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meaning that is strictly causal in the notion of power is one of regular sequence: that is, a regular sequence such that whenever A does something, what follows, or what probably follows, is an action by B' (Dahl 1965:94).

As I have argued elsewhere (Isaac 1987), this view fails to distinguish between the successful exercise and the possession of power, conceiving of power exclusively in terms of the contingent success of agents in securing their purposes. It is also empiricist in its view of causality and scientific explanation, both of which, for Dahl, are conceived in Humean terms. In this sense, appearances to the contrary, it is a view shared by Dahl's most vocal and well-known critics, Bachrach and Baratz (1970) and Lukes (1974). For all these theorists power is a behavioural relation of actual cause and effect, exhausted in the interaction between parties. While these theorists in different ways allow the importance of collective rules and resources, all also insist that these are to be sharply distinguished from, and have no necessary connection to, power. Lukes, frequently taken to be a 'radical' critic of Dahl, attests to this when he avers that all three faces of power 'can be seen as alternative interpretations and applications of one and the same underlying concept of power' (Lukes 1974:27). For this concept power is the ability to advance one's interests in conflict with others.

This concept can be traced back to the writings of some of the 'founders' of modern political theory. Thus Thomas Hobbes defines power, in terms of the purposes of individuals, as the 'present means, to obtain some future Good' (Hobbes 1968:63). Both Hobbes and Locke hold that 'Power and Cause are the same thing', conceiving such causation in mechanistic, Newtonian terms (quoted in Ball 1988:83). As Locke writes:

> A body at rest affords us no idea of any active power to move; and when it is set in motion itself, that motion is rather a passion than an action in it. For when the ball obeys the motion of the billiard-stick, it is not any action of the ball, but bare passion. Also when by impulse it sets another ball in motion that lay in its way, it only communicates the motion it had received from another, and loses in itself so much as the other received: which gives us [an] idea of an active power of moving.
>
> (Locke 1961:194–5)

It was David Hume who canonized this view, insisting that 'the idea of power is relative as much as that of cause; and both have reference to an effect, or some other event constantly conjoined with the former' (Hume 1962:77). In this view power is nothing more than empirical causation. The formulations of Hobbes and Hume are important because they make explicit what is only implicit in many more contemporary formulations: that such a view of power presupposes an atomistic view of social relations, a Humean conception of causality, and an empiricist or 'covering law' model of scientific explanation. Hume is quite clear

that any claims about underlying causes or pre-existing powers are invalid: 'the distinction…betwixt power and the exercise of it is…without foundation' (quoted in Ball 1988:85).

A certain reading of these texts became the basis for the behavioural revolution in power research. Many of the behaviouralists also drew upon the work of Max Weber, who defined power as 'the probability that one actor in a social relationship will…carry out his own will' (Weber 1968:53) against the resistance of others. This conception, quite influential, joins the Humean conception of causality and atomistic ontology with a phenomenological emphasis upon intentionality. The writings of Laswell and Kaplan (1950), March (1953), Simon (1953) and Dahl (1957) all treat power as a relation of empirical causation, whereby one agent prevails over another in a conflict of some sort or other. Subsequent critics, such as Nagel (1975), while they introduce sophisticated methodological arguments, clearly continue in this genre. As Nagel writes, aptly summarizing the behavioural view despite many disagreements: 'the causal version of power has achieved widespread acceptance' (Nagel 1975:11).

This view is also shared by many rational choice theorists. While most of these theorists reject many of the more positivistic epistemological premisses of behaviouralism, they share the behavioural view that social life is to be understood in terms of the contingent interactions between individuals and groups. They also share the typically behavioural aversion toward theoretical abstraction and the postulation of hidden causes and underlying structures. Unlike many behaviouralists, rational choice theorists are particularly interested in the motives, incentives and co-ordination problems involved in strategic bargaining. This interest can also be traced back to Hobbes's notions of reputation and anticipated reaction (Hampton 1986; Gauthier 1969) and Weber's concern with strategic action, but its more rigorously formalistic orientation is of more recent vintage.

Peter Blau's *Exchange and Power in Social Life* (Blau 1964) was an early effort to apply the concepts of microeconomics–self-interest, maximization, marginal cost and marginal benefit–to the conceptualization of power. For Blau power is an exchange relation between parties where an imbalance in the services exchanged (what Blau calls a 'payments deficit') is compensated for by the subordination of one party to the other. While other rational choice theorists depart from Blau on many issues, they share his interest in what Brian Barry calls 'an economic analysis' of power (Barry 1976). Barry agrees with the behaviouralists that power is a way of gaining compliance on the part of others, but, taking this concern with strategic action one step further, he writes that power is 'the possession of the means of securing compliance by the manipulation of rewards or punishments' in order to modify the behaviour of others (ibid.: 90). In this view power

necessarily involves considerations of marginal cost and benefit on the part of the agents involved. Such a focus opens up many interesting game-theory questions regarding the strategic leverage of numerical minorities, the effects of procedural rules upon strategic bargaining, and the consequences of boundary conditions upon co-ordination problems affecting group bargaining (Shapley and Shubik 1954; Harsanyi 1962; Olson 1965; Shepsle and Weingast 1987).

