an *explanation* why this basic right is of a radically different

6 In fact, Dworkin believes the appeal of utilitarianism – the paradigm of a theory concerned with collective goals – is that it seems to embody the right to equal concern and respect. See *TRS*, 236.

character than all other natural rights. Rights normally defeat claims of collective goals; why do they merge at the level of the basic right, and why aren't we free to consider this merging as a severe defect in a theory of natural rights? As we noted in Section II, the point of the concept of a 'right' would be lost if it played a very similar role to other moral/political concepts. If the 'right' to equal concern and respect gets cashed out in the dictum that a government should always pursue its goals in a fair or egalitarian manner (e.g., singling no one out for undue special consideration) this would seem to be good grounds for considering it not to be a genuine right. After all, no other right can be so made equivalent to an egalitarian goal in this way. For example, to say that all persons have the right to religious freedom and that the government must respect that right is *not* to say that the government should pursue the goal of religious freedom in a fair or egalitarian manner. It is perfectly compatible with the latter statement that the government restrict everyone's religious freedom somewhat in order to protect the achievement of some other collective goal (e.g., social stability), while this is incompatible with the statement that all persons have a *right* to religious freedom, since in that case coercion directed against a person's religious practices is unjustified (except in unusual circumstances).

Third, nowhere does Dworkin provide an *argument* that the moral authority of collective goals follows from his fundamental right. Dworkin will need quite an impressive argument here, for his conclusion is surely counterintuitive. As Dworkin himself pointed out, most collective goals are concerned with the aggregate promotion of some benefit; they encourage tradeoffs between individuals and accordingly place little or no stress on *specific* individuals being treated in a certain manner. But Dworkin's basic right, despite its many affinities with collective goals, does not encourage tradeoffs and is not concerned with the aggregate promotion of any good, so it does not appear evident that the *general* appeal of the idea of a collective goal stems from his basic right.

Another way Dworkin might meet my objections would be to drop the idea that the basic right to equal respect and concern is just a political right. Suppose the right refers to a general way people ought to treat one another – with as much concern and respect as they treat themselves.⁷ This modification in the basic right would help to blunt my previous criticisms of Dworkin's theory in three ways. (1) The right now does seem to be genuinely *fundamental* in light of the fact that we often think the bottom line as far as rights go is that a person ought to be

7 At one point ('Seven Critics,' 1260-2) Dworkin suggests this interpretation upon which I am building.

treated with a certain minimum of respect and concern due to him as a person. (2) The values behind this modified right are more individualistic and more in line with the idea of a person having his own uncoerced life to lead. (3) It eliminates the idea that one can begin a theory of rights by examining what political rights one has to a fair distributive share.

However, a serious problem now arises. As we noted in Section I, Dworkin says that to treat persons with 'respect' means treating them with the understanding that they have their own conceptions of how their lives should be lived, while treating them with 'concern' means treating them with the understanding that they are capable of suffering and frustration. 'Respect' and 'concern' are thus quite different concepts. If one has a right to respect one would suspect that this would get fleshed out in a right to (at least a) certain amount of freedom from coercive interference. You respect a person if you allow him to make plans and projects in accordance with his values and his notion of the good life. A right to concern, however, seems very different. No doubt a right to concern would coincide with a right to respect in that coercion inflicts suffering as much as it fails to respect a person. But the fact that suffering and frustration can be inflicted indirectly, unintentionally, and/or through a network of interlocking yet non-coercive actions, would appear to mean that a right to equal concern would entail a right that one coercively intervene (or that others so intervene) in order to prevent others from causing great suffering or frustration. Indeed, such a right might well justify some acts of paternalism; if one is suffering a great deal and is unable to know where one's true betterment lies, concern might call for others temporarily restraining one from performing acts harmful to oneself.

