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OXFORD UNIVERSITY PRESS

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Author(s): Hillel Steiner

Source: *Mind*, Apr., 1974, New Series, Vol. 83, No. 330 (Apr., 1974), pp. 194-210

Published by: Oxford University Press on behalf of the Mind Association

Stable URL: <https://www.jstor.org/stable/2252906>

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The Natural Right to Equal Freedom

HILLEL STEINER

Some time ago, Professor Hart advanced the thesis that 'if there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free'.¹ He argued that any ascription of or claim to a particular moral right presupposes the recognition of a general right to freedom and this, in turn, commits the ascriber or claimant to affirming the equal right of all to be free. But the correct attribution, to any individual, of a commitment to the recognition of the equal right of all men to be free, was held to be qualified in two ways. For, Hart observed,

it is still important to remember that there may be codes of conduct quite properly termed moral codes . . . which do not employ the notion of *a* right, and there is nothing contradictory or otherwise absurd in a code or morality consisting wholly of prescriptions (p. 176).

By 'prescriptions' Hart means rules which characterize the performance or forbearance of particular kinds of action as 'good', 'bad', 'right' or 'wrong' in accordance with the contribution made by such actions to the realization of some value or ideal which the rule-affirmer upholds. In the first part of what follows, I shall argue that there is something seriously absurd about moral codes of conduct consisting wholly of prescriptions, and that they are still more absurd when considered as possible legal systems. I do not, however, advance the claim that they are formally contradictory, though the degree of absurdity which can be attributed to them is, from any moral standpoint, one which gets as close to unintelligibility as any formally non-contradictory set of statements can aspire to do.

The second qualification has to do with the membership of the class of persons to whom the term 'all men' is intended to refer, in saying that the equal right to be free is one belonging to all men.

1 H. L. A. Hart, 'Are There Any Natural Rights?', *Philosophical Review*, vol. 64 (1955), pp. 175-191; p. 175.

For Hart maintains that though the ascription of or claim to moral rights

does presuppose the recognition that interference with another's freedom requires a moral justification, this would not itself suffice to establish . . . that in the recognition of moral rights there is implied the recognition that all men have a right to equal freedom; . . . *any* differences between men could . . . be treated as a moral justification for interference (p. 189).

In the second part of what follows, I shall argue that the differences (between men) which can be thus used are of two general types, and that an individual's right to equal freedom is not denied—though it may be overridden—in justifying an interference with his freedom by reference to his being different in the first of these two types of ways. And I shall suggest that justification of interference by reference to the second type of difference, though it does entail a denial of an individual's right to equal freedom, does not constitute a formal qualification of Hart's thesis. Finally, and in the light of this argument, I shall consider what can be meant by ascribing to an individual an entitlement to equal freedom and, at the same time, justifying an action interfering with his exercise of that right.

I

Before directly embarking on this argument, it is perhaps worth remarking that, appearances notwithstanding, many moral codes of conduct which seemingly consist wholly of prescriptions *do* contain rules for rights. That is to say, though many such codes may explicitly consist solely of 'action-prescriptions',¹ these prescriptions presuppose rules ascribing rights. Hart cites the Decalogue as 'perhaps the most important example' of a moral code consisting solely of action-prescriptions (p. 182). But if we examine the sixth and eighth Commandments closely, we find that this claim is somewhat misleading. The sixth Commandment is

- 1 I shall use the term 'action-prescriptions' (corresponding to Hart's 'prescriptions') to refer to rules prescribing the performance or forbearance of particular empirically describable kinds of action; by this I mean rules which, in commanding or forbidding certain kinds of action, contain no other term having normative or evaluative meaning apart from the term prescribing the performance or forbearance.

'Thou shalt not kill'. Now we know that this prescription is not one forbidding the killing of any thing capable of being killed, that is, any thing that lives. It is not a rule prohibiting literally all killing. Rather, it is one which presupposes the existence of another rule specifying the kinds of thing of which the taking of their lives is to be understood as 'killing' by adherents of the Decalogue. Taking the life of any other sort of thing is not proscribed by the sixth Commandment. It does not seem to be an obviously tendentious use of the term 'a right' to describe the difference in moral status between members of these two classes of things as consisting in the fact that the former have, while the latter do not have, an ascribed right to be left alive.