The voluntarist model derives much of its attractiveness from its scientific pretensions. Indeed, what holds it together as much as its atomistic social assumptions is its commitment to a covering law model of scientific explanation, and its claim to be able to offer predictive and thus 'falsifiable' generalizations. To this extent the powerful barrage of criticisms of empiricist philosophy of science that have been articulated in the past twenty years cannot but serve to weaken its appeal (Isaac 1987). But the model has been confronted by other criticisms as well. Some have claimed that while the model rigorously conceptualizes problems surrounding the exercise of power, it is unable to offer theoretical explanations of how and why agents are able to exercise power as they do. Others have raised questions about the blindness of the model to questions of ideology and to the way agents' preferences and practical horizons are constituted by pre-existing normative and cultural forms that are not the *ex nihilo* creations of any maximizing individual or group. Each of these criticisms is given voice in different ways by the hermeneutic model.

THE HERMENEUTIC MODEL

Hermeneutics is the study of meaning (Palmer 1969). The hermeneutic model of power holds that power is constituted by the shared meanings of given social communities. This approach shares with rational choice theory the idea that beliefs are the central ingredients of power relations, and that considerations of rationality necessarily come into play in social life. It differs, however, in rejecting the idea that instrumental rationality or cost-benefit thinking is a universal attribute of human beings (Wilson 1970). By contrast, hermeneutics is concerned with the varying symbolic and normative constructs that shape the practical rationalities of situated social agents. This involves an ontological belief that humans are by nature linguistic beings and that it is thus in language that the character of a society, including its forms of power, is to be found. It also involves the epistemological belief that some form of hermeneutic understanding, rather than scientific empirical generalization, is the appropriate method of studying social power.

The hermeneutic approach has acquired an increasing prominence in contemporary social theory (Bernstein 1974, 1983). Charles Taylor, for example, has argued that the first principle of any social explanation must be the uniquely linguistic and conceptual character of human social life. As he writes:

> The point is that the objects of public experience–rite, festival, election, etc.–are not like the facts of nature. For they are not entirely separable from the experience they give rise to. They are partly constituted by the ideas and representations which underly them. A given social practice, like voting in the ecclesia, or in a modern election, is what it is because of a set of commonly understood ideas and meanings, by which the depositing of stones in an urn, or the marking of bits of paper, counts as the making of a social decision. These ideas about what is going on are essential to define the institution.
>
> (Taylor 1979:34)

An appreciation of this can be traced throughout the 'canon' of Western political philosophy–Aristotle, Machiavelli, Montesquieu, Tocqueville. None of these writers treated power as simply an empirical compliance relation, and all of them sought to account for the norms, mores and 'spirit of the laws' that constituted forms of social power.

Hegel's section on 'Lordship and Bondage' in *The Phenomenology of Mind* (Hegel 1967) is undoubtedly an important ancestor of contemporary hermeneutic thinking about power. Hegel's basic point is that even relationships of extreme domination, which would appear to be entirely anomic, are sustained by the need for some kind of mutual recognition on the part of its agents. Hegel's emphasis on the centrality of consciousness and reciprocity represented a departure from the more atomistic conceptions found in Hobbes and Hume and in the English tradition more generally. This emphasis can be found in the writing of a good many nineteenth-century German social theorists, including Ranke, Dilthey, Simmel and Weber (Manicas 1987).

More recent theorists have built upon this approach. Thus Peter Winch insists that the exercise of power presupposes a normative context giving meaning to behavioural interactions, a context that the voluntaristic approach is unable to countenance:

> An event's character as an act of obedience is intrinsic to it in a way which is not true of an event's character as a clap of thunder, and this is in general true of human acts as opposed to natural events…. There existed electrical storms and thunder long before there were human beings to form concepts of them…. But it does not make much sense to suppose that human beings might have been issuing commands and obeying them before they came to form the concept of command and obedience. For their performance of such acts is itself the chief manifestation of their possession of those concepts. An act of obedience itself contains, as an essential element, a recognition of what went before it as an order.
>
> (Winch 1970:9–10)

A command thus presumes some mode of mutual understanding, and obedience some 'uptake' of the appropriate command. While Hannah Arendt's view is both more idiosyncratic and more normative, she too insists that power cannot be understood on the voluntarist, Newtonian model: 'Power

corresponds to the human ability not just to act but to act in concert. Power is never the property of the individual; it belongs to a group and remains in existence only so long as the group keeps together' (Arendt 1972:143). According to Arendt, humans are uniquely communicative beings, and it is through their shared meanings and relationships that their capacities to act are sustained.

This view is also advanced, in a different way, by Talcott Parsons. Parsons sought to develop a comprehensive theory of 'the social system', synthesizing the insights of both the voluntaristic and phenomenological traditions. He thus emphasized the importance of both strategic interaction and the 'internalization' of social norms. According to Parsons, power is

> a generalized capacity to secure the performance of binding obligations by units in a system of collective organization when the obligations are legitimized with reference to their bearing on collective goals and where in case of recalcitrance there is a presumption of enforcement by the negative situational sanctions– whatever the actual agency of that enforcement.
>
> (Parsons 1969:361)

What binds these various formulations together is their emphasis upon norms. For all of the proponents of the hermeneutic model, power is embedded in a system of values which constitute the very identities, as well as the possibilities for action, of social agents. While this model has much to recommend it, a number of critics have argued that its emphasis on language blinds it to the more 'material' dimensions of power, which may be real even if they are not recognized as such by social agents (Mills 1959; Gellner 1970; Habermas 1983).

