



**VALUES AND THE SOCIAL ORDER**

by

**Anthony de Jasay**  
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1. From Value to Rational Action

The basic building block of social theory is practical inference, the logical relation we consciously or unconsciously refer to for understanding, explaining and predicting human action. Aristotle introduced practical inference as a way of linking the good or desirable to the action that was good, right. Recent thought treats it as the appropriate form of reasoning from means to ends, goals. /1/ Ends are broadly characterized by values, which must be, to put it at its lowest, one of the variables upon which the desiredness or goodness of ends depends. The notion that action, and more precisely the choice among feasible actions, is purposive, is implicit in such reasoning, as is the possibility of using its premisses, if sufficiently specified, for telling whether an action that applied some means to some end was rationally chosen or not, or how strong, how demanding a criterion of rationality it satisfied. Significantly, Miss Anscombe regards calculation as an integral element of practical reasoning. It would help clarify further thought if "choosing" were distinguished from the mere "taking" of an alternative, - a distinction that depends on the element of calculation, and that revealed preference and empiricism do not find congenial.

Compared to practical inference which can yield causal theories, even amply confirmed hypotheses of correlations, inter-dependences, implicit functions lack ambition. They amount to potential evidence

that can underpin social theory, but they do not constitute social theory. In this sense, the narrowly positivist tradition that is reflected in much of macro-economics and macro-econometrics, and structuralist and functionalist sociology is a negation of such theory. Its self-righteous refusal to "look inside people's heads" and to see human choices as the calculated fitting of means to ends, allows it to produce a range of things from forecasting models to mere strings of words, but precludes it from providing explanations.

Unlike the <sup>h</sup>ysical sciences, inference presupposing purposiveness is proper to the study of reasoning beings, and cannot be avoided without inordinate loss of content.

This, it seems to me, is what gives ends and the values they carry a special role in the social sciences. It is all very well "to take them as given", but if they are, can they avoid being unintelligible? - and is not the explanation of actions built on them cut short before it starts being interesting? An end has presumably attributes, properties that make it sensible for men to apply means in order to attain them. These attributes, some or all of which we may consider to be "values", serve as motives; in being imputed to an end, they are capable of identifying the action aimed at the end as rational or not. Value, in this very broad sense, is an indefinite, open-ended, almost inchoate concept. It is not at all obvious that we can do better by treating it as referring to a narrower, closed class of "higher" moral attributes. In the present essay, I will treat them both as moral reasons furnishing norms for conduct that could <sup>not</sup> be explained by individual advantage /or, as is sometimes put, <sup>by</sup> individual utility-maximisation/, and as prudential reasons furnishing the substantive content of individual ad-

vantage.

Very useful work has been and will yet be done within the "scarce means to given ends" paradigm. In addition, this tradition imposes salutary mental discipline, of which there is never too much around. But it is patently limited, and the clear distinction it promises between the positive and the normative is somewhat fictitious. Who has "given" the ends? - how do we know that he has? - and if he did, did he do so for a reason? It is not always possible nor desirable to shut out questions of this kind. However, if they do get asked, - and social choice theory, political philosophy and history must now and again ask them, even if many branches of economics can get by without it, - we find ourselves studying ends. The iron curtain between "is" and "ought" may then turn out to be more permeable than it looks from afar.

For it is conceivable that if we put ends, their values and the side constraints of action within the explicandum rather than outside it, the very distinction between ends and means will start looking spurious, or at least arbitrary, a matter of opportunistic convention. The choice of means may or may not be rational, explicable with respect to some end, but need one, or can one always, stop at the point where this end ends? It is always possible to go one step further and similarly explain, or fail to explain, the choice of the end in question. It can always be shown, by practical inference, to be the means to a "further" end, and that end, in turn, can likewise be unmasked to reveal its nature as a means to yet another, further and and so on. Either we face

an infinite regress, a sort of endless spiral, or we finally run up against an end which, despite all our hermeneutic ingenuity, is genuinely inexplicable, non-instrumental, valuable per se and hence "final". There is no third alternative, no "middle". But the two alternatives, the instrumental and the final, are not "out there" in the world of ascertainable facts, nor are they merely the consequences of our definitions. They are, to all intents and purposes, two opposing subjective judgments reached on grounds another reasonable person may but need not share. An end is final when we cannot plausibly think of another end or an associated value that would explain why it is chosen. But when do we give up trying?

Take the ends that are almost universally treated as non-instrumental, such as well-being, happiness, fulfilment, goodness, or /in another register/ eternal salvation, - whether our own, or of loved ones, /including, for the more fierce kind of altruist, all humanity/. If we find it hard to think of plausible reasons why wellbeing should be desired, happiness is worth pursuing, and goodness is an attribute of preferable states of affairs, we effectively sentence them to be dismissed as tautologies. The very attempt to explain them is fatuous. Happiness makes happy, goodness is preferred to badness, satisfaction satisfies. Nothing more informative can be said. On the other hand, if we persevere and look around for introspective evidence or other clues, we may decide that wellbeing is the means enabling us to transcend subsistence and address "higher-order wants" fulfilment is the proper use of our faculties leading to their development, while eternal salvation is our contribution to

God's purpose. Thus we provide at least verbal explications, albeit of disputable content, that transform final ends into instrumental ones. The exercise can go on and on until our patience is exhausted. The stop is where we put it.

What is true of "final" ends in this context seems to me to be true of unexplained, exogenously "given" constraints. It may well be just a matter of judgement whether to treat laws, right, rule, and even perhaps certain physical features of the social landscape, as being themselves "chosen" in view of their instrumental character. Endogenous and exogenous are separated by the scope of the inquiry. Tastes, final ends, unexplained values, exogenous institutional constraints begin where our inquiry stops, and not the other way round.

The stop may, of course, be called at any point in the chain, but some points are more convenient than others. Economics, in particular, has requirements that have given rise to two widely adopted, classic stopping points. One is profit in the theory of producers' behaviour. It is the ultimate maximand, the final "value" for the purposes of the theory. This is no denial of the plausible supposition that if the firm maximizes profit, it is because its owners want the profit for something that is even more "final". But that is no longer within the theory; it is another story. The other classic stopping point is the preference-ordering of final consumption goods in value theory, though the ordering is avowedly wide open to further analysis in terms of diverse "wants", physical and psychological dispositions from which the preferences for diverse goods could be derived.

Stopping points are willy-nilly used in any social theory that links ends and means. But when its scope is outside economics in the narrow sense, it is no longer very obvious where they can most conveniently be put. The question of their suitable place opens up deep divisions. One is between individualist and holist explanations, individual and collective values. The other is between cognitivist and non-cognitivist meta-ethics. Which side of such divisions we come down on, has consequences for the way we make sense of social orders, and the kind of order we would recommend. Alternatively, our preconceptions about the right sort of order may lead us to take one side or the other, - for only by taking the "right" side can we render values, principles and rules consistent with the ideology of Weltanschauung within which we feel comfortable. Either way, the stopping point matters.

## 2. Cognitive values, revealed preferences.

Holists and individualists are at daggers drawn as if the heresy of the ones were a serious threat to the faith practised by the others. Much of this hostility seems overdone. The reciprocal threat is real in some respects only, and those are mostly confined to two fields. One is what Popper calls "historicism" and that also extends to "organicism": the other is what I should call value-holism. Outside these, ecumenism would be quite safe. Let me try and suggest the area of legitimate coexistence.

James Coleman, a sociologist with faultless methodological individualist credentials, observes a swarm of gnats made up of identifiable individual gnats, and finds that it is acting as if it were a single entity directed by its own goals. He recommends

treating it as an actor called a swarm. /2/ It is quite conceivable that with some knowledge of entomology, one could explain, by reference to the motives and opportunities of individual gnats, why the swarm darts this way or that, yet still holds together. But there would be little point in making the effort. The gnats are all the same, their roles are undifferentiated, and probably nothing would be gained nor lost by making the methodological individualist hypothesis that they interact by each doing what it deems best on the assumption that the others will be doing what is best for them. /3/ Here, holism is a handy short cut. Whether such a thing as a swarm, or "society", "state", "community" and other notorious holistic terms, "really" exist or, as Hayek insists, are mere mental models /Hayek, 1952/ is, as far as I can see, beside the point. The words neither can nor need be avoided.

The mutual threat does not reside in holistic concepts, but in the use they are put <sup>to</sup> in deciding whether the whole is or is not the sum of its parts. For individualists, it is not: they have Occam on their side. For holists, it is: they can invoke Aquinas. If it is, certain theories about certain composite entities, such as the "large group", sellers and buyers interacting through a market, society, the race, etc. can only be adequate if they cannot be decomposed, without leaving any residue, into theories about the actions of the individual members of the entity in question. Stating it the other way round, in the holist tradition a theory about individuals as members of multi-person entities, no matter how carefully it differentiates between them by type, class or role, and however subtly it grasps the interdependence between

them, will still fail to be a social theory worthy of the name. For holists, a theory about society built from the assumptions of methodological individualism can only be right by sheer, statistically improbable accident.