And the appropriateness of employing the concept of 'a right' to describe the normative impositions of (parts of) the Decalogue is even more apparent when we come to consider the eighth Commandment, 'Thou shalt not steal'. For we cannot say that a particular act is one of theft, unless we believe that the item taken, rightfully belongs to someone other than the actor. And we cannot entertain such a belief unless we affirm some rule which prescribes what belongs to whom. But a rule prescribing what belongs to whom is a rule for rights.

Rights are typically conceived of as *possessed* or *owned by* or *belonging to* individuals, and these expressions reflect the conception of moral rules as not only prescribing conduct but as forming a kind of moral property of individuals to which they are as individuals entitled (p. 182).

Now it is true that, as Hart remarks, all the prescriptions of the Decalogue constitute duties owed to God, and not to individuals as such. In this respect, the normative impositions of the sixth and eighth Commandments do not conform to what we commonly conceive of as 'rights'—things owed to individuals as individuals. But this consideration should not be allowed to obscure the formal difference obtaining between these two Commandments and the other Commandments governing interpersonal conduct. For these other Commandments consist of pure action-prescriptions which do not presuppose some additional normative rule. We know what kind of conduct 'bearing false witness' is; the same is true of 'honouring one's parents', 'committing adultery' and 'coveting'. (There are obvious problems about construing 'coveting' as a kind of conduct.) Although in the case of these other Commandments

we may require some definitions, these are not constituted by the same kind of rule as is presupposed by the sixth and eighth Commandments. It is not sufficient, for purposes of informing someone of what these latter two Commandments require of him, simply to offer him dictionary definitions of 'killing' and 'stealing'. Thus, in so far as a code of conduct contains action-prescriptions concerning 'killing' and 'stealing', it contains implicit rules for rights. What can be said of codes which are devoid of any such implications?

Consider a moral code of conduct consisting solely of action-prescriptions. Let us say it contains a rule prescribing the performance of X in an appropriate circumstance. Now suppose that on a given occasion this kind of circumstance confronts two individuals who are both adherents of this code. And further suppose that in dutifully proceeding to perform X, each of these two individuals finds his own performance obstructed by that of the other. Would each of them be correct to infer—from the 'ought implies can' principle—that because he cannot proceed with his performance of X, he is not actually obligated to do so? This inference would strike us as odd, I think, because if both individuals drew it and behaved accordingly, neither would perform X even though one could do so. And a moral code condoning inaction on the part of *both* individuals in this situation would appear to be somewhat absurd. The correctness of the inference is doubtful because each of the two individuals must know that, if the other does draw that inference and behaves accordingly, he himself will be able and therefore obligated to perform X.

But there is a further reason why the 'ought implies can' principle does not apply here and, thus, why the inference would not be a correct one. For the obligation imposed by such a moral code—to perform X—cannot but be understood as an obligation to undertake whatever actions are necessary to facilitate the performance of X. If I am under an obligation to meet my students at 9.30 a.m., my performance of this duty may well require that I perform a number of prior actions to enable me to be in a position to teach my students at the appointed time. I may know it is necessary, for instance, that I prepare certain materials beforehand, that I set my alarm clock, that I catch the bus before 9 a.m., etc. The test, of whether these preliminary tasks can be considered obligatory by virtue of their relation to the prescribed duty, is to ask whether my non-performance of the prescribed duty (because I

am unable to) would be morally blameless if that inability were due to my having freely chosen not to perform one of the preliminary tasks. I suggest that the answer to this query must be 'No' and, consequently, that having an obligation to perform in a certain way entails having an obligation to take such actions (not otherwise forbidden) as are known to make such a performance possible. In our obstructed situation such actions would consist in attempts on the part of each individual to subdue coercively the other person who is obstructing him, in order to proceed with his own performance of X.