THE STRUCTURAL MODEL

The structural model shares with the hermeneutic model an aversion to methodological individualism and an appreciation of the importance of norms. However, it avoids an exclusively normative treatment of power, contending that power has a structural objectivity that is missed by both voluntaristic and hermeneutic approaches. The structural model can be traced back to Marx's analysis of the capitalist mode of production in *Capital* (Marx 1967) and to Durkheim's *Rules of Sociological Method* (Durkheim 1966). Both theorists insist upon the pre-given reality of structural forms that both enable and constrain human conduct. These forms may have a normative dimension, but they are not reducible to the beliefs that social agents have about them. As Durkheim writes:

> When I fulfill my obligations…when I execute my contracts, I perform duties which are defined, externally to myself and my acts, in law and in custom…. The

> system of signs I use to express my thought, the system of currency I employ to pay my debts, the instruments of credit I utilize in my commercial relations… function independently of my own use of them.
>
> (Durkheim 1966:56)

According to the structural model, power can be defined as the capacities to act possessed by social agents in virtue of the enduring relations in which they participate (Isaac 1987:80). It does not arise *ex nihilo* in behavioural interaction, nor is it a purely normative or symbolic reality. Rather, it has a 'materiality', deriving from its attachment to structural rules, resources, positions and relationships. As I have argued elsewhere (ibid.), such a view is presupposed by a good deal of neo-Marxist analysis of class and feminist analysis of gender.

The structural model involves a relational social ontology (Bhaskar 1979). Against voluntarism it maintains that society is not reducible to the properties of individuals, and that in fact it consists of relatively enduring relations in which individuals participate. Indeed, following Marx, the model holds that 'the individual is the social being…which can individuate itself only in the midst of society' (Isaac 1987:111–12). Such a view does not reify social structures. Rather, such structures are viewed, in the words of Anthony Giddens, as the media and outcomes of human agency. As he puts it, there is a 'duality of structure' (Giddens 1976). Social structures do not exist separate from the activities they govern and human agents' conceptions of these activities, but they are also material conditions of such activities. There would be no language, for example, without speakers speaking; and yet language is at the same time the medium without which speech would be impossible. Language thus has structural properties upon which agents draw. In this respect it is more generally paradigmatic of social structures, which provide capacities to their participants. In this view, for example, to be a capitalist is to have power. But this power does not arise from the contingent interactions of capitalists and workers, nor is it exhausted by the beliefs and normative commitments of capitalists and workers. Rather, it is a property of the structure of capitalism, one which agents draw upon and exercise in their conduct in order to achieve their specific objectives. The structural view shares much with the hermeneutic view, yet it remains committed to the project of scientific explanation and to the view that it is the task of science to hypothesize about underlying structures. In this latter belief it departs most decisively from the voluntaristic model, substituting typically realist conceptions of science for empiricist ones (Ball 1975; Bhaskar 1975; Isaac 1987).

The structural view has attained an increasing prominence in social and political science. It is contested, of course, especially by adherents to a more voluntaristic model. But it also faces a challenge from less conventional, 'post-modernist' writers. These tend to argue that the structural model remains wedded to certain typically 'modernist' beliefs in the unity of the subject and the

privileged status of scientific discourse. Some of these criticisms, especially the latter one, echo the Frankfurt school's critique of instrumental reason and modern social science (Benhabib 1986). But critical theory's understanding of power is actually quite close to the structural view identified here. In common with structuralists, critical theorists tend to think of power as embedded in structured relationships and seek to deploy some kind of critical social science to identify such structures (Fay 1987).

THE POST-MODERNIST MODEL

Post-modernists, along with hermeneutic and structural theorists, reject individualism and voluntarism, and believe that language and symbols are central to power. They claim, however, that scientific discourse possesses no distinctively epistemic validity. Instead they insist that structural conceptions of power, like hermeneutic ones, unjustifiably privilege certain conceptions of knowledge and certain conceptions of human agency. As Jane Flax writes:

> Postmodern discourses are all 'deconstructive' in that they seek to distance us from and make us skeptical about beliefs concerning truth, knowledge, power, the self, and language that are often taken for granted within and serve as legitimation for contemporary Western culture.
>
> (Flax 1987:624)

This is a view shared by many feminists (Ferguson 1987). Thus Nancy Hartsock argues that a reconceptualization of power requires 'a relocation of theory onto the epistemological terrain defined by women's lives', and that such a development would 'stress those aspects of power related to energy, capacity, and potential' rather than those connected with compliance and domination (Hartsock 1983:151, 210). Similarly Allison Jaggar insists that there is a distinctively feminist 'epistemological standpoint' from which a more 'positive' conception of power might be articulated and justified (Jaggar 1983). What is distinctive about these theorists is their claim that conceptions of power are gender-specific and grounded not simply in philosophical differences but in radically different kinds of experience. The feminist view of power highlights certain kinds of relations–typically those involving mutuality–over others, and, like Arendt's view (pp. 62–3), it is quite explicitly normative, purporting not simply to identify but to valorize realms of experience and human possibility previously hidden by more accepted, masculinist models of power.