Thus a right to respect and a right to concern point in opposite directions. This raises a grave problem for Dworkin. His basic right is the right to equal respect *and* concern. This can now only mean one of two things. Either the basic right is a right against coercive interference *and* a right to coercive interference in other's (and one's own?) life, or we have two basic rights, one against coercion and one which requires coercion. In the former case, to maintain coherence we need some additional principle to tell us in what areas coercion is permitted and in what areas it isn't, while in the latter case, we need some sort of ordering principle that tells us which right is primary and what we should do when the two rights conflict. Dworkin provides us with no such principles. Moreover, were he to do so it would be an admission that his theory of rights had failed. For the idea of a right to equal respect is a version of some sort of right to liberty (against coercion) while the idea of a right to equal concern is really a version of some claim about a right to equality, or, more accurately, welfare rights. And since one of the points people have had

in mind when they refer to an opposition between liberty and equality is that welfare rights and a right to liberty can easily conflict, then it follows that Dworkin's basic right to equal concern *and* respect contains the conflict between libertarian and egalitarian claims that he denied existed. This conclusion is strengthened by Dworkin's version of the liberal and conservative theory of rights.

The concept of *respect* does seem more at home with the liberal's view that there should be rights *against* the government's use of coercive power in areas like free speech and free choice in sexual and personal matters, and with the conservative's view that property rights are necessary to *limit* the government's power to redistribute or expropriate wealth. The liberal sees regulation of political and personal speech and/or practices as demeaning to an individual because it frustrates his ability to act on his plans and projects which are intimately connected with his life goals, while the conservative sees redistribution or expropriation as disrespectful because it implies that those successful in their life endeavors are to be punished or condemned. On the other hand, the notion of *concern* does seem more at home with the liberal's defense of government coercive *intervention* in the market and with the conservative's belief in *outlawing or restricting* deviant practices and/or beliefs. In both cases the state's use of its coercive apparatus is seen as necessary because certain institutions or practices – the market for the liberal, deviant or immoral practices for the conservative – cause grave suffering for those directly or indirectly affected by the institution or practice. Clearly, were the liberal or conservative to focus on concern where he focuses on respect and vice versa, a different theory of rights would emerge. This shows again that Dworkin's basic right to equal respect and concern contains conflicts that he declared his theory would show to be spurious (in this case, that liberals and conservatives disagree where libertarian and egalitarian claims are applicable) (L, 123-4).

The arguments in Sections II and III have placed Dworkin on the horns of an insuperable dilemma. Either his basic political right to a fair distributive share is not a basic right, or, if it is interpreted in a more individualistic manner so that it is not just a political right, then it contains within it internal conflicts between libertarian and egalitarian claims that he denied existed.

IV

The reason why modifying the basic right so that it contains within it the conflict between a right to liberty and a right to equality is a problem for

Dworkin is that he believes that there is no such thing as a general or basic right to liberty. This is another sign that Dworkin does not have a theory of rights, for any theory of natural rights must contain a right to liberty as one of its fundamental (or 'abstract') rights.

This argument is grounded by noting some facts about natural rights. First, as we noted in Section I, if someone has a right it is wrong to coercively intervene with his exercising that right. Second, rights entail obligations to respect or not to violate the rights.⁸ Third, a *fundamental* right is one that is not presupposed by other rights and is one that grounds most or all other rights. A *fundamental natural* right is one all persons have simply in virtue of being persons (as opposed to a right simply arising from, or justified by, contract or utility). Fourth, at least most of the rights that persons have must be congruent with the individualistic values that natural rights presuppose and protect; otherwise the particular rights that people allegedly possessed would have little relation with the reason rights in general are considered to be necessary in the first place. And if most rights must be congruent with such individualistic values, then one would suppose that the fundamental right(s) which ground(s) particular rights would also be congruent with these values.