However, a holistic explanation of the 'actions' /if one may call them that/ of society must proceed by practical inference no less than the methodological individualist one, or it will describe but fail to explain. For, to be true to itself, it must maintain that its subject is a single actor in a more than metachorical sense. Holist theory must not damage itself by claiming that the single actor in question is mindlessly staggering around the social scene, weaving patterns whose regularities are wholly independent of its motives, or that it has none. /Needless to say that if there are no regularities, there is no theory/. If its actions are purposive, they must be serving ends whose selection is in some sense instrumentally determined, and is intelligible in terms of the values grafted on the ends. The holistic actor, in other words, has holistic values.

Now this need not be understood as a separate, unconnected value system competing with individual values. On the contrary, the holistic actor is supposed to be motivated by values that many individuals also share. Communitarians and socialists, many of whom are holists though not many recognize it, do not profess ends that liberal individualists must reject or regard as bereft of value. If anything, it is the price communitarians and socialists would be willing to pay and the deontological constraints they would transgress for these ends, that are unacceptable to the opposite camp, and no doubt vice versa.

If it nevertheless makes sense to call certain values that both holists and individualists profess "holistic", it is because these are attributes of ends no one can attain for himself alone. He can aim at them only by seeking either to persuade others in his group to aim at them too, or to have them somehow imposed on others in his group. Holistic values are indivisible /4/: an individual cannot finely regulate the "amount" he obtains by marginal adjustments in the "quantity" of means he devotes to them. If he reaches a holistic value, many others - typically, all members of a compound entity - must reach it, too, and ordinarily he cannot have more of it without many other people, too, having more of it, though not necessarily in the same proportions.

The disparate examples of holistic values that spring to mind add up to the daily bread of a community's politics. No one can shut sex-shops and sweep pornography from the streets, clean up corruption, restore the cathedral, elect a government of ecologists, nourish artistic creation, give the young access only to what is fit for them, and so forth, unless he can do it for the whole neighbourhood, the town, the entire society. It is likewise impossible to have economic growth, the promotion of 'strategic technologies', 'industrial policy', 'fair trade' and 'stability' for any single individual unless all have it /whatever that means/, whether they like these things or not and whether they gain or lose from them. Values attached to distributions, such as social justice, are by definition holistic solidarity or equality in that they cannot be enjoyed by one without being chosen for some whole,

the distributive base over which the good to be distributed is reshuffled, churned into the requisite pattern.

In holistic parlance, it is the common good, the public interest, the public weal that require us to ban drugs and pornography, to promote high culture over low, to have virtue prevail, to plan the economy rationally, to bring about equality. Two possible interpretations can be read into such expressions. Under one, the values in question are good without having to be good for any one individual /they may be, but that is beside the point/. /5/ Their goodness is a matter of truth or falsehood; it is possible intersubjectively to decide which it is /a job often assigned to the 'impartial observer'/. Here, we inhabit the realm of cognitive meta-ethics /6/, in company with Aristotle and Aquinas, but also, in a less appealing tradition, with Bentham. It is worth stopping to remark that Bentham first formulated his central proposition of utilitarian ethics in a manner independent of distributive considerations, and added an egalitarian requirement in a later version almost as an afterthought. /Pedro Schwartz, 1986/. This world is now peopled by closet-cognitivist utilitarians, from Pigou to Hare, Sen and Harsanyi, who believe that the good of several individuals can somehow or other be integrated, /with due regard for algebraic sign/, into a kind of whole and that such wholes can themselves be quantitatively compared to one another.

The other interpretation is basically non-cognitivist and therefore less demanding, more innocuous, but only at first sight, - for in due course it leads to the same deep cognitivist trap. How do we know that the community wants a reign of virtue, a national industrial policy, compulsory health insurance, progressive

taxation, subsidized opera and folk dancing? The non-cognitivist answer is that we learn it, so to speak, from the horse's mouth: it periodically reveals its preferences for these values through the political process, by some recognized method of social choice, e.g. by voting for the corresponding programmes. What better evidence is there that the public wants something than that it says so?

### 3. Social Choice; 'Natural' or Rule-Based.

Voting, of course, is neither the only nor the most obvious, normal, 'natural' method for reaching collective decisions. In antiquity, unanimous agreement preceded by persuasive oratory was the norm, and in many tribal societies, as well as in countless committee, jury and board meetings of our own age, this norm is still sought after, though not always with complete success. Early Roman law laid down, /albeit only with regard to water rights, that "quod omnes tangit ab omnibus approbetur"; the principle was taken up in a wider context in the Justinian code and came to be widely applied in medieval Church government. The Emperor Frederick II invoked it, as did Edward I in summoning Parliament; it was frequently restated in the 14. and 15. century in many countries from England to Hungary by learned authorities, including Occam. /Guéna 173-4/. That decisions favoured by members of a majority should be binding on a dissenting minority was an innovation that crept in almost surreptitiously, through Church institutions. Perhaps its first important appearance was in the government of the mendicant orders in the 13. century /Guéna 182/ and the conciliar movement later practiced the method when all else failed. Subsequently, it spread from clerical to lay

government. It is perhaps not flippanant to remark that mendicant friars are quintessentially equal, and Church government is meant to be strictly non-violent, - two elements that go some way toward explaining why majority rule originated where it did.

The materially stronger part of any group can always make the weaker part agree to its decisions by beating it into submission. Since applying violence is costly, as is resistance to it, both parties are better off if the weaker part submits before violence is used against it. However, the weaker half would be even better off if it had neither to submit nor resist violence. It may therefore be tempted, by a show of determination, to deter violence and avoid altogether the collective decision it dislikes. It could achieve this by misleading the stronger half into thinking that the cost of subjecting the weaker half by violence will be too high and exceed the benefit of the collective decision sought. This may be either facilitated or hindered /it is impossible to say which a priori/ if neither party knows even approximately which is stronger, which weaker. In any event, there is obvious room for pre-commitment strategies, reputation-building, bluff and counter-bluff and the calling of bluffs by both parties. Even in the absence of miscalculation, violence may not be avoided, though there is clearly a good deal of historical evidence that sometimes it can be. Consequently, if such situations are recurrent, the group may reach a cooperative solution by convention: all concerned may /tacitly or otherwise/ agree in advance that the proposal of the stronger-looking half is to be adopted by both halves. Like in chess where analysis of an unfinished game can induce a player to resign without playing

it out, the parties in the collective decision problem may assess the forces ranged on either side, and without further pain and strain declare the question resolved in favour of the stronger force.

This would be the 'natural' solution to non-unanimity. More precisely, it would be a first-order 'natural' solution supplemented by a second-order convention of non-violence. The latter could also arise 'naturally'. /It is not wholly fanciful to suggest that this is what must be going on under the surface in cases of unanimity in well-run committees, where after some preliminary debate serving to reveal the force of opposing positions, questions are resolved without voting. Those who find themselves on what looks like the weaker side may prefer not to manifest pointless dissent/. Under this solution, land /hence men at arms/ in earlier times, economic influence and possibly also the means of mass persuasion in our own age, would have the decisive power over collective decisions, and would largely determine the 'holistic values' the community declared to favour and, by adopting the corresponding policies and laws, caused to prevail. It is crossing the Rubicon to move away from an assessment of the opposing powers and interests in kind, and count numbers of votes instead.

In contrast to what I characterized as the natural solution, whether enriched by a violence-avoiding convention or not, this solution is an artificial one, which deliberately abstracts from all the naturally occurring elements of a decision problem bar two: the alternatives put up for question and the numbers of votes

cast for each. Once the principle of simply adding up votes regardless of who cast them, and regardless also of the intensity of preference or the weight of concern that causes each to be cast, has been agreed, the democratic die is cast as well. Minority rule is impossible since within each electorate more than one minority could be constituted, hence one minority alone could not be decisive. Majority rule alone is possible; within it, there is a ~~possible~~ choice between qualified and simple majority. However, the smaller is the majority, hence the larger the minority, the larger is /all other things being equal/ the majority's benefit from a collective decision, since the larger is the cost that can be imposed on the minority. This is patently the case in simple zero-sum redistributive decisions: by maximising the losing minority, the winning majority can maximise its redistributive gain. The same is true of positive-sum decisions that nevertheless have some redistributive character.

This being the case, any collective decision rule requiring some qualified majority is vulnerable to erosion. Within any qualified majority, there is a smaller one that has a clear interest to decrease the winning majority and increase the losing minority. The potential gain from doing so can be profitably invested in the effort to change the decision rule accordingly, provided a residual gain is left over. Any decision rule is self-referring /whether de jure or only de facto/, capable of being used for changing it. If the rule is that two voters can block a change /?/ in the rule, it can be changed by overcompensating one of them for the loss he would suffer from the

change. However, the change permits despoiling two; from the proceeds, it is necessarily possible to overcompensate one.