It might be objected that this moral code may contain rules prescribing forbearance from such coercive actions. This objection fails. It fails because it is not possible for a moral code consisting solely of action-prescriptions to contain such rules. For a rule prescribing forbearance from coercion is a rule for rights. As Hart says,

the concept of a right belongs to that branch of morality which is specifically concerned to determine when one person's freedom may be limited by another's (p. 177).

And he uses the phrase 'limit another's freedom' to 'mean either the use of coercion or demanding that a person shall do or not do some action' (p. 177). A rule forbidding the use of coercion would be a rule ascribing rights to both of the individuals involved in our obstructed situation.

But since our code of action-prescriptions contains no rules for rights, its adherents must, so to speak, fight it out with one another in any such obstructed situation. In pursuance of their respective duties to perform X, they are each obligated to employ all available measures necessary to remove the obstacle constituted by the other person's acting. And this obligation persists until the point where either (i) one of them has actually prevailed, that is, succeeded in performing X, and the other is incapable of further 'attempting', or (ii) both are incapable of further 'attempting'. It is only at this point that the 'ought implies can' principle comes to the rescue of one or both individuals, if they are still alive. For, of course, the absence of any obligation to refrain from coercion must entail the absence of any proscription of killing, as well as of lesser forms of interference—as was seen in the previous discussion of the sixth Commandment.

Now it is important to appreciate that a moral code consisting

solely of action-prescriptions, though it entails the normative consequences just outlined, is by no means contradictory. There is no sense in which its rules give rise to a conflict of duty, as would be the case for a code which contained rules prescribing the performance of both X and not-X in one and the same kind of circumstance. No logical problem besets a system of rules which makes obligatory the performance of two actions that may be mutually frustrating, as long as those actions are required of two different persons by one and the same rule. Only rules, as normative assertions, can stand in relations of contradiction to one another. Actions cannot. Nevertheless, it is evident that there is something more than a little absurd about the kind of moral code examined above. And it is probably fair comment to remark that it is doubtful whether any such code has ever existed. For while it is empty to ask what is the point of having a moral code or moral principles, it is not unreasonable to wonder what could be in the mind of the author or adherent of a code the rules of which at once make X performances obligatory and, at the same time, are such as to require (in certain circumstances) the deliberate frustration of any X performance *for the sake of no other principle or value*. For, as was noted above, one of the two possible outcomes of obstructed situations is that the requisite mutual coercion will result in both individuals failing to perform X.

The absurdity of such a code is even more marked when we try to conceive of it as constituting a legal system. There is, in the first place, the difficulty of identifying as a legal system any set of rules which permit, much less prescribe, boundless coercion by private individuals of one another on behalf of their respective purposes—even where pursuit of those purposes is legally obligatory. If laws are considered as emanating from governments, and if the concept of government includes the notion that it is an agency enjoying the exclusive use of legal force within civil society, the rules of the kind of code we have just considered cannot be laws. Secondly, there is the problem of how such rules could be understood as enforceable. It is part of the conventional view of what a legal system is, that it consists of enforceable rules. Now this characterization is admittedly problematic, since what would constitute a sufficiently severe sanction against law-breaking is at best an empirical question, and the enforceability of any set of laws will consequently vary with the capacity of those ostensibly subject to the laws to endure or resist official coercion. Nevertheless, a legal

system based on a moral code such as we have just examined would labour under the peculiar difficulty of being unable to inflict greater suffering on law-breakers, than law-abiders may be obligated to inflict on one another in pursuit of their legal duties.

All these rather strange normative implications, of moral codes consisting solely of action-prescriptions, can be seen to follow from what is entailed by the logical requirement that we universalize our moral judgements. The principle of universalizability entails that all actions performed in compliance with the same moral rule are of equal moral worth. In the absence of rules for rights, there can be no grounds for saying which one, of any two (or more) such actions that are mutually obstructive, ought to be performed. And there is no logical reason why any two such actions may not be mutually obstructive. In other words, moral codes consisting solely of action-prescriptions are necessarily capable of generating such conflicts, and necessarily incapable of prescribing their resolution by means other than the frustration of (at least one of) the prescribed performances, i.e. by the physical coercion of their adherents by one another. Such coercion is, indeed, obligatory.