This is a major point of contact between feminists and the work of Michel Foucault, which, in his words, seeks to advance the 'insurrection of subjugated knowledges' that have been 'disqualified' and 'buried' by received and more accepted discourses (Foucault 1977:81–2). Like them, Foucault claims that his genealogical analyses of power are 'anti-sciences'. His conception of power has

many affinities with the structural model. He quite explicitly rejects a voluntaristic model, which views power as that 'which prohibits, which refuses, and which has a whole range of negative effects: exclusion, rejection, denial, obstruction, obfuscation, etc.' (ibid.: 183–4). As with the structural model, he views power as constituted by certain structures or 'discourses', and considers power to have a 'positive' as well as a 'negative' dimension. In other words, Foucault believes that social agents are constituted and enabled by the relations of power in which they participate, and that whatever 'resistances' power engenders they are themselves constrained by the structures in which they emerge. Foucault's writings on power have spawned an enormous critical literature. What is most important here is that, despite his affinities with the structural model, certain of Foucault's philosophical commitments decisively separate him from this model. First, he rejects any 'global' or 'totalizing' approaches to the study of social power, insisting that such discourses are 'totalitarian'. He thus favours the local analysis of 'micro-power', holding that only such knowledge can avoid becoming entrapped in modern forms of power and domination. Second, in so far as Foucault endorses a 'struggle against the coercion of a theoretical, unitary, formal and scientific discourse' (ibid.: 85), he seems to insist that even his 'local knowledges' are anti-epistemological in any sense. Third, identifying the concept of the human subject with modern forms of domination, Foucault, while talking of 'resistances', has little to say about the duality of structure and agency, and less about the way in which agents can and do transform the conditions under which they live. Finally, drawing upon Nietzsche, he seems to ontologize domination in some form or other. Rejecting the problems of freedom and justice, he maintains that 'right should be viewed…not in terms of a legitimacy to be established, but in terms of the methods of subjugation that it instigates' (ibid.: 96). In all these respects Foucault's conception of power is profoundly deconstructive. And, if it is clear that he wishes to offer some alternative, his formulations seem to defy any systematic theoretical or normative approach to social life (Taylor 1984).

It is worth noting, as a number of commentators have done, that there is a deep tension between the feminist approach to power, which valorizes feminine experience and orients itself toward some more or less genuine emancipation, and the radical anarchism, if not nihilism, of Foucault. Thus the post-modernist model constitutes substantive unity less than any other model does. Rather, what defines it above all else is a kind of suspicion of existing theoretical approaches and the claims of epistemological privilege that they support.

CONCLUSION

Each of the four models of power I have outlined has a point, and each fixes on some crucial dimension of social life. Each of the first three models underscores

an important theme–the centrality of strategic agency, shared norms, and structured relationships to the conceptualization of power. And the fourth, post-modernist, model also offers an important insight into the fractured and problematic character of social life, insisting that power is complex, ambiguous, and located in a multiplicity of social spaces, and that traditional conceptions and methods remain insensitive to much of this.

In my view the structural alternative offers the best possibility of a creative synthesis of these insights. While it retains a commitment to certain standards of scientific explanation and criticism, it also allows for the insights provided by the alternative models. It acknowledges the importance of human agency and the self-understandings of agents. And, through Giddens's notion of the duality of structure and agency (p. 64), it is capable of incorporating both the voluntarist insight into the importance of strategic manoeuvering and the contingency of outcomes and the Foucauldian insight into the constitutive, positive character of power, which enables as well as constrains.

In this context this can be only a suggestion, one which will undoubtedly engender critical responses. It is probably fair to say that no single model of power states everything that needs to be said about the subject, and that what is needed above all else is for these models to critically engage each other. Controversy about the concept of power would seem endemic to social theory. The best that we can hope for is that such remains wedded to real substantive theoretical and practical problems, and that it remains self-critical and continually open to contestation and revision.

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4

CONCEPTIONS OF LAW

GEOFFREY MARSHALL

Law can be described in short as an ordering and regulation of human behaviour. However, this fails to distinguish it from other modes of ordering and regulation that derive, for example, from morality, religion or social convention. The exact relationships between these different forms of ordering and whether they can or cannot be clearly distinguished has perhaps been the major source of disagreement among legal theorists.

Two kinds of dispute about law have been involved: first as to its source, and second as to its elements and structure. If, as those theorists commonly described as natural lawyers believe, all law stemmed from divine law or some law of right reason immanent in the nature of things, then all human law must depend in part for its validity on compliance with that higher law. If, on the other hand, law may proceed independently from or be 'posited' by a human legislator or legislators, then it may be considered valid independently of its correspondence with divine or natural law or with justice, morality or reason. This, in brief, was the view adopted by 'legal positivists'.

In addition to disagreeing about the source and authority of law, legal philosophers have also held different theories about the way in which the elements of the legal system should be characterized. Legal philosophers, such as Thomas Hobbes, Jeremy Bentham and John Austin, depicted the operation of laws as the issue by a legislator (whether divine or human) of commands or imperatives that emphasized their collective will. On the other hand, some twentieth-century critics, such as Hans Kelsen and H.L.A.Hart, have pictured legal systems in terms of presumptive norms and rules.

Many jurists, particularly in the United States and Europe, have devoted themselves not to formal analyses of the legal system as a whole but to studies of the judicial process or to the interplay of social and economic forces that affect legal institutions and legal decision making. The so-called realist or instrumentalist school in the United States included John Chipman Gray, Jerome Frank and Karl Llewellyn. In Scandinavia, realist and sceptical theories of law

emerged in the work of Axel Hägerström, Karl Olivecrona and Alf Ross (Olivecrona 1939; Ross 1958). Within analytic legal philosophy the dispute between positivist and anti-positivist theories has continued. One modern form of non-positivist theory is seen in the writings of Ronald Dworkin (1977, 1986). It should also be added that there exists a self-denominated 'critical legal studies' movement, originating in the United States, that sees all formal legal structures as manipulated by dominant social interests, and the making of law by judges and legislators as exercises in the deployment of political power. If this conception of law is correct, the great majority of legal philosophers since Aristotle have been wasting their time.