What is true of a blocking minority of two is obviously true of any larger number; the marginal blocking voter can always be overcompensated from the loss to be imposed on the extra-marginal ones. Equilibrium, in the sense of a decision rule that cannot be profitably changed, is reached where the potential gain of the winning majority is at a maximum, i.e. under simple majority rule. This is probably the underlying reason why the historical evolution of democracy has clearly been directed towards this terminal state, and why simple majority rule is widely considered to be more 'democratic' than any rule requiring a larger majority or permitting a smaller blocking minority.

Counting every vote for one and no more than one /equivalent to Arrow's Anonymity axiom/ is one of the conditions giving rise to the well-known paradox of social choice, namely that a social choice rule incorporating this and a few other minimally democratic requirements is unable to order all feasible social states of affairs /'holistic ends'/ in a coherent, non-self-contradictory manner. A rational, non-self-contradictory ordering will obtain if individual votes, i.e. expressions of preferences for alternative states of affairs, are weighted by the intensity of preference, interest, concern of each particular voter. One-man-one-vote, however, is designed to express ordinal and to suppress cardinal preference: information about "how much better" the voter likes the outcome he votes for, fails to transpire.

It is ironical that such suppression is held to be a virtue /8/, and the 'natural' solution to the social choice paradox is categorically rejected in democratic theory, which insists that letting some votes have more influence on the result than others would violate an important moral principle, equality. /We should pause to note that what it would violate is one possible version of equality. One can formulate other, equally plausible equality axioms that would, on the contrary, require giving some people more votes than to others, depending on the person or the question to be decided, or both./

The upshot is that the ordinal preferences of different individuals in a community, expressed as votes, are added together to produce one whole. This whole is then taken to have expressed society's choice. However, the aggregation involved in this procedure is no less dubious than in the consequentialist derivation of the common good from individual goods in the Benthamite tradition, <sup>touching upon</sup> ~~discussed~~ in Section 2 of this paper, which consists of adding up different individuals' utilities to arrive at 'total utility', the 'solution of the social welfare function'. Arguably, both interpersonal utility-aggregation and vote-aggregation suffer from the same defect. Both propose to perform impossible arithmetic operations for the sake of justifying a holistic result. Justification is allegedly found <sup>pretending that the result is in fact the</sup> ~~in making it come out as~~ the compound sum of individual components. The latter have empirical, intersubjectively testable existence, - they are 'real' and so is their sum.

Democrats, and utilitarians, may concede that it is im-

possible to add up, or to deduct from each other, heterogenous quantities, say plums and walnuts. Yet they might defend voting, as well as consequentialist reasoning to find the common good, the public interest, on the ground that what is heterogenous at one level is homogenous on the next higher one. On that higher level, so many plums and so many walnuts are, all together, so many pieces of fruit, to be counted, added or subtracted as such, and the same is true of the preferences and interests of different individuals. For all men are homogenous as men, and so are their preferences, ends, values regardless of who, among equals, holds each. It is of the essence of democratic ethics not to recognize differences of subject or object among them. For democrats, the commensurability of different persons' preferences must be 'analytic', a consequence of their equal worth /9/ and the legitimacy of their aggregation is nothing more than a necessary truth that follows from the definition of democracy. For this purpose, the right definition is that it is a collective decision procedure designed to give each participant as much influence on the outcome as to every other.

This, of course, is an irrefutable defence resting on a quasi-tautology. Votes can be added up because they are homogenous because they are equal because the voters are equal. The charge of value-holism or the graver charge of smuggling in a whole under the innocuous pretence that it is really only the sum of its parts, in fact amounts to a charge that democracy is not a satisfactory normative political theory. Underneath Arrow's paradox lurk morally and even prudentially /10/ more substantial faults.

Such a finding, were it to be sustained, does not mean that any other theory is better. In the nature of the case, any argument in favour of one is forever bound to be inconclusive. Objections of comparable force can be marshalled against any normative political theory intended to justify any procedural /though perhaps not any substantive/ rule for making collective decisions. Selecting one looks inherently, inescapably relativist.

Far from deflating any hope one may attach to thinking about alternative social orders, this conclusion is hopeful /in a manner of speaking/. It points us toward the merits of what I have elsewhere called a 'strict liberal' minimalist position. There is manifestly a great deal that is wrong with social choice as such. Whichever way it is reached, 'democratically' or otherwise, there is a strong presumption that it wrongs some. The vague moral notion that wronging some is nevertheless right, or is doing good "on balance", can only be supported by affirmation; no other support is possible. The real normative task of political theory is to delineate the category of social choices that are justified by their substantive content provided there is any, if they cannot be justified by the manner in which they are reached.

Since non-unanimous social choice eo ipso imposes 'dominated' choices on some part of the community, the problem is hardly procedural - how to impose such choices? - but substantive - which ones may legitimately be imposed?

From here, there is an obvious follow-up. How to avoid making all the other decisions that are perhaps not legitimate, but ready at hand, temptingly available? - especially as it is in

the immediate interest of one half of society to impose them on the other half. If the odds are against good decisions, should one not seek above all to make fewer ones, as a kind of stochastic strategy of minimizing wrong?

The scope for legitimate collective choices may well be quite narrow. Deontological rules to keep the use of political power within limits that are correspondingly narrow would be well worth devising, though respect for them would be constantly threatened by the strong temptations to use politics broadly rather than narrowly, maximally rather than minimally.

#### 4. Rules Influence Outcomes

Making prior consent to non-unanimous decisions subject only to the satisfaction of procedural conditions, is obviously not neutral for the substantive content of the decisions that are likely to be taken by this procedure. On the contrary, perhaps nothing is more decisive in shaping the resulting social order. It will be a redistributive order.

Taken literally /11/, majority rule elevated to a sufficient condition for social choice, - as is suggested by the ideas of popular sovereignty or the supremacy of parliament - transforms politics into a three-person "distribution game". In this game, the total payoff is the sum of what the three players initially possess. If any two can agree on any other distribution among the three, it shall be effected. Hence a majority coalition of two can, by agreeing, dispossess the third. Once the coalition of two has taken all from the third, it becomes vulnerable to a split. Whichever way the coalition members

shared the payoff, the dispossessed minority can in the next game tempt one member of the majority to desert, form a new coalition, and agree on a new sharing at the expense of the deserted member of the previous coalition. The poorest player can always destroy an existing coalition, because he can always offer one of its rich members a large enough share of the possessions of the other rich member to make both of them better off. The former rich player, now that he is poor, can in his turn split and destroy the new coalition by employing against it the same bribing strategy. Depending on the bargaining solution, redistribution may take place not from the richest to the poor, but from the richest to the middling rich and only marginally to the poor.

The game can be repeated indefinitely, the role of dispossessed going round cyclically.

However, this is an unstable result. It can be stabilized in various ways, one of which is to enforce an agreement on an egalitarian distribution. Such an agreement, however, is vulnerable to defection in the same way as any other distributive one, because under the given procedural rule any two players can change it in their own favour by ganging up on the third. Repeated experience of cyclical dispossession, with the sum of the supergame being nil or, in effect, negative /since the cyclical movement must have some negative utility/ might then teach the parties to prefer the stability of egalitarianism and render the agreement self-enforcing.

A more likely /and life-like/ stable solution might arise if one player was, for practical purposes, a goose laying golden eggs in each game. This player would find himself the

permanent loser, the others dispossessing her in each game of some freshly laid eggs, leaving her just enough to go on laying in the next game.

The "golden egg" version serves, in fact, as the common nucleus of positive theories of redistribution. In such theories, some part of society uses a /procedural/ decision rule to gain income, wealth or opportunity at the expense of another part. This may happen through the manner of raising revenue /shaping the pattern of taxes/ or through expenditure /transfers and public goods targeted at particular classes of the population/ or non-budgetary reallocations of rights and privileges /affirmative action, restrictions on the freedom of contract including price and rent controls, etc./ or through combinations of these methods. Some theories assume that redistribution, whatever else it is designed to do, must redistribute from rich to poor; redistribution within income categories, from rich to rich and from poor to poor, is often overlooked. Some of the most interesting results, however, are produced by analysing this type of redistribution; public choice theory has produced many such.