It follows that any moral code which does not entail such consequences must be one containing rules for rights. It must assign rights to all those capable of acting in accordance with its action-prescriptions, that is, all moral agents. These rules constitute reasons for one person to forbear from performing an action which interferes with the performance of another. The claims to forbearance grounded in these reasons thus entail a general claim to individual freedom which, as Hart says, 'directly invokes the principle that all men equally have the right to be free' (p. 188). We say that if one is going to talk intelligibly about what action ought to be performed in a certain circumstance, one must be prepared to affirm that a like action ought to be performed in any like circumstance. Similarly, if one is going to talk intelligibly about what amount of freedom one individual is entitled to from another, one must be prepared to affirm that any individual is entitled to a like amount of freedom from any other. And this requirement is satisfied only by an affirmation of the entitlement of all individuals to equal freedom from one another. It is because we each believe ourselves to be free to choose our actions, that our use of the word 'ought' has sense. Similarly, it is because we each believe that other beings—whose actions can impede our own—are also free to choose their actions, that our moral claims to their for-

bearance have sense. We do not make moral claims to the forbearance of beings whom we consider to be incapable of choosing their own actions. We do not consider them to be moral agents. And just as the requirements of the universalizability principle constitute the condition of intelligibility in making moral judgements in general, so too do the requirements of the 'equal freedom' principle constitute the condition of intelligibility in making moral judgements about claims to forbearance, in particular.

II

But even if the adherents of non-absurd moral codes are thus committed to affirming the 'equal freedom' principle, there remains a serious obstacle in the way of vindicating the literal claim that equal freedom is an entitlement of *all men*. Hart draws attention to this difficulty toward the end of his argument where he notes that it would

be possible to adopt the [equal freedom] principle and then assert that some characteristic or behaviour of some human beings (that they are improvident, or atheists, or Jews, or Negroes) constitutes a moral justification for interfering with their freedom; *any* differences between men could, so far as my argument has yet gone, be treated as a moral justification for interference and so constitute a right, so that the equal right of all men to be free would be compatible with gross inequality (p. 189).

Now there can be little doubt that such grounds have been and are used to justify actions limiting the freedom of other human beings, and it is clear that there is nothing obviously absurd or unintelligible about such justifications. Nevertheless, it is important to draw a distinction between these grounds in order to see more clearly just what their invocation implies about their proponents' positions concerning individuals' entitlements to freedom. There is, for instance, a significant difference between denying an individual equal freedom because he is improvident, and denying him equal freedom because he is a Negro. In the former case the denial is grounded in the possession of a behavioural characteristic; in the latter case it is grounded in the possession of a non-behavioural characteristic. This difference is not unimportant when we are considering the question of how interference with the behaviour of others is to be justified, if it is to be justified at all.

Were we to interfere with the action of a person on the grounds that he is improvident, it would be eccentric—not to say incomprehensible—if, at the same time, we were to affirm that the action interfered with was not an improvident one. It is difficult to imagine how, without filling in some complicated additional facts, we could justify preventing a person from mopping his brow on the grounds that he is improvident. And when we do interfere with an improvident action of his, we do not do so because of the sort of person he is, but rather because his action is the kind of action it is. Were he to act differently, we could not justify interfering with his behaviour. Our interference may, admittedly, constitute a denial of equal freedom to him. But our justification of this interference would not consist in nor entail a claim to a *right*. We can perfectly consistently affirm both that an action of ours is an interference with another's right, and that it is nevertheless right. This is the point of the familiar example of the case in which one has previously promised to return a gun to its owner who has subsequently developed suicidal tendencies. The same thing is involved in a case where it is necessary to steal another's motor car in order to deliver someone who has become critically ill to a hospital in time. In both cases we may be interfering with what we would acknowledge to be another's rights in order to perform a right action.