One final point before proceeding: Why should one assume that there must be a (some) *fundamental* natural right(s)? Because all particular individual rights are either rights which emerge in virtue of some *special* relation between particular people (e.g., rights arising from promising and contracting) or ones which refer to some *circumscribed* area of human activity (e.g., rights to free speech, property, free exercise of religion, etc.). Now such particular or circumscribed rights seem to require grounding by some other rights, and while this doesn't *prove* there must be a (some) fundamental right(s) which do the grounding, it would be extremely odd if a theory of rights *just* contained a series of particular rights. In any event, Dworkin himself assumes there is a basic right, so

8 In 'The Correlativity of Rights and Duties' *Nous*, 4 (1970) 50-1, David Lyons argues against this. He claims that there are rights, such as these specified in the First Amendment (Congress shall make no law...) that do not impose obligation on others, but merely a disability or lack of authority to violate the rights. Yet the First Amendment, says Lyons, still refers to genuine rights, for if Congress legislates in the areas the Amendment says it is forbidden to, citizens are entitled to complain and take their case to court where presumably the legislation will be declared null and void. Regardless of whether this analysis fits legal rights, it won't do for natural (moral, nonlegal) rights. When someone in a non-legal setting violates my moral rights, it is not a question of him lacking the authority to do so; it is that he ought not to do so. And since this 'ought' corresponds to specific treatment due an individual, we call it an obligation.

my claim is not one he could attack. If the assumption of a basic right still seems too dogmatic, my argument can be reformulated as: if a theory of natural rights contains a (some) basic right(s), then one of these rights must be a right to liberty.

We need to look at the possible candidates for a (some) fundamental right(s), given that the right to equal concern and respect was eliminated by the arguments in Section II. One candidate is the right against coercion (the right to liberty), and it fits the requirements for a fundamental right quite nicely. Many particular rights are rights against others inflicting force or violence while one is pursuing certain peaceful activities, so it makes sense that there is a general or fundamental right against coercion which grounds them. Furthermore, such a right clearly protects individualistic values. It is also perfectly coherent that all persons have this right, that all persons are obligated to refrain from coercing anyone, and that one commits a wrong if such coercion occurs. Finally, a right against coercion, being quite general, does not seem to be presupposed by any other right, and it is plausible to assert that all persons, simply in virtue of being persons, possess it, in as much as (at least) some degree of liberty is necessary in order to pursue virtually any goal or value one might have.

What are the other candidates for a basic natural right? Since people make claims against each other to do or to refrain from something, and since we have already discussed a likely general claim about others refraining, then the alternative seems to be a general right that others do something. The (alleged) right to well-being or welfare naturally comes to mind, that is, the right that others provide you with some aid or assistance. Such a general right would serve to ground any particular welfare rights – e.g., putative rights to education, health care, etc. Another possible candidate might be the right to life, but this can easily be shown *not* to be a fundamental right. The right to life is (roughly) either a right that others not take actions to end your life, e.g., a right not to be killed or a right that others provide you with the means to life (or both). In the first case the right to life is an instance of, or is derived from, the right against coercion, and in the second case the right to life is an instance of, or derived from, the right to well-being (or both). Thus the right to life can't be fundamental and we are left with the right to well-being as the candidate, other than the right against coercion, for a fundamental natural right.

Regardless of whether the right to well-being is a fundamental natural right, it cannot be the *sole* fundamental right. If it were, three very odd results would ensue. (1) There would be *no* fundamental right which was congruent with individualistic values. Rights to well-being don't focus on the value of a person leading his own life free from the coercive interference of others, but rather focus on the value of having cer-

tain (primarily material) means or goods necessary for a decent life. It might be thought that rights to well-being are justified by some notion of what is good for an agent's flourishing, but in that case such flourishing will undoubtedly include some sort of right to liberty, which by hypothesis we are excluding here. (2) Since the values presupposed and protected by the right to well-being and the right to liberty (against coercion) are so different, it would be very difficult to derive any particular rights of the latter sort from a general right to the former. (3) There would be no fundamental right all people could exercise at any one time. While the right against coercion can be universally enjoyed at the same time by everyone simply refraining from coercion, if everyone tried to exercise their right to aid no one would enjoy the right: everyone would also be obligated to give aid, so no one would get any aid. The right to well-being can only be enjoyed in a weak sense: everyone 'has' the right but it only 'falls due,' so to speak, when one finds oneself in a situation of need.

These three points, taken jointly, show how implausible it would be to suppose that the right to well-being was the sole fundamental natural right. It follows that, given there seem to be no other candidates for a basic natural right, that the right to liberty must be a fundamental natural right.