Further insight into the nature of redistributive social orders is gained when to the interpersonal dimension an intertemporal one is added. A coalition satisfying the procedural decision rule can redistribute income in its favour at the expense of some /perhaps unspecified/ part of the next generation, by failing to match public expenditure with revenue. There are macro-economic limits to how far this can go, but /as the persistent large deficits of such countries as Greece, Italy, Belgium or the United States show/, they are remarkably non-

stringent. Micro-economics, that is ordinary utility-maximising behaviour, is supposed to set limits, too, for the utility of present income must be equated at the margin to the utility of the present value of future income. Government dissaving crowds out private capital formation, hence reduces future income. At some point the gain of present income by way of more government services and public goods, transfers or lower taxes is offset by the loss of future income due to lack of investment. This limit, however, is lifted if enough people fail to think of their descendants, or feel no concern for their material welfare. /12/ Those who have no descendants or who feel a little concern for them, even if they were not the majority, can provide a sufficient building block for the formation of a coalition that will redistribute intertemporally, for *prima facie* they can, inside the coalition, compensate their partners with inter-personal gains in exchange for getting their way with inter-temporal ones. A deficit will then be run even if most voters think that, taking their concern for their descendants into account, they would be better off with a balanced budget.

A case can be made that a pure, substantively unrestricted majoritarian democracy would end up by "churning", taking much /and in the limit, all/ of everyone's income under one set of redistributive measures and simultaneously returning the same income to everyone under a different set of measures, whether in money or in kind. Some would be making /small/ gains, others /small/ losses, most of the gain being purely 'optical', illusory, self-deceiving, due to particular benefits of redistribution being more concentrated and conspicuous than its general costs /a factor

amply explored in the public choice literature/. Basically, most people would be paying for most of their own redistributive benefits, but not all would realize that this was the ~~the~~ case.

It is perhaps easier to conceive of this scenario than of its contrary, namely that a society unhampered by restrictions on its democratic decision-making power will, for utility-maximising reasons, endogenously generate a political self-denying ordinance, a barrier to redistribution. /Bouillon, / Here, the basic argument is that <sup>(progressively more radical)</sup> if redistribution earns for the winning coalition <sup>progressively</sup> a larger slice of a <sup>steadily diminishing</sup> ~~smaller~~ pie, it would find that its slice reaches some maximum and then starts to decrease well short of the point where redistribution is transformed into a frenzy of unrestrained and <sup>destructive</sup> ~~sterile~~ churning. Hence, in order to maximise its slice, it would seek to moderate redistribution both from rich to poor /13/ and between special interests within the rich and within the poor.

One of the reasons why it is difficult to put one's trust in an endogenous barrier of this kind is that the choice that has to be postulated between a given slice of a large pie and the larger slice of a smaller pie cannot be made by each individual for himself. It is only intelligible through practical inference of the holistic kind; the winning coalition as such must exercise restraint on behalf of its members. This looks suspiciously like a 'fallacy of composition'. We see that it is in the interests of a holistic entity that restraint be exercised; but how can we translate this into the interests of the individuals who must each decide to vote accordingly? It is true for the holistic entity that it would maximise its ends by adopting the means of a barrier; but why is it true of any particular individual

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who makes the effective choice? There is no direct passage from such global magnitudes as the economy-wide elasticity of work effort with respect to the income tax rate, or of risk-taking with respect to the capital gains tax rate, to the relevant practical reasoning of each individual who matches his 'means', - the political support he can swing behind a particular redistributive programme - ~~tho~~ his 'ends', post-tax real income and the non-budgetary advantages he thinks he can derive from redistributive policies, such as price controls, regulation of various kinds and 'rents'. It is implausible to present the representative individual as succeeding correctly to balance, at the point of marginal equivalence, his putative redistributive gains against his personal share in the loss of national income due to redistribution.

An endogenous, utility-inspired barrier would be more likely to spring up, in rather a jack-in-the-box fashion, after things have gone a long way past any maximum for the winning coalition, /never mind the median voter who can always find compensation within the coalition/. When a large mass of voters finally turns round and comes to blame redistribution and all its works for the palpable damage it has done to the economic environment and its moral underpinnings, there may be a wholesale backlash that has nothing marginal about it, as happened in recent years in England /1979/, the United States /1980/ and Sweden /1991/. By that time, however, redistribution has long overshot the theoretical equilibrium. The problems involved in an attempted pull-back, a 'rolling back' of the size of government and the share of public expenditure are well known, as are the reasons that cause redistributive coalitions fairly promptly to re-form and

start all over again. The upshot is in all probability a continuing historical pattern made up of a forward creep of ever more complex, ever less transparent redistribution periodically pulled up short by painful, wrenching conservative stops.

##### 5. Social Choice made 'too easy'.

Getting a purely procedural social choice rule established is rather like eating the fruit from the tree of knowledge. It is fateful knowledge that cannot be unlearned. Using the knowledge is the sin of one part of society as it imposes its ends on the rest freely, costlessly, without risking repercussions in the earthly short term, - for resistance, let alone the use of force, against the "common will" is inconsistent with prior consent to accepting any outcome provided it is the product of due process.

Social choice, making decisions collectively for both self and the dissenting minority, becomes easy. Like venial sin, it stirs little or no remorse. It can become a compulsive habit, too. For the very existence of the choice rule /the accessibility of forbidden fruit/ is a permanent temptation. It keeps provoking society to split into two virtually equal halves, one of which will turn out to be the winning coalition. Success in forming it has richly rewarding distributional consequences. They go far beyond anything known under pre-democratic "social choice"; feudal strife, the matching of baronial against royal power, contests between town leagues and territorial lords, church-state rivalries over the revenues of investiture, conflict between the landed and the commercial interest, have only scratched the surface of the distribution of property and income. They had a strong effect only in the very top layers of society; the middle and the bottom used large-

ly to keep their share, if only because, closer to subsistence, they offered too thin a margin for redistribution as potential victims, and their power was insufficient to put them among the potential victors. One-man-one-vote has, of course, changed *all* that.

Under democracy, the winning coalition is entitled to define the common good for society as a whole, and by relatively simple recourse to the collective choice rule it can legislate, for all, one holistic end after another, while shifting the resulting burden at least to some extent on to the losing coalition.

The operation of the choice rule is protected from criticism by its automatic association with holistic values few have the courage /the 'fall?/' expressly to denigrate. Redistribution is always, though not always accurately, identified with the service of equality, social justice, compassion, 'caring', solidarity, and sometimes even of prudential considerations like social stability, the willingness of the less privileged to tolerate the existing social order, and so forth. The 'objective' function /as Marxists used to say/ of these values is to legitimize precisely those democratic choices which, by overriding the very property rights which a social order is intended to protect, are most in need of legitimation. In this sense, these are the democratic values par excellence; they lift democratic outcomes into a moral dimension. Yet equality and social justice, not to speak of the rest, inescapably fail the Paretian test of an "improvement", in that in realizing them, the interests of at least some persons must be sacrificed to the interests of others. Whatever may be their intrinsic merits, it is strange to have them called 'liberal values'.

In the light of such considerations, the recent Hegelian speculation about 'liberal democracy' representing the "end of history" appears particularly inane. Only the attention it has received is more so. 'Liberal democracy' is a curious conjunction to start with. However, if it stands for a world, where everyone can assume prior consent by everyone else to all democratic decisions, that world is surely anything but a final resting place for history. It is singularly fertile in ceaselessly producing and reproducing distributional conflict, for property rights are never 'given', known quantities in it. Instead, they are permanently 'in play' as stakes in democratic politics which can recast them to fit the public interest, the common good, the will of the majority. Admittedly, all this happens non-violently. Surely, however, historical change, movement need not always be violent. If anything, it may be more febrile, more unstable if it is sheltered by an agreed and all-powerful choice rule from the risks and costs of ~~violent~~ changes brought about by violence.

#### 6. On the ethics of choosing 'socially'.

Contrary to what might be thought, a purely procedural social choice rule is consistent with a purely consequential /hence substantive, content-dependent/ evaluation of social states of affairs. An omnipotent majority and consequentialism, even in its narrow, utilitarian version, are comfortable bedfellows.

Ethics is either universally valid, applying to all human action if it applies to any, or - as Bentham would have it - the public good is in one sphere, private ethics in another, and actions in the two spheres need to be judged by different yardsticks

/Lyons, revised ed., 199, 20 ff./ Were one to take this position, most of the ethical problems of good government would be swept under the carpet. However, the position would involve countless morally indefensible judgments, besides being crashingly banal. Yet if there are to be no two different ethics at the same time, individual and holistic values must find their relative places, however large or small, within one. Should this prove to be altogether impossible, the social order these values motivate may itself be ethically inconsistent. Putting it differently, if it were held that any feasible social order must both protect individual rights and promote equality in some relevant sense, the two requirements could not be fulfilled. One could only redistribute by violating certain individual rights, that is, metaphorically speaking by sinning. Sin, of course, is an ubiquitous, everyday phenomenon, but it would be absurd to frame deontological rules to govern the social order that made a virtue of it and granted it a legitimate role.

A consequentialist type of ethics might take the view that all purposive action, including social choice, contributes to certain goals to some degree. The goodness of actions derives from the hierarchy of values that make these goals the chosen ends. Social choice helps attain the ends of many individuals and its value is some composite function of all the values these individuals associate with the ends reached by it. The consequentialist reconciliation of private and public ethics is nothing but the formation of this composite. It is, as utilitarians would put it, the incorporation of all relevant values in the arguments of the social welfare function.