It is a consequence of the fact that our moral discourse employs the concept of 'a right', that actions may be evaluated as being exercises or violations of rights, as well as being right, wrong, good or bad. The test of whether an action can be construed as an exercise of a moral right is, on Hart's argument, to establish whether it is compatible with the enjoyment of equal freedom by all. And since the rightness or wrongness of an action depends upon whether it conforms to some particular moral principle, there is no reason why a wrong action may not be an exercise of a moral right, nor why a right action may not be a violation of a moral right. The conformity of an action to a prescription in a particular moral code in no way entails nor otherwise guarantees its compatibility with the enjoyment of equal freedom by others. It is precisely because there is 'that branch of morality specifically concerned to determine when one person's freedom may be limited by another's' (p. 177), as well as the branch which is concerned to determine 'what should be done for the realization of happiness or some ideal of personal perfection' (p. 176), that actions (performances and forbearances) possess these two evaluative aspects—*just* (or *not unjust*) or *unjust*,

as well as *right* or *wrong*. Kant distinguished these two constituent elements of the morality of actions as the 'juridical' and 'ethical' aspects of actions. Thus, to interfere with another's improvident action may be both unjust and (ethically) right.

An affirmation that actions possess these two evaluative aspects is, I think, implicit in the question Hart poses in his more recent essay, *Law, Liberty and Morality* (Oxford, 1969). He asks 'Is it morally permissible to enforce morality as such?' (p. 4). And he remarks that 'it is plain that the question is one *about* morality, but it is important to observe that it is also itself a question *of* morality. It is the question whether the enforcement of morality is morally justified; so morality enters into the question in two ways' (p. 17). Now it is apparent that for these remarks to have sense, it must be supposed that a rule stating whether morality ought to be enforced, cannot itself be one of that collection of rules referred to by the term 'morality'. For if a rule about the enforcement of morality is itself part of what is meant by 'morality', Hart's question merely asks whether we ought to do that which we ought to do. The implication of this would appear to be that, although the answer to the question about the enforcement of morality is itself a moral principle, it is a moral principle of a *different kind* from those the enforcement of which is being considered. Thus, for example, it is Mill's failure to appreciate that there is a different kind of moral principle involved here, that seriously weakens his argument in *On Liberty* where he foregoes any advantage to his case that might be derived from employing the idea of 'abstract right' as a thing independent of utility. The same difficulty besets his attempt to show that justice is grounded in utility, in *Utilitarianism*. For these reasons it seems to me that Hart's description of his own anti-Devlin position as 'utilitarian', is somewhat misleading. For the issue between them cannot be simply one of whether or not certain individual practices are harmful to others. Presumably, if people claim to be harmed by a certain practice of another, there is no way for this claim to be gainsaid unless an appeal is made to some (doubtful) doctrine of 'real wants' and 'real injuries'. The issue is, rather, how we are to specify that form of individual action which affects others and with which interference is justified. And this requires a principle which is independent of moral codes laying down what is harmful (wrong) and beneficial (right).

It might be objected that to postulate two kinds of criterion for morally evaluating actions, is to drain all normative meaning from

the terms 'right' and 'wrong'. It is to assert that one can describe a particular action as being both 'right' and one which 'ought not to be done', i.e. because it is unjust. Alternatively, it might be objected that the postulation of these two criteria drains normative meaning from the terms 'a right' or 'just' (in conformity with moral rights) and 'unjust' (in violation of moral rights), as seems to occur in the case of our interfering with an improvident action. Kant, in what appears to be an attempt to get round this dual criterion problem, suggests that the requirement that we fulfil our juridical duties is itself an ethical duty.

That I adopt as a maxim the maxim of acting justly is a requirement that Ethics (rather than jurisprudence) imposes on me.¹

(It is worth noting that this appears to be the only maxim the adoption of which is required by Ethics, according to Kant. No other particular maxim need be adopted, though any other maxim which is adopted must be in conformity with the Categorical Imperative for its action to be right). But this attempted solution will not work since, even if all duties are thus rendered *ethical*, there is still no reason why an action to realize happiness or any other ideal, may not lack conformity with the ethical duty (of justice) to respect another's equal entitlement to freedom. The reverse is equally true. In effect, Kant is claiming that justness must be the supreme virtue, that the justness of an action is a necessary condition of its (ethical) rightness, and that the unjustness of an action is a sufficient condition of its (ethical) wrongness. His mistake lies in his apparent belief that this claim is itself a logical, and not a moral, one.