THE CONCEPT OF LAW

In the English-speaking world a major part of the debate about the general character of law in the last thirty years has focused upon issues raised in H.L.A.Hart's work *The Concept of Law* (Hart 1961). The main purpose of Hart's book was to mount an attack on the imperative theory of law exemplified in the work of John Austin, who in 1832 in *The Province of Jurisprudence Determined* (Austin 1954) had portrayed law as consisting essentially of commands or coercive orders backed by force emanating from a sovereign legislator whom subjects were habitually accustomed to obey. Hart attacked this 'gunman theory' by arguing that the idea of orders habitually obeyed fails to capture both the variety of types and purposes of law and the idea that laws are obligatory or binding in ways that habits and practices are not. Whilst criminal laws might be analogous to commands, civil laws and rules of procedure cannot easily be so pictured. The role of legal rules is not only to command, but also to enable and to permit private arrangements (for example contracts, marriages and wills). They have a multiplicity of purposes. Besides punishing offenders, laws may distribute benefits, regulate organizations, educate law students, excite the envy of foreigners, support conventional morality and so forth. The key to the understanding of a legal system, Hart proposes, is to be found in the idea of a rule rather than in that of command. Conforming to rules differs from habitual conduct in that it involves the idea of obligation and a critical attitude to deviation by those who are subject to the rules. In any one legal system some primary rules determine duties, obligations, rights and powers. Other secondary rules will determine procedures for law making, define institutions and provide for legal change. A legal system is simply, Hart suggests, a combination of these two sorts of rules. Each system will be distinguished by a rule of recognition–a special secondary rule which lays down the standard or conditions under which valid laws may be made in the particular system. In the United Kingdom the rule of recognition will identify the Queen and both Houses of Parliament as the

source of authorized law making and of change in existing laws. In the United States the notional rule of recognition will identify the constituent people of the United States acting through the procedures laid down in the Federal Constitution as the ultimate source of valid law.

The idea of such a standard-setting or pedigree rule is not dissimilar to that set out in the work of the Austrian jurist Hans Kelsen (1961, 1970, 1991). Kelsen's theory, like Hart's, is positivist in that it separates questions of morality and moral obligation from those of legal validity and legal obligation. In both systems law is valid and legally binding because it is properly made in terms of a rule which complies with criteria set out in the ultimate rule or norm of the system. In Kelsen's theory the validity of each law depends upon its ultimate derivation from a basic norm or 'Grundnorm' and upon the system of norms being efficacious and subject to general obedience. The validity of the Grundnorm itself must be presupposed. Hart criticizes this idea as based on a misunderstanding. The basic rule of recognition in a legal system may be viewed–as may the other rules–from two viewpoints: one internal, the other external. From the internal viewpoint of those who use and work the system, the basic or pedigree rule is an operative rule of law. But as the standard of validity it cannot itself in the same sense be valid or invalid. Neither can the legal system as a whole. Validity is a relational term that determines the status of a lower rule in terms of a higher rule or standard. The existence and character of the ultimate standard or rule of recognition is a matter of social fact. From the viewpoint of an external observer it is simply the standard adopted in a particular society to regulate and identify its laws. Legal validity and legality is always in this sense relative to a particular set of legal rules. There is no legal validity floating in the air. The question of whether a legal rule is valid can only be raised when the rules in question are identified. An act may be lawful in terms of English law but not in terms of French law or international law or the law of the European Community. It is a matter of social fact which set of rules a particular community observes.

Several aspects of Hart's concept of law have met with criticism. Three issues have been:

1 the relation between law, justice and morality;
2 the idea of law as composed of rules; and
3 the application of rules in the judicial process.

LAW, MORALITY AND LEGAL POSITIVISM

Legal positivists have often been criticized for neglecting the connections between law and morality. Critics have pointed out the essential role played by such ideas as reasonableness, due process, and fairness in the common law and

in the constitutional law of most developed states. These facts are not inconsistent with Hart's variety of positivism (Hart 1961), nor indeed with the views of earlier positivists such as Bentham and Austin (Bentham 1970, Austin 1954). All accepted that there are many connections between law and morality. The development of positive law, for example, is influenced by prevalent moral notions. Morality, again, may be the source of legal criticism or the inspiration for reform of the law. Third, a legal system may consciously make compliance with morality a criterion of validity for some of its laws (as does the United States, or Canada or Germany). The positivist claim would be, however, that this last possibility is a contingent fact about those particular legal systems and not a necessary feature of all systems.

In *The Concept of Law* Hart concedes that legal systems must in practice take account of certain basic features of human existence (Hart 1961). The facts of human vulnerability and limited human altruism imply that legal rules, to be effective and lasting, must make provision for certain minimum needs such as the protection of life and security, without which other rules would be pointless and short-lived. Thus there is a minimum content to human laws which is not accidental, but is not a logical requirement for the validity of laws. This is, in Hart's view, the 'core of good sense' in the natural law theorist's belief that law cannot be expounded in purely formal terms. Theorists such as the American jurist Lon Fuller, with whom Hart had a much-discussed debate in 1956 (see Hart 1983), have argued that there are certain requirements that are inseparable from the enterprise of regulating human conduct by rules (Fuller 1964). Rules in their nature must be general, prospective not retrospective, be impartially applied, deal with like cases in a similar way and so on. Hart's reply was that these requirements did not in themselves rule out the possibility that particular laws might none the less be evil or iniquitous. For him the indisputable core of positivism is that law and morality can be separated, at least in the sense that the formal validity of a law is never conclusive as to its moral quality or as to the question of whether it deserves the citizen's obedience.