He who says composite, however, says aggregated, made into a whole in some manner, and these facile words beg a question instead of proposing an answer. Earlier in this paper I argued the logical absurdity of calculating the algebraic sum of votes, or, in the same vein, of the gains and losses of different people and calling the result "the balance of good". Essentially the same absurdity surrounds the albeit wider consequentialist attempt to evaluate social states of affairs by weighing each one by the individual values, including the most abstract as well as the down-to-earth, that the members of society attach to them. /14/ The non-cognitivist enterprise to find out the goodness or otherwise of social consequences, so to speak, from the horse's mouth, 'from society itself', fails for lack of a horse, let alone a horse's mouth that would speak.

A half-way house between the non-cognitivist position that pretends to no knowledge of the good except insofar as it is the good of someone, and gets trapped in the impossibility of aggregation, and the cognitivist one that claims directly to divine the worth of <sup>whole</sup> states of affairs, is the recourse to the 'impartial observer' who takes account of everyone's good from one moral point of view. /15/ However, there is nothing to compel agreement that the moral point of view he takes is the right, or the only one among several right, points of view, - unless of course we share it to start with. The impartial observer taking a moral point of view is, on a close look, indistinguishable from a mere observer merely taking a point of view.

A remaining avenue open to consequentialism, - I take it to be the only one - is cognitivist, and consists in adhering

to the belief that we can both recognize, and justify to others, the ranking of good, better and best states of affairs on intrinsic grounds, without having to refer to the persons for whom they are good. It is also 'value-holist', maintaining that it is rational for society, or the race, the ethnic community, the Vaterland, to choose a state of affairs regardless of which particular individuals in society would or would not choose it. No doubt rashly risking to be called to order by classical philosophers for misinterpreting Aristotle, I should call this double position Stoic, Spartan and Aristotlean, as distinct from the Athenean one that pays more heed to individuals. It is satisfying esthetically but precarious intellectually, for it is neither self-evident nor can it be argued for. It supposes a prior commitment to virtues. More disturbingly it leaves room within its terms for widely differing kinds of social orders, some of which look glorious and noble, others inhuman and awful. It is possible to see these orders in all kinds of lights /16/, - and this may be the very reason why this ethic and the political philosophy derived from it is not only faulty /for aren't they all?/ but more at fault than others. One is moved resignedly to echo Adam Ferguson that we must try and rely on law since, unlike in the age of Spartan simplicity, we cannot rely on virtue. /17/

#### 7. Need order have an ethic?

Lord Devlin, in a much-commented lecture /Devlin 1965/, once sought to establish the true role of law as an instrument of social survival rather than of the realization of ethical principles, a guide to the good life. He contended that law is

needed to enforce some morality, whatever it may be, without which society would disintegrate. While "disintegrate" is obviously a subjectively twistable word and no two people need agree whether a society, - say, inner-city America or post-socialist Russia - has "disintegrated" or not, the drift of the argument nevertheless makes perfect sense. Devlin's particular point was that it did not matter what morality the law sought to enforce as long as it enforced one. The threat to social survival was moral and legal laxity, indifference, indeterminateness and fudge. Diametrically opposed to this diagnosis is Hayek's Social Darwinism, which predicts that societies adopting one morality and one type of law /and other basic social institutions/ survive better than those adopting some other type. The test of institutions is natural selection culminating in survival for the best. The best, in fact, turn out to be spontaneous orders; they have the highest capacity for survival.

In neither the Devlin nor the Hayek view, however, do human preferences for particular values have a role in the selection of the social order. Is this possible, and plausible? - and if it could be the case, what would it entail?

Positive law influences behaviour by setting norms for it, providing for redress and sanctions in cases of their breach. Its central subject, so to speak the mould in which the norms are formed, is the system of rights. On one view, the law creates them. On another, it discovers the rights that are there, or ought to be there, and by legislative and judicial action transforms them into legal rights, which it undertakes to uphold. Simplifying, we might consider Bentham, Austin, Kelsen and most

modern legal positivists as holding the former view: for them, the legislator and the judge create rights and no one else can. Most moral philosophers, natural lawyers and common lawyers tend to take the latter view. They see rights as prior to law, as moral truth derived from human nature or from God's intentions, or as implicit in the purposes underlying social arrangements. It follows, then, that law is <sup>as</sup> capable of violating as of upholding rights. Bruno Leoni and Hayek incline to feel that law made by the legislator is liable to violate rights, law found by the common law judge tends to clarify them.

Clearly, however, any sharp distinction between 'created' and 'found' law is somewhat unreal, as is the one between made law. We 'create' what we can and wish to, but we 'discover' what statute and judicially we are looking for and are predisposed to find. It is a commonplace now that discovery is the child of preconceived notions, theories. Perhaps a more important and more genuine distinction is one between laws that do, and laws that do not, restrict people's admissible and Pareto-superior options, i.e. do or do not stop them from bettering their lot if they can do so without worsening anyone else's. It is not evident to my mind that this is the same distinction as the one between 'made' and 'found' law.

For the granting of a right, whether it is supposed to be made ex nihilo or as the legal recognition of something that was implicit in morality, custom or expediency, entails the creation or recognition of the concomitant obligation without which the right would have no valuable content, and could not even be exercised. While the right is a benefit to some, ~~the~~

the obligation is an /actual or contingent/ burden on others.

In creating the right for adult citizens to elect their legislators and political office-holders, an obligation is imposed on the latter to abide by the election's result even if it means submitting to loss of office. This obligation may be no hardship in the eyes of most of us who do not hold political office, for why should office-holders have security of tenure instead of being exposed to our displeasure? Admittedly, in civil life many people do claim some right to a degree of job security, and the right is sometimes recognized in that employers assume the corresponding obligation. There are good reasons why this should not be the case in politics; our obligation to grant them job security would contradict our right to elect and recall politicians, a right to which they have at least implicitly agreed.

On the other hand, in creating or, as some would say, in giving legal recognition to, a right to work, a right to a formal education, a right to have one's artistic creations exhibited, performed, bought, a right to be healed when ill, a right to compensation for drought or flood damage and so forth, a different, onerous set of corollary obligations is imposed. It may be said that the obligor is 'society', the whole community or the state; stating it ~~euphemistically~~ in such lullaby language may obfuscate but does not change the fact that the obligation will be borne by as yet undesignated individuals who must be taxed or otherwise deprived of their resources when the rights in question come to be

exercised.

The right, then, is implicitly justified by consequentialist reasoning in precisely the same manner as other redistributive measures not based on rights. Both amount to a change in the social state of affairs that is not a Pareto-improvement; it is good for some, bad for others but still assumed to be 'good on balance', - whether the balance is struck by the old-fashioned utilitarian pseudo-arithmetic or by some, intellectually more respectable comparison of reasons for and against. Both are inspired by the values of whoever was in favour of granting the right, and both are justified by giving values such weights as will ensure that the aggregate benefit-burden balance turns out positively.

Making a change that is not a Pareto-improvement may be a vice on the oft-cited Kantian ground that if one person is made better off by making another worse off, the latter is used as a means. It may also be condemned on the different ground that the latter person's rights must not be violated whatever the good this permits to be done to others, for rights are "trumps" that must prevail over the common good - at least sometimes. /18/ It seems to me, however, that imposing changes that are not Pareto-improvements involves a possibly more fundamental, epistemic vice: there is no way of supporting the assertion that the good to one person is greater than the bad that must be inflicted on the other to bring it about. If such outcomes are nonetheless to be legitimized, this must be done, not by pretending to measure the incommensurate, but by invoking holistic values that do not depend on comparisons

of the good of some to the bad of others.

Equality, social justice, solidarity, human fulfilment are the most often cited holistic values in support of rights that are not self-justifying on simple Paretian grounds. A notable feature of most of these holistic values is that they not only compete with individual ones as do all alternatives. They in addition attack and undermine individual values, dislocating them in the preference ranking of individuals. Solidarity, to take one of them, depreciates responsibility for oneself if only because it reduces its relevance in the face of hazards, hard knocks, adversity. Equality is antagonistic to achievement. Security saps thrift. Social justice impairs the respect for agreements. Equality and social justice may also act as anti-values to the value of prosperity, material ease /if the latter count as values/, spoiling them with remorse. One may, of course, recognize such antagonistic pairs, values acting as anti-values upon others, without taking a view of which are better, those that chase or those that are chased. What one should not do, however, is to feign a belief that all these values are mutually consistent and tolerant and capable of thriving together in a good 'pluralist' society.

The observant reader may, at this point, feel that he is hustled through a brutal change of scenery with insufficient warning. For he was made to pass from rights whose corollary obligations were being voluntarily assumed by the obligor 'for value received', to rights that 'society' gives to some and to obligations that others are made to assume involuntarily. The former is the world of civil society, the latter of collective

choice, of politics. In civil society, law is meant to protect and eventually clarify rights rooted in original possession or subsequently created by contract. In the world of politics, law creates rights and obligations that are not reflections of the intent of the parties but of the political authority; in enforcing them, it shapes and upholds a social order of its own making.