I shall return to this problem at the end of the paper. For the moment, the point I wish to make is simply that calling an action which interferes with another's equal freedom 'right', does not entail—when grounded in his possession of a particular behavioural characteristic—denying that the amount of freedom to which that person is formally entitled is equal to one's own. It is an assertion that the interference with the action was justified because the action was wrong, and thereby implies that there can be circumstances in which interferences with that person's freedom would be impermissible. When or if that person behaves differently, say

1 *The Metaphysical Elements of Justice*, ed. Ladd (Indianapolis and New York, 1965), p. 35.

frugally, we can have no grounds for interfering with his rightful freedom. For one cannot justify an unjust action on the grounds that it is unjust. Irrespective of what one's moral principles are, it is unintelligible to claim a moral entitlement to a greater amount of freedom for oneself than one allows to other moral agents since this claim entails, when universalized, that each moral agent is entitled to an amount of freedom greater than that to which every other moral agent is entitled. And this does not make sense. Whereas, however misanthropic it might be, there is nothing unintelligible about justifying an uncharitable action on the grounds that it is uncharitable.

The position is quite different when a denial of equal freedom to an individual is grounded in his possession of a non-behavioural characteristic, say, that he is a Negro. For here an interference with his exercise of freedom is not justified by reference to the kind of action in which that exercise consisted, but rather by reference to the sort of person he is. The adoption of this sort of justification would imply an affirmation of the view that there is no kind of action this individual could perform (or forbear) which would deprive one of grounds for interfering with his freedom, for it is supposed that he has no formal entitlement to freedom. In this sort of case, one would not be committed, even in principle, to the proposition that he has a right to equal freedom since it is implicitly denied that he has any rights whatsoever. One could do him no injustice, as such. I have already argued that non-absurd moral codes must contain rules for rights and, thus, the affirmation of a moral agent's possession of moral rights commits one to recognizing the right of any moral agent to equal freedom. The denial of rights to some, but not all individuals, on grounds of their being a certain sort of person, entails a denial that those individuals are moral agents. Hence, interference with the conduct of such individuals could not be seen to constitute the obstruction of actions having moral worth. Their actions could have no moral status at all; they could be neither right nor wrong. Adoption of this sort of justification would commit one to the position that there could be no circumstance in which interference with that sort of person's freedom, as such, would be impermissible.

Now there is nothing contradictory or otherwise absurd about denying that certain sorts of human being are moral agents. Indeed, there are invariably certain classes of persons to whom most of us would be unwilling to ascribe moral agency, such as

infants, the mentally ill, etc. But, of course, there is always a price to be paid in any denial of moral agency—namely, that those who are held to lack it cannot be said to have duties or obligations of any kind. Lacking rights because they are not held to be moral agents, they must also lack any obligation to respect the rights of others.

In this connection, Mr. N. G. E. Harris has recently claimed that Hart's argument fails to show that the acknowledgement of moral rights (i.e. adherence to non-absurd moral codes) commits one to affirming the natural right of all men to be free.¹ He cites the possibility of a Fascist code which, in ascribing moral rights, confines their possession to Aryans on the grounds that they alone are moral agents. And this, he rightly says, only entails a commitment to the proposition that Aryans each have an equal right to be free. This argument seems to me to be correct, though whether it constitutes a confutation of Hart is unclear. For Hart begins his paper by saying that what he means, in ascribing the right of equal freedom to all men, is that it is a right which is presupposed to pertain to 'any adult human being capable of choice' (p. 175). The latter phrase is a fairly conventional specification of what is covered by the term 'moral agent'. Thus, if this is what Hart intends in his use of the phrase 'all men' throughout his essay, no fault can be found with his argument along the lines suggested by Mr. Harris. Nevertheless, his criticism serves to remind us that there is no reason why one need accept one particular specification of the class of moral agents, and not another.² So the most that can be said is that, in ascribing moral rights to individuals, we are committed to affirming that anyone who is a subject of moral obligations is entitled to an equal amount of freedom. And in so far as one excludes certain individuals from the class of moral agents because of the sort of person they (non-behaviourally) are, one is not committed to recognize, even in principle, that they have any moral entitlements to freedom.