There is perhaps not a great distance between Hart and Fuller on this point. It can properly be said that if we are discussing modern civilized, and particularly liberal, systems of law, they generally do, by constitutional provisions, make the validity of laws turn not only on formal authoritative enactment but on compliance with basic substantive moral requirements. The difference seems to come only to this: that the natural lawyer wants to say that whether formally specified in the positive rules of a constitution or not, every system must be presumed to incorporate a requirement that provisions violating basic ideas of justice should be treated as invalid and be declared to be so by courts in every system. To a certain degree this view seems to be accepted in the jurisprudence of the Federal Constitutional Court in Germany. The positivist thesis which, by

implication, is adopted by courts in most jurisdictions, however, is that only those substantive criteria of validity specified in the positive law of the constitution will be judicially applied. If this permits the enactment of particular unjust laws the problem raised is a moral and political one for citizens and politicians and not a judicial issue for courts of law. For a Hartian positivist, law and morality are always separable in this sense. Judges and lawyers must consider and use moral ideas in many areas of the law but only where the positive law itself imports and requires their use.

LAW AS RULES

The view that law can be understood as a combination of different kinds of rules whose validity is specified by a rule of recognition has been contested by Professor Ronald Dworkin (1977, 1986) on the grounds, first, that law does not consist solely of rules and, second, that in modern developed legal systems there is no single rule of recognition that can act as a test for the validity of particular laws. The theory set out in *The Concept of Law* (Hart 1961) can perhaps be defended against these criticisms. It is not clear that the distinction between rules and principles is a fundamental one. In one sense it is part of a useful analysis of the rule concept. Rules in Dworkin's analysis are seen as fairly precise prescriptions that are said to be applicable in all-or-nothing fashion (Dworkin 1977:22) whereas principles state aims or goals that may intersect and may have differing weights in accordance with which they may be balanced. Principles, in fact, appear to be rule-like statements that incorporate general or vague terms. But the primary thrust of Hart's *Concept of Law* was directed against the Austinian notion of law as command. Both rules and principles, whether or not they differ otherwise than in degree, may be contrasted with imperative commands and it may be that Hart's theory would not be fatally weakened if it were to concede that a legal system contained a combination of rules and principles.

The status of the most general rule or standard–the pedigree, basic norm or recognition rule–enters the argument at this point. A possible criticism of the rule of recognition is that there may be more difficulty in actually stating it accurately for any particular society than appears from Hart's discussion. In stating fully the basic norm of the United Kingdom legal system, for example, a long and complex proposition would need to be elaborated. Reference would perhaps need to be made to the rules and authority of common law as well as to the authority of Parliament to make statutes. Common law may be superseded by statute but it does not derive from statute and is a separate source of law. In stating or describing the ultimate sources of legal validity we might also wonder what degree of detail needs to be incorporated. Law may be made by Parliament. But do we need to specify Parliament's configuration or membership or the

procedure by which it operates? And what is the force of the criticism that such a rule, whether long or short, cannot function as a test for the validity of laws? A simple answer would be that it is not intended to have that function in the sense of enabling a court or observer to decide whether a particular action or disputed rule is or is not lawful, or is a valid rule of the system. To know that it would be necessary to know a great many other things besides the rule of recognition–for example what powers, duties and obligations had been created by laws validly made under it; who had been authorized to act and in accordance with what principles; what subsidiary or delegated powers had been created; what interpretative rules had evolved or been laid down and so forth. The basic norm of a system of rules obviously could never be used as a measuring rod or test of validity in that sense–any more than knowing who had authority to make and change the rules of a game would be sufficient to allow one to act as umpire in relation to the legitimacy of particular actions in the game. That is not the function of such an identifying rule. Its job is rather to act as a signpost or identification of the ultimate source of appeal or authority as to what is legitimate or illegitimate in the system.

THE JUDICIAL APPLICATION OF RULES

Professor Dworkin's criticisms of the positivist rule model of law have been debated at length (see Raz 1979; Cohen 1984; Gavison 1987). A final element in the debate is whether the accusation that positivism is tied to a particular view of adjudication can be fairly maintained. It might certainly seem to follow from the Dworkin rules/principles distinction that if a legal system consisted solely of rules, precise answers to all legal questions would be available. But if the rule/principles distinction is rejected the idea that a legal system consists of rules does not commit its author to the view that all rules are fixed, definite or certain. Hart's discussion of adjudication (which is not a central concern of *The Concept of Law*) does not suggest a belief that rule-interpretation is a matter of mechanical application. It suggests that most legal rules or concepts have a core of meaning in which that application is uncontroversial and a penumbral area in which it is uncertain. But the Hartian model ought not to be tied to any particular thesis about the way in which uncertainty in the application of legal rules should be judicially resolved. The positivist thesis about the exclusion of morality as a necessary constituent in legal validity need not be committed to any particular theory of adjudication. Many critics of legal positivism, however, treat it as if it were synonymous with or entailed a mechanistic, inflexible or conservative view of the judicial process. A positivist model could, on the contrary, accommodate and provide for interpretative rules or codes that instructed judges to apply any theory of interpretation whatsoever, including the Dworkinian recipe that would

have judges in difficult, uncertain or hard cases apply principles that would make the best sense of the system's general purposes, whatever the judges took those to be. Perhaps, though, a positivist would prefer to specify those purposes in the system's basic constitutional norms.