The passage from civil society to politics, then, is from an order that is value-neutral in that it has, at first blush, no involuntary feature /19/, to one where some value is invoked to justify the imposition of obligations for the sake of rights. This world cannot tolerate value-neutrality; it would lose legitimacy if it did.

By a roundabout route, we have come back to the question raised with regard to the social orders seen by Lord Devlin and Friedrich von Hayek, each in his different way. These orders, made for or tested by survival, are in a manner of speaking value-neutral. At least, values do not play a determining role in their functioning, - either because, as in Devlin, any value will do as long as it is firmly respected, or because, as in Hayek, no one seeks to shape the order in the image of any particular value nor is anyone trying to justify anything in value terms. If the emergent order nevertheless turns out to favour certain values over others, this will be the wholly unintended outcome of natural selection in which values prevail according to their contribution to the survival of the 'host organism'. Macedon overshadows Athens, the barbarians topple Rome, Confucian East

Asia gains economic supremacy over the slothful and feckless Occident, - or not. Time will tell. But whatever happens and whichever order prevails for the time being, it prevails for reasons that have nothing to do with anyone's preference for the values that characterize the order.

A social order that is value-neutral in this accidental, ad hoc sense may be feasible and have good chances of survival. But if this is all there is to it, it is an unattractive proposition. Unlike nature, humanity always demanded more than survival and 'non-disintegration', and no doubt always will. Survival is a prior condition, not the sole object of the exercise. Looking for more, for a social order that goes some way toward letting people choose what they think they would like may be a Utopian ambition, but <sup>it is probably</sup> an irrepressible one. If it cannot be repressed, it is no doubt best to indulge it consciously, with open eyes, and with the warning flags fluttering. For, like Hippocratic medicine, the first commandment of social philosophy is surely: "Avoid doing harm."

#### 8. The feasible, the admissible and the right.

Making sure to avoid doing harm before trying to do good forbids what I called, throughout this essay, 'balancing', offsetting the interests, values and votes of one person, group or class against those of another, and determining which should weigh more. Doing so is the original sin inherent in 'social choice', and though men will not cease sinning nor give up the practice of collective choice, and though a social order cannot

possibly eradicate this sin, it should not encourage it by provoking brazen temptations. Least of all should it dress up sin as virtue.

There are, as this essay has kept on insisting, compelling reasons for abandoning the effort to evaluate social orders by evaluating their full consequences. /20/ Modern political thought, in accepting some of these reasons, has increasingly turned to alternatives that it is pleased to call 'rights-based'.

Much of this thought is, to put it bluntly, confused and confusing. It seems to me that it is best understood if we adopt, at least for the present purpose, a threefold classification of the subject of rights-based theories. This classification has one merit, namely that it groups like with like from the point of view taken in Section 7 about choices that better some and wrong no one. There are, then, distributive rights, redistributive rights and /for lack of a more respectful term that would fit/ redundancies. Distributive rights are matched by voluntarily assumed obligations. Redistributive rights have involuntary, collectively imposed obligations as their counterparts. Redundancies are not rights properly speaking and entail no concomitant obligations, but merely signify the absence of any obligation if the corresponding right is absent; but this goes without saying.

With this triple classification at the back of our mind, let us address the problematical nature of the greater part of 'rights-based' political theories. Their general approach is to propose a panoply of rights selected so as to correspond to the essential nature of the right-holder, to his basic aspirations, to his needs and interests that are worthy of respect, and so

forth. There is little or no explicit reference in their selection to the essential nature, needs and interests, basic aspirations and so forth of the bearers of the matching obligations.

The imposition of involuntary obligations is justified on the standard consequentialist ground that the benefit the rights in question confer on some is greater, or morally more valuable, than the burden they impose on others. There is, as far as logic can take us, only a hole where this argument sees grounds. But even if the ground were there, it could hardly bear the weight of a right, whose nature entails that it simply must not be violated. Respect for a right qua right cannot be justified on consequentialist grounds which represent the 'balance of reasons'; like Dworkin's card-like rights that are sometimes trumps over the public interest and sometimes trumped by it, depending on the merits of the case, consequentially justified rights stand when, but only when, the balance of expected consequences favours them. They do not stand by virtue of a deontological rule that is derived from the very nature of rights. /The muddle over 'consequentially justified' rights parallels the muddle over rule-utilitarianism. In the latter, we are supposed to choose the act that conforms to the good rule, e.g. 'honour your promise' even if keeping the particular promise did not increase aggregate utility. Surely, however, it must do, for if it did not, the rule would not be a good rule on utilitarian grounds. Keeping the rule increases the social usefulness of promising. This is the reason why rule-utilitarianism recommends that every promise be kept. However, if this is a good reason, keeping the parti-

cular promise is utility-enhancing, breaking it would be utility-reducing, and act-utilitarianism would come to this conclusion anyway. It would not need <sup>the additional help of</sup> rule-utilitarianism to reach it./21/ Utilitarianism cannot both judge acts on the balance of reasons, and serve as the *raison d'être* of rules that must be kept independently of the balance of reasons, so to speak reflexively./

Let us at this point pull back to the Archimedean fixed point of distributive rights, that is rights backed by obligations whose basis is rock-solid both epistemologically and morally. We really have it from the horse's mouth that they do exist because the obligor <sup>himself</sup> says so. They are indisputably legitimate, for the very individuals who must bear the obligations have, by executing valid contracts, each separately declared their agreement to bear them in exchange for value received. This, then, we know on clear evidence. What else is sure?

In a broad sense, rights created by /voluntary/ contracts are all property rights. /Note, for precision, that not all property rights are created by contract. Some result from unilateral gifts and bequests, and a historically not unimportant category originates in 'finding', invention, original occupation, homesteading. Some kinds of intellectual property belong to this category./ They distribute benefits from possession, use, yield, or more precisely the powers of disposition over these benefits, among individuals. In this broad sense, employment contracts, too, give rise to property rights to the extent that they create powers to dispose of another's labors in exchange for income, though the power is severely circumscribed. The sum of all these rights determines a distribution.

What seems to distress most theorists of 'rights-based' social orders is that what I call here distributive rights seem to <sup>be</sup> a bleak, cold-hearted and narrow base to build a society on. They sense a great vacuum, and proceed to fill it with 'bills of rights', 'human rights', minority rights', perhaps also 'gender rights', 'cultural rights', rights to 'equal respect and concern', but also welfare rights, and why not rights to 'worth-while options', 'meaningful life chances' and so forth. The list is lengthening as time goes on and as we find new reserves of magnanimity and ingenuity for repairing gaps in the web of rights.

Evidently, however, the list is a heterogenous mix of redistributive rights, redundancies, and mere pious wishes that have no practical meaning. As Sen disarmingly admits regarding his own proposed additions to the list, 'goal-rights' and the sub-class he is particularly interested in promoting, 'capability rights', the attempt to integrate goals and rights "rather blurs the distinction between rights that relate to so-called positive freedom and those related to negative freedoms such as liberty and non-coercion." /Sen, 1982, 200./ In fact the distinctions that are blurred, if that is the right word to use, are of a different and more fundamental order. Consider in detail one of his 'capability rights' that must enable the economically deprived "to make claims on the state" to rectify their deprivation. /Sen, 1982, 199./ It is not altogether clear whether they ought to have the right to make such claims, or the right to have the claims met, i.e. their deprivation rectified. The latter entails redistribution in favour of the poor. But if this is done, it is done anyway,

for another reason. ~~There is a~~ 'Social choice'<sup>is</sup> made by the winning coalition, and it is part of the conditions for the coalition to function that there should be redistribution in favour of the poor /as well as, and perhaps more so, in favour of other interests/. The 'capability right' to rectify deprivation adds nothing to this.

Partisans of proliferating rights, however, might rightly point out that it is one thing to get redistribution, and quite another to get it 'as of right'. Given a 'capability right' to have redistributive benefits conferred, they depend on the right-holder, i.e. the poor, and not on coalition-forming or other contingencies of the political process. What if power relations shift in ways unfavourable to the poor?

Much of this objection is casuistry. It is true that continuing redistribution depends on politics. But it is equally true that continuing to have the right to it depends on the same politics. Both are contingent on the constellation of political forces being favourable to the 'goal', and if they are not, there is no 'capability'/22/; and for this reason all redistributive rights have a certain phoneyess about them, dressing up as matters of right something that is a matter of the political balance.