What then is achieved by thus distinguishing between the kinds of human difference which may be employed as grounds for interfering with an individual's exercise of equal freedom? For if a person's right to equal freedom can be both acknowledged and susceptible to violations which are intelligibly justifiable (i.e. on

1 'Hart on Natural Rights', *British Journal of Political Science*, ii (1972), 125-127.

2 See further my note 'Moral Agents' in *Mind*, lxxxii, 326 (1973), 263-265.

grounds that a particular exercise of his rightful freedom was itself wrong), how is his position practically different from that of someone whose moral agency is denied outright and who is thus devoid of any acknowledged right to freedom? It is true that in the former case the interference must be acknowledged by its perpetrator to be *unjust* (a violation of a moral right) even though he considers it morally justifiable on other grounds, whereas no commitment to such an acknowledgement exists in the latter case. In this respect, we could say that the recognition of someone's moral agency and, thereby, of his entitlement to equal freedom, creates an additional consideration to be borne in mind when we are contemplating interfering with a particular exercise of his rightful freedom—a consideration which is absent in cases of proposed interference with the conduct of individuals who are not deemed to be moral agents. And, more specifically, such a recognition must constitute grounds for not interfering with his freedom when his exercise of it consists in an action which is morally indifferent; whereas no such grounds exist in the case of someone not recognized as a moral agent, since he has no rightful freedom and all of his actions are morally indifferent. But is this really a sufficient reason for insisting upon the importance of the distinction between the two types of grounds for interference?

I believe the distinction is worth drawing for two reasons. In the first place, it enables us to see how the second qualification on Hart's thesis can be got rid of. I have suggested that there are certain classes of persons to whom nobody would ascribe moral agency. Such persons do not fall within the scope of any part of our moral discourse as *subjects* of obligations, much less of rights. This being so, it seems important to establish that all those who do fall within this scope in this manner, must be acknowledged to possess the right to equal freedom. And if, as is evidently the case, Hart's thesis is not intended to show that, say, infants are entitled to even his qualified right to equal freedom, then what it does show is that all moral agents must be said to be entitled to an unqualified right to equal freedom. And this seems to me to be a sufficient reason for jettisoning any agnosticism over the ascription to all men of the natural right to equal freedom. Given that *any* normative imposition can apply only to 'adult human beings capable of choice', interference with the equal freedom of any such person must be acknowledged to be a violation of his or her moral rights. Or, to put this point more forcefully, it is contradictory for an

adherent of a non-absurd moral code to affirm both that an individual is a moral agent and that he is not entitled to an equal amount of freedom.

But even if the unqualified ascription of this natural right is thus formally justified, can there be any reason why the requirements of actually respecting this acknowledged right must override other moral considerations? Is an interference with an exercise of this right, because the particular action involved is wrong, necessarily less capable of moral justification than a morally desirable action interfering with the conduct of a person who is not a moral agent and therefore not a subject of rights? On the face of it, we must deny this necessity. All interfering actions—all actions, for that matter—which are in conformity with the requirements of moral rules are equally capable of justification. Kant is mistaken in thinking that because an action is unjust, it is necessarily incapable of moral justification. Nevertheless, I wish to suggest that the moral duty to respect the right to equal freedom of others is of a peculiarly compelling character.

There are a number of arguments which can be brought to support this claim and which are all simply different aspects of one and the same point. If we understand moral principles as action-prescriptions for realizing certain values, and rules for rights as prescriptions for realizing a certain interpersonal distribution of freedom, we can see that these latter rules bear a logically unique relationship to all other moral principles. For possessing freedom is a *logical* prerequisite of compliance with any other moral principle and of the pursuit of any moral value. One cannot be said to be obligated to perform a certain action unless one is free to do so. Freedom, for any individual, is not simply one value amongst others. And insofar as one's freedom to pursue any moral value can be restricted by the actions of others, rules prescribing the extent to which any one individual may restrict the freedom of another can significantly determine the extent to which each individual can act to achieve his own moral values. To violate the rule of equal freedom is to accord a priority to the achievement of one's own values at the expense of that of others' values. And this, when universalized, is to invite a similar response from others.