The above conclusion must be defective if Dworkin is correct that it is 'absurd to suppose men and women have any general right to liberty at all, at least as liberty has traditionally been conceived by its champions.'⁹ Dworkin's argument for this conclusion comes in two parts. First, he claims that the advocates of liberty have interpreted it to mean *license*:

I have in mind the traditional definition of liberty as the absence of constraints placed by a government upon what a man might do if he wants to. ... This conception of liberty as license is neutral among the various activities a man might pursue. ... It diminishes a man's liberty when one prevents him from talking or making love as he wishes, but it also diminishes his liberty when we prevent him from murdering or defaming others. (TRS, 267)

Then Dworkin goes on to argue that there can be no right to liberty as license. Obviously, it is not terribly difficult to show there is no right to do *whatever* one wants to do, since if we all had such a right absurd results would ensue. If whatever I want to do I have the right to do, this means I have the right to violate your rights, because my action will probably prevent you from doing what you want to do; similarly, if you

9 TRS, 267; also see p. 277 where he calls it 'incoherent.'

have the right to do whatever you want, including stopping my actions – by murder or assault or whatever – you will undoubtedly violate my right to do what I want to do. Thus, one could both act within one's rights and violate another's rights by one and the same action!

Bentham used arguments like the one above to show that natural rights were nonsense; Dworkin, however, does not use such arguments but instead employs a different one.

... there is no general right to liberty as such. I have no political right to drive up Lexington Avenue. If the government chooses to make Lexington Avenue one way downtown, it is a sufficient justification that this would be in the general interest, and it would be ridiculous for me to argue that for some reason it would nevertheless be wrong. The vast bulk of the laws which diminish my liberty are justified on utilitarian grounds... they nevertheless do not take away from me anything I have a right to have.¹⁰

This argument is defective from start to finish. If liberty means the absence of constraints a government can impose on a person, we can more perspicuously define liberty as the absence of the use or threat of coercion, since government's constraints are ultimately coercive. However, it does not follow there is no right to liberty (against coercion). For coercion which is used to combat coercion by others would be justified on the grounds that no one has a right to violate anyone else's rights or on the grounds that no one has a right to *initiate* coercion. Such statements are needed in order to obtain a coherent set of rights; without such principles situations such as self defense would be such that one could both act within one's rights and violate someone else's rights by the very same action.¹¹

How does what has been said bear on Dworkin's example? Traffic regulation is merely an example of rules for the use of property. Any person or group of persons who owns property sets rules for its use –

10 TRS, p. 269; also see L, p. 124.

11 Admittedly, this specification of the right does not handle innocent threats and innocent shield cases as set forth by Robert Nozick in *Anarchy State and Utopia* (New York: Basic Books 1974) 33-4. In such cases the use of coercion to combat coercion ends up being used against those who have not themselves initiated coercion or voluntarily chosen to violate someone's rights. While a theory of rights must eventually account for such cases, all I can say here is this. It may be that when principles for such cases are enumerated, as well as principles for filial authority or putative cases of justified paternalism, that the right against coercion gets reformulated as the right not to be coerced unjustifiably, where unjustifiably means 'where there is no special and usually compelling reason.' Even if the right is reformulated in this way, it would still be fundamental – since the cases of justified coercion would be sharply limited – as well as coherent.

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whether it is the government who owns the streets and designs traffic rules or a private person who owns a house and e.g., sets rules for his guests. These rules *per se* have nothing to do with liberty or its violation; they are merely an inevitable outgrowth of ownership. If questions of liberty arise, they do so at the level of the property right itself which is the genesis of these rules. The relation between the right to liberty and property rights is beyond the scope of this paper; the key point is that questions of liberty *only* arise on the level of whether the government ought to own the streets. A libertarian like Nozick who thinks that coercion is only justified if used to combat coercion would probably say that the government violates people's rights by coercively extracting funds from taxpayers in order to build streets and roads. The right violations occur in virtue of state ownership, not because the owners lay down rules for the use of the streets and roads.

I conclude, then, that Dworkin has not proved that there is no such thing as the right to liberty, and thus that he has not overturned my claim that any theory of natural rights must contain a basic right to liberty.

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