The other possible interpretation of the 'capability right' we are trying to understand, is perhaps less trite. Sen suggests this interpretation by relating the right to the freedom of speech. The economically deprived must be capable, 'as of right', to make claims. If they could not and did not, public

opinion might pay no attention to them and the redistributive process might pass them by. They must be able to speak up, to demonstrate in the street, to ~~lend~~ their support to one political entrepreneur rather than another depending on who was most likely to satisfy their claims, etc. Note, however, that they must be able to do all these things, not if and because they were granted a right to make claims, but if and because nobody can prove to have contradictory rights to stop them doing any of these things. The economically deprived can go on 'making claims' in the same way as they can walk, speak, sleep, remember and exercise their other faculties. All their feasible options must be admissible unless they prove to be inadmissible; and to prove that they are, somebody's contrary right must be proved. Only then would the economically deprived have an obligation to refrain from some form of claim-making or another, like squatting on somebody's property. Failing proof of contrary right, the capability right is redundant, - it is a 'right' to do what it is admissible to do. Its obverse, no less redundant, <sup>an obligation not</sup> is ~~to forbid~~ /to do what is forbidden.

We can, of course, also seek to grant a right to do what it is inadmissible to do by virtue of another right somebody else <sup>like empowering the hungry poor to steal food from the rich</sup> happens to have, but in that event what we must do is to invalidate the latter's right, not to give the former one that would violate that of the latter.

The important point is that people do, as a matter of definitional, necessary truth, dispose of their admissible options and need no separate 'capability~~x~~ rights' to some parti-

cular subset of the admissible set. The same argument holds with respect to any other 'right' such as 'human rights', which affirm no more than this: what people are legally able to do because no one has a right to stop them, they ought to be legally able to do. This is obviously a redundancy. If, on the other hand, some other-than-legal ability is meant, perhaps money or knowledge, it is a category mistake to treat the matter as one of rights. Rights define the frontier between the feasible and the admissible. The feasibility of an action is not to be confused with the right to do the feasible.

Neither redistributive rights, nor /a pleonasm/ 'rights to liberties' fill a vacuum because there is no vacuum of the kind they could possibly fill.

Some feasible options are inadmissible because they would violate a right, and this is perhaps the most evident source of the constraints that go into the making of the social order, - for if a right is a right, it must not be violated. Constraints, however, come in other colours and hues and from other, perhaps less evident sources as well. What characterizes the system of constraints that would go best with the type of social order that causes the least wrong, and is the most commendable? - and can a system of constraints be justified without relying on excessive presuppositions about values?

### 3. Justifying deontic orders.

For reasons that should progressively emerge, I call an "excessive presupposition" about values the attempt to use

them as justifiers of any feature of the social order preventing Pareto-improvements, or imposing outcomes that are not Pareto-improvements.

It can be readily seen that all purposive actions of a person that do not inflict a loss on another are designed to bring about Pareto-improvements, for this follows from the action being purposive, and from its causing no loss. Thus, a freely agreed contract that inflicts no loss on a third party is designed to be a Pareto-improvement. The scope of the concept extends to schemes of social cooperation: it includes firms that are networks of contracts, and also the enforcement of "imposed" Pareto-optimal solutions in non-cooperative games of the prisoners' dilemma type. Prisoners' dilemmas are treacherous terrain, as are externalities, for it is relatively easy to allege that a social situation requires a coercive constraint either because the participants are caught in a prisoners' dilemma or because they create a harmful externality. In both cases the constraint would arguably help correct a Pareto-inferior outcome, but it is far from certain that such cases occur as often, or are as important, as it is alleged. There is no place here to explore the grounds for believing this; it suffices to remark in passing that a social order should not make room for coercion on the a-prioristic identification of certain standard situations, such as public goods, with prisoners' dilemmas. Some attempt at testing, or some other substantive proof, should be required that for instance a certain public good does have the characteristics of such a dilemma. Orthodox, received public goods theory, for one, is quite insufficient to establish the

case that without coercion we could have no public goods, or only 'too few' of them. Without testing it, one can at best reserve judgment.

Constraints, however, that are in all probability necessary to ensure that our actions and interactions are Pareto-improvements, are eo ipso justified. Inasmuch as they forbid actions that would harm others or violate their rights, they demarcate, within our feasible options, the inadmissible from the admissible in such a way that everything admissible is either an improvement or is indifferent. The principal constraints that function in this way are, of course, distributive rights, tort laws and rule-like self-enforcing social conventions that facilitate co-ordination and co-operation by setting norms. They are all, taken globally, self-justifying.

Obviously, not all constraints are self-justifying. A simple example is legislation restricting the freedom of contract or otherwise curtailing the exercise of property rights; such legislation is patently capable of frustrating certain transactions that would be Pareto-improvements, as well as of causing outcomes that are not. Redistributive social choices are probably the most important of such Pareto-inimical constraints. In a well-designed /23/ social order, this effect, which is at least controversial, would not be countenanced unless it were justified.

The justification, however, runs into precisely the same difficulty as the evaluation of social states of affairs, - which of course is what we should have expected. Two approaches are possible. One is straightforward consequentialism, or one

of its special versions like utilitarianism, combined with non-cognitivist meta-ethics. With this approach, one would say that the law, convention or other constraining institution is not intrinsically good, /and we wouldn't know it if it were/, but it is good because it favourably influences the interests of the people who are affected by it. Since, however, the constraint in question has been defined as having effects that are not pure Pareto-improvements, it cannot be good for all. If it is good for those who gain from it and bad for those who lose, the justification must hold on the balance of reasons or not at all. However, as we have argued in Section 6, "the greater good of the gainers outweighing the lesser bad of the losers" is, strictly speaking, gibberish because it compares incommensurables. Hence it cannot justify the constraint.

The other approach, a frankly cognitivist justification, is at least coherent, potentially rational. Here, we would argue that a constraint is conducive to a value that has intrinsic worth independently of, or over and above, the gains and losses of the individuals its operation affects. As far as I can judge, these values must be holistic, preferred by a part for the whole. /24/ Chosen by some decisive part of society or of course the legislator acting on its behalf, such values impinge on everyone whose options are restricted or rendered more costly by the constraint. Perhaps unexpectedly, the analogy with the arguments of Section 6 continues to hold in the cognitivist context as well: equality, distributive

justice, universal love, solidarity, the intrinsic worth of art or, why not, of 'multi-culturalism' that cannot survive on individuals' voluntary support alone, national greatness, and such other values as the occasion may call for, can all, without logical difficulty, serve to justify any configuration of non-self-justifying constraints. It suffices to impute a great enough intrinsic worth to the particular value the constraint favours.

Tempting as it would be stop at this point, the story has an ending it behoves us to reach. He who says constraint says enforcement. Some constraints are self-enforcing in the special sense that enough of the constrained individuals find it worth their while voluntarily to invest efforts or other resources to deter violations, without a specialized agency /e.g. the state/ having powers to force them to contribute the resources in question. Other constraints may require enforcement in the everyday sense of coercion, threat of sanction, <sup>and</sup> compulsory contribution of the <sup>re</sup>sources <sup>for enforcement</sup> needed. The problem is a case in public goods theory, and is not directly relevant for the present. More relevant is the adequacy of any enforcement, voluntary or coerced. Whether the respect for the law can be mainly, let alone wholly, a matter of fear of sanctions is a question legal philosophy tends to answer in the negative. What is true of law is probably even truer of rule-like conventions whose sanctions are usually less reliable. Moreover, respect is somewhat broader and more demanding than mere obedience. Even if a large measure of obedience can be

secured by enforcement alone, a corresponding measure of respect probably cannot be.

Apart from sanctions, people can have two kinds of reasons to respect constraining institutions. One is dependent on content or context or both. I stay within a rule because, all things considered, it is useful, beneficial, in most circumstances it is not 'too' constraining but only 'reasonably' so. If this were not so in a particular case, I would not wish to observe it, and might try to violate it, depending only on the risk of being found out. The other kind of reason is content- or context-independent or both. I obey the rule because it is a moral duty to respect rules that qualify as such by virtue of the authority of the rule-giver, the object the rule is meant to secure, or because everybody else respects it. My obedience does not depend on the merits of the case. I do not refrain from killing a person because I think he deserves to live, nor from maiming him because he 'owns his body', nor from stealing his property because he earned it, or needs it more than I. I do not do any of these things because it is my duty to refrain from them. Arguably, all proper, genuine rules are deontological in this sense, because if they were to be observed only according to the merits of the case, they would demand no more than what ad hoc pragmatism dictated anyway, and would serve no purpose of their own.

It is easy to accept as deontological rules the constraints that we find to be self-justifying. Acceptance goes with the grain, it is 'natural' inasmuch as self-justifying constraints refer to a bare handful of minimal first principles, and little

else. People must be left to choose what they prefer if they can do it without violating anybody else's rights. Rights are matched by obligations. Obligations arise from torts and promises. Torts must be avoided or redeemed. Promises are made to be kept. Property is created by finding and contract.