Second, there is the previously mentioned fact that, unlike all other moral duties, the *negation* of the statement asserting the duty to confine one's actions to such exercises of freedom as are compatible with equal freedom for others, cannot be intelligibly

affirmed. It does not make sense to say that each moral agent should enjoy more freedom than any other moral agent. This is why one cannot be said to perform an unjust act *because* it is unjust. One must always justify an unjust action on other grounds. And this logical fact places a strong weapon in the armoury of anyone wishing to argue for the priority of duties of justice over other moral duties. For if someone violates another's rights in pursuance of his own moral purposes, he must, if pressed to justify his action, either concede that it ought not to have been done or agree that others would be right to violate his rights in pursuance of their own (possibly opposite) moral purposes. But since rights are constitutive of freedom, and since the possession of freedom is a logical prerequisite of pursuing moral purposes, agreement to the latter proposition constitutes affirming that it would be right for one's own moral purposes to be subordinated to those of others, that is, that it is part of one's own moral purposes to have one's moral purposes subordinated to the moral purposes of others. And this, again, is unintelligible. So while unjust actions may be done for moral reasons, they are always open to this unanswerable objection.

Finally, there is the question of the relation between the duty to respect others' rights to equal freedom and the ascription of legal or political obligation to individuals in civil society. If we assume that legal and political institutions would not exist if individuals did not or could not come into conflict with one another, we must presume that the reasons why individuals are held to be obligated to obey the rules of these institutions, in some way take account of the nature of such conflicts. Let me elucidate this somewhat obscure remark. By saying that individuals can and do come into conflict with one another, I mean that their actions can and do prove to be mutually obstructive *and* that they are often unable to agree as to which one of their mutually obstructive actions is morally better, that is, ought to enjoy priority. They are unable to agree on this matter because they affirm different moral values. Consequently, neither has a reason to forbear from obstructing the other, and conflict persists. If the rules created by legal and political institutions, to prevent or resolve such interpersonal conflicts, are to possess moral validity for persons affirming different moral values, they cannot be such as to favour the pursuit of any one of these values at the expense of the rest. For if the distribution of freedom and forbearances—the distribution of rights—created by

those rules were such as to accord greater individual freedom to those who pursue a particular moral value, persons upholding other values could have no reason for acknowledging an obligation to respect those rights. If, on the other hand, a positive distribution of rights is neutral with respect to different moral values, a reason does exist for all moral agents to accept its impositions. And the only distribution of rights which can be neutral with respect to different moral values is one which is neutral with respect to the authors of moral values, that is, one which accords equal freedom to every moral agent.

These three arguments for the priority of duties of justice—that there is something commonsensically imprudent about interfering with another's equal freedom in behalf of one's own values; that it is impossible to formulate an intelligible justification for interference with another's equal freedom, as such; and that, if politics and laws presuppose interpersonal differences over moral values, equal freedom for each is the only possible condition of universal political and legal obligation—though compelling, are not conclusive. And so, in the end, the question of whether to do what is just or what is right (i.e. conducive to the realization of one's own values) in circumstances where the two are in conflict, is itself a moral question. Whether other moral agents are to be treated as ends in themselves or merely as means to one's own ends, is unavoidably a moral question, even if it makes no sense to treat them as means purely for the sake of treating them as means. But the affirmation that this is a moral question is in no way parasitic on the thesis that intelligible discourse about individuals' entitlements to freedom—a type of discourse to which adherents of non-absurd moral codes must attend—presupposes the recognition of the right of every adult human being capable of choice to equal freedom. Any action interfering with another such person's equal freedom *must* be acknowledged by its author to be unjust, regardless of what his moral principles are. Whereas, the necessity of his acknowledging the rightness or wrongness of any action is entirely contingent upon what his moral principles are.

UNIVERSITY OF MANCHESTER