In the Hart-Dworkin debate there is perhaps something characteristic of the differences between European and American approaches to the idea of law. European theorists have, from the time of Hobbes, attempted to describe the elements and structure of legal systems as a whole. The interconnections of legal theory with political philosophy, theories of the state and political obligation may have had some influence on this tradition. By contrast, American jurisprudence has concerned itself overwhelmingly, and it might even seem obsessively, with what might appear to be merely one element in a system of law, namely the judicial process. The character and overwhelming political importance of courts and adjudication in the United States may provide a partial explanation. In the writings of the American realist school and in Dworkinian anti-positivism there is almost no mention to be found of any general model of the legal system. In Professor Dworkin's *Law's Empire* (Dworkin 1986) the question 'What is Law?' becomes explicitly the question 'What is the nature of the process by which it is ascertained what the law is in a particular case?' We shall find out what law is when we know how judges should decide cases. That approach may have some value, since courts and adjudicators are to some degree assuming an increasing importance in European legal systems. Nevertheless, not all questions about law are about its application, or even its application in hard cases. There are basic questions for legislators and citizens as well as for judges that involve reflection about legal structures and about the idea and role of law in society.

THE USES AND LIMITS OF LAW

The concept of law and its relation to morality and to political obligation are not matters that concern only legal philosophers. There are times and places when individual citizens have to decide whether they are bound by, or owe allegiance to, law. Sometimes, though rarely, this question relates to the legal system in general. If Lithuania declares itself to be an independent sovereign state, or if Quebec were to secede from Canada unilaterally, as Rhodesia in 1965 rejected its existing legal subordination to the United Kingdom, the citizens of those territories need to decide what their legal and moral obligations are. Courts, also, need to apply some theory about the nature of law and the foundations of a legal system to decide cases testing the actions of the new governmental claimants to the exercise of lawful authority. In the Rhodesian case, and in other Commonwealth territories where *coups d'état* or revolutions have taken place, judges have invoked and debated theories of law–in particular Kelsen's thesis (p.

72) that the validity of laws in a system is dependent on the effective or generally efficacious operation of the system as a whole.

In liberal societies citizens also believe that there are limits to their obligation to obey particular laws. Both natural law doctrines and legal positivism permit and indeed require disobedience to law in appropriate circumstances, though adherents of natural law would in those circumstances base their rejection of obligation on the view that particular laws that clearly violate the requirements of justice cannot be valid laws, whilst legal positivists would in the same circumstances hold that legally valid and legally binding laws were not morally obligatory, since violation of basic rights was a reason for holding legal obligation to be overridden by moral obligation. Natural lawyers perhaps do not need the concept of civil disobedience (in the sense of disobeying unjust but valid laws) since they can always claim to be exercising their legal right to disregard non-existent legal obligations, where requirements of justice are ignored by lawmakers. A Dworkinian citizen of Law's Empire also might not feel bound to treat the decisions of legislators and even of the highest appeal court as a conclusive final adjudication of what was and was not law. This may make a difference to the tactics of civil disobedience since the stage at which participants switch to or reject unlawful behaviour has often been thought important.

For the legislator and voter an understanding of the character and roles of law is an essential ingredient in decision making. In liberal societies it is believed that there are moral limits to the use of law to coerce or restrain individual action. Should law coerce individuals to prevent self-inflicted harm? Is there an area of private action (decisions involving procreation, marriage, sexual behaviour for example) which law should not penetrate? How far should law be used to restrict the freedom of communication or artistic creativity or to compel racial harmony. What law is and what it can and cannot effectively do are closely connected questions. Some modern legal theorists have attempted to generalize and analyse the technique element or functional uses of law bringing out the range of purposes beyond the coercive or penal functions. There is, for example, a grievance-remedial function; an administrative-regulatory function; a public benefit-conferring function; and a facilitation of private arrangements function (Summers and Howard 1965).

Law, perhaps it should be added, has an educative function. The study of organized society begins with it. Political, social and commercial activity is carried on within a framework whose boundaries are set by the legal and constitutional rules. Political science begins with law though it does not end with it. It is none the less not an isolated science that can stand on its own. The greatest legal scholars have always known this. Mr Justice Oliver Wendell Holmes put it this way: 'If your subject is law, the roads are plain to

anthropology, the science of man, to political economy, the theory of legislation, ethics and thus by several paths to your final view of life' (Holmes 1920). Perhaps he exaggerated. But not very greatly.