Each of these basic precepts is undemanding in terms of the moral theory that supports it. Most of them, in fact, lay down behaviour norms that seem to be part of our genetic heritage; part of it we share with our simian cousins. /Eibl-Eibesfeldt 1984, 443-464, also Eibl-Eibesfeldt /1967/ 1978, 489-492, 620-622./ A social order whose non-physical constraints can largely if not wholly be derived from such undemanding principles is likewise undemanding. Constraints requiring justification, on the other hand, may or may not be assimilated to deontological rules by all concerned. The holistic values they depend on are presuppositions that conform to the moral intuitions of some but not of others. Such presuppositions are 'excessive' if, as I believe to be the case, they are meant to elevate the constraints in question to the rank of deontological rules. It is not a moral duty to surrender some of our resources in order to promote equality. There is nothing morally binding about 'social choices' by virtue of the fact that they are 'democratic'.

## NOTES

1. Anscombe, G.E.M., 1957, states: "... the thing wanted is at a distance from the immediate action ... /which/ is calculated as the way of getting ... the thing wanted." 45.
2. Coleman 1985 p. 114. Also J.W.N. Watkins, in Ryan
3. I.e. that the swarm is in Nash-equilibrium.
4. For Charles Taylor, a notable adversary of philosophical individualism, one cannot both admit that not at all 'ultimately valuable' goods are divisible, and adhere to 'social atomism'. Taylor 1979.
5. Cf. T.M. Scanlon, 1978, 1988: "I depart from the classical utilitarians and many of their modern followers in rejecting subjective preferences as the basis for the valuation of outcomes. This role is to be played instead by an ethically significant, objective notion of the relative importance of various benefits and burdens." 76.  
Also Scanlon 1975.
6. Cf. Kliemt, 1987, 502-506, who stresses that for the cognitivist, normative standards can be categorically justified; somebody can have a legitimate claim to know what is good without knowing such contingent elements as the circumstances under which it is good, and for whom.  
Cf. also, for a position that is tentatively both cognitivist and holist, Scanlon 1977 repr. in Waldron 1984, 143 and footnote: "their value does not rest on their being good for particular individuals..." "Perhaps all convincing appeals to these notions can be reduced to instrumental arguments, but I do not at present see how."
7. Of course if fewer than two could block it, it would be a unanimity rule, ~~not~~ a collective decision rule.

8. Pope Boniface VIII decreed that "zeal should not be added to zeal nor merit to merit, but only one number to another". His reason was opportunistic: he sought a means to overcome squabbling about the relative zeal and merit of bishops standing for opposing points of view. Over the centuries, however, any differential influence over collective decisions has come to be seen as reprehensible, morally wrong, a falsification of the 'true will' of the people, hence of the result that 'should have been' obtained. Why this has come to pass is a question that would repay study, but is well beyond the scope of this paper.

9. Incommensurables are, of course, neither greater nor smaller nor equal to each other. For 'greater', one can read better, worthier, more important. Equals are necessarily commensurable; it suffices to declare <sup>men and their wishes</sup> them to be equal to solve the aggregation problem. *It could of course also be solved by declaring them to be unequal yet homogenous, - but this might be harder to get accepted.*

10. It is a 'prudential' fault of democratic decisions that they do not seem well designed to serve the interests of the voters, except those in the uncommitted middle whose adhesion is sought by both of the two competing halves of an electorate. In practice, this tends to take the form of redistribution from both the rich and the poor towards the middle. /Health and education services, and the provision of many public goods, are widely considered to have a redistributive effect in favour of the middle-income groups./ In abstract models, the median voter theorem expresses the same phenomenon: both those above and below him get the short end of the stick.

11. It is arguable, however, that no such rule can be taken literally, and simple majority rule in particular cannot. If the winning coalition ruthlessly abuses the potential offered by the rule, the losing coalition will cease to abide by it and will rebel, strike, sabotage, emigrate, send its capital abroad or whatever. We can <sup>then</sup> revert to what I called above the "natural method" of making collective decisions, where the result approximate that which would obtain if one part of society had to "beat into submission" the other half in order to obtain it. The result, in other words, will ~~then~~ reflect all the relevant power relations, including of course the reluctance of shouldering the cost of using power.

This idea of the ultimate contestability of procedurally correct decisions that defy underlying power relations is put forward in a most original essay by Patrick Minford /Minford 1991/.

Society's "core", for Minford, is a coalition that no alternative coalition could defeat <sup>by any means (including violence)</sup>. In the core, the distribution of power /and property/ is stable. Any other distribution must in the long run be overcome or overthrown by enough citizens using their capacities and endowments to that end.

12. Under rigorous assumptions, if cumulative deficits increase, people increase their savings pro tanto to maintain the wealth /real income/ they intend to bequeath to their descendants. /Barro, 1974/. Alternatively, they can stop voting for deficits. As opposed to the Barro theorem, there can be a case where people would rather leave no bequests, or best of all negative bequests if that were possible. They are, then, "bequest-constrained" and

will cet.par. vote for growing cumulative deficits. /Cukierman and Meltzer, 1989./

13. The tradeoff between redistribution and the national income available, combined with the median voter theorem, provides the equilibrium distribution of post-tax income, the share of national income absorbed by government, and the degree of inequality in Meltzer and Richard, 1981.

The Meltzer and Richard result, i.e. that the median voter would stop voting for more redistribution at a point where his post-tax income was still lower than the average post-tax income, would no longer necessarily hold if one abandoned their assumption that redistribution is effected by proportional taxation and return of the proceeds by way of equal lump-sum payments per caput.

There is no reason why redistribution should be non-discriminatory; there are many reasons why it should be discriminatory. Suppose that the median voter would lose by voting for more redistribution. All those poorer than the median voter, however, would make greater gains if he did. They could overcompensate him for his loss from their gains. Hence they could induce him to vote for more redistribution. Its pattern will be discriminatory including a transfer in favour of the median voter from the rest of the winning coalition, which the winners can profitably grant out of the additional loss the extra redistribution imposes on the losing coalition. This remains generally true even if the extra redistribution has a negative sum. For it does not matter to the winners that the losers lose more than they gain, as long as they gain something.

14. As Philippe Foot reminds us, "J .S. Mill notoriously found it hard to pass from the premiss that the end of each is the good of each to the proposition that the end of all is the good of all". Foot, 1985, repr. in Scheffler, 1988, 241.

15. Harsanyi, in Sen and Williams, Utilitarianism and Beyond, 1982, 39. The impartial observer has 'ethical preferences' that are, so to speak, not his own. His evaluations are, in the jargon, 'evaluator-neutral'. Unfortunately, this condition cannot ensure that another impartial observer should arrive at an evaluation that is even approximately the same. The 'ethical preferences' of two observers may be both impartial without being unique, and their evaluator-neutral evaluations may well differ, - which leaves one wondering what 'evaluator-neutral' ~~can possibly mean~~ really amounts to.

16. Apologists of the nation state as valuable enough to be worth any individual sacrifice, and many ideologists of totalitarian systems, evidently see them in one light, agnostic value-relativists in another, - there are, no doubt, other lights seen through other prisms.

17. Cited by Rawson, 1981, 349.

18. Cf. Dworkin 1976, who invokes rights as cards that are sometimes trumps over the card of the common good, sometimes not, - which card takes the trick depending on which is backed by the weightier argument. Dworkin remains blissfully unaware of the vacuity of ~~all this~~ his finding that the weightier reason weighs more.

19. This is perhaps an unusual way of stating the sufficient condition for value-neutrality. It springs from the idea that

when each chooses what he prefers, no choice is swayed by a value other than that of the chooser. Obviously, values do influence choices in a truistic sense, without this necessary truth contradicting value-neutrality. "To each, his own values" makes the social order value-neutral.

20. As Philippa Foot puts it by way of concluding her elegant analysis: "we /must/ accustom ourselves to the thought that there is simply a blank where consequentialists see the best state of affairs." Foot 1985, repr. in Scheffler 1988, 242.

21. "To justify a rule is, among other things, to justify not acting, on occasions, on the balance of reasons." Raz in Hacker and Raz, 1977, 220-1.

22. It is possible but not <sup>certain</sup> ~~very probable~~ that it takes a bigger shift of political forces to legislate away, or curtail, the redistributive 'entitlement' of a group <sup>(e.g. to reduce tax-free benefits)</sup> than to alter the discretionary dispositions of the budget and cause the same group <sup>(e.g. to tax the benefits)</sup> a comparable loss. This rather second-order possibility is hardly the goal the advocacy of redistribution 'as of right' has in mind.

23. Without professing complete confidence that society as a whole can develop and function as a "spontaneous order", I should certainly not wish to exclude it either. Hence I am not implying that 'well-designed' must be a matter of conscious, 'constructivist' design. I must leave the matter open for now.

24. If a value were unanimously preferred, <sup>even</sup> forcing it down our throats <sup>might</sup> ~~be~~ be a pleasant experience for all of us. The

constraint which forced it would in some bizarre sense be Pareto-optimal. It would, however, presumably be redundant.