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5

CONCEPTIONS OF JUSTICE

KAI NIELSEN

In thinking about justice, and about morality more generally, the traditions of Aristotle and Locke have had a powerful influence. Both have been adapted to contemporary life in constitutional democracies. 'Sanitized' is perhaps a better description, particularly in the case of Aristotle. It would appear at first sight that Aristotle and Locke conflict but I think this is a superficial observation. Locke is indeed a severe individualist, while Aristotle stresses the social nature of the human animal: how an individual is, in her/his very identity, in her/his very humanity, a part of a greater whole. The very structure of our choices, the beings that we are, the very 'I' that is part of a 'we', are inescapably the expressions of a distinctive social ethos. And this, of course, includes the values and norms we have, our very most primitive conceptions of what is right, just and desirable. Locke, by contrast, sees individuals as independent. He views them as people capable of living in a state of nature, independent, tolerant of differences, seeking knowledge and concerned to protect their autonomy or self-ownership. A Lockean ethic will be concerned most fundamentally with the protection of individual rights. This individualist stress need not conflict with Aristotle's, or for that matter Hegel's, stress on the deep and irreversible way we are social animals through and through: how our very identity is formed by our society. Individualists, with a Lockean orientation, need not ignore their own past and how they are formed by a particular ethos with its distinctive structure of norms. We are socialized in distinctive ways that are inescapable and are a condition for our being human. But we need not be prisoners of our socialization. We are all distinctive sorts of human beings formed by a particular ethos, but within limits. Sometimes, when we are a certain sort of person and fortunately situated, we can change our ethos, moving it in different directions in part as a function of our thoughts, desires, will and actions. And almost always we can by our distinctive reactions situate ourselves in patterns of our own choosing or partly of our own choosing, though set, and inescapably, in the distinctive social context in which

we find ourselves. These thoughts do not, of course, come from nowhere. They are not simply the creation of the person who thinks them. But they also are not unaffected by the individual. They are their own and they reflect who they distinctively are People—or at least a not inconsiderable number of people—think of what kind of world they want and they have the ability to reflect carefully on what kind of world they have, including what distinctive kind of social creatures they and their fellows are, and they sometimes can, under propitious circumstances, forge a world a little more to their own liking, including to their own reflective and knowledgeable liking. There need be no conflict between a Lockean individualism and an Aristotelian stress on our social formation.

Where we may find conflict between Aristotle and Locke is over what is just and over how justice is to be understood. Aristotle's conception of a proper social order, a best regime, is that of a hierarchical world in which magnificent and magnanimous aristocrats rule and in which slaves do everything else. Human flourishing, so important for Aristotle, seems to be very much for the rulers alone. Locke was no egalitarian, but in the state of nature all human beings are free and their natural rights function to preserve and extend their autonomy: their self-ownership. The autonomy and self-ownership we are talking about is something that is to be sought for all human beings capable of autonomy and self-ownership. The moral import of the structure of rights is to protect the autonomy and self-ownership of all.

Classes and strata there will be, but it is Locke's conception that these divisions will not cut so deep as to undermine self-ownership and the natural rights of all human beings. People may have their stations and their duties but they are all, as creatures of God, free and stand with respect to self-ownership and the rights of humans in a condition of equality. A just social order cannot, as in an Aristotelian conception of social justice, allow a society of slaves or serfs where for some people resources external to them are properly subject entirely to communal control such that they, having no control, or very little control, of the means of life, have their autonomy undermined. *Such* class divisions are not morally tolerable for Locke. But this does not mean that no class divisions are tolerable. Locke took what we now call a class-structured society to be normal and proper.

It is true that Locke has no definite conception of human flourishing such as we have in Aristotle, but whatever human flourishing comes to, for Locke it cannot be a condition where human autonomy is undermined. Aristotle's conception of justice was unabashedly aristocratic. However, as I remarked initially, Aristotle can readily be sanitized (MacIntyre 1988; Shklar 1986:13–33). His aristocratic conceptions could be dropped without at all touching his thoroughly social conception of human nature and its importance for a proper understanding of ethics and politics.

Marx, with clear indebtedness to Aristotle's stress on our sociality, came to stress against the ideology of the rising bourgeois order with its individualism and atomistic conception of human nature, that persons, as social creatures, could, under propitious circumstances, enhance the communal character of their lives (Miller 1981; Kain 1988; Gilbert 1990:263–91). Moreover, a social order could, and would, come into being which would replace the extensively self-oriented individualism of the bourgeois world, with its stratification into hostile groupings, with a more egalitarian social order which would, in a way the more stratified society could not, enhance both the human flourishing and autonomy of all human beings (Marx 1962; see also Nielsen 1989a:61–97).

The individualistic social order of which Locke's thought was an expression, as well as the aristocratic, hierarchical social order which Aristotle and the Medievals rationalized, would, as Marx saw it, gradually be replaced by this more egalitarian order. In the formation of this order the re-educative effects of public ownership and democracy, arising in a world of greater material abundance and productive power, will slowly erode the possessive individualism of the previous bourgeois order. Such individualism would gradually disappear and there would come to be a genuine social harmony in which we would acknowledge with a clarity of self-understanding both our communal natures and our self-ownership. Community and self-ownership would be linked.

Given the history of Marxism and (even more importantly) the history of actually existing socialisms claiming to be Marxist, there has been both within and without such societies considerable scepticism about the harmonious linkage of community and autonomy. What was hoped for was that deprivatized citizens would emerge under conditions of a very thoroughgoing equality of condition. They would be persons with both a firm sense of their individuality and their self-ownership, on the one hand, and of there being a 'we' on the other. This 'we' would not be an ethnocentric 'we' but a 'we' which included the whole of humanity. There would be in such socialized individuals not only a sense of distinct communities but a sense of the human community as well. However, what emerged in actually existing socialisms were authoritarian societies, thoroughly stratified, where privileges and power went to a small elite and where there was not only little autonomy but little equality as well. (Though it should also be said that in some respects these societies are more egalitarian than capitalist societies.) It should also be kept in mind that while there was much talk of community, there was in reality little in the way of community. It should be said of these societies what Marx said of medieval societies: that they were *gesellschaften* parading as *gemeinschaften*. They are hardly examples of where autonomy and community became uncoupled for there was little of either in such societies.

What combination of community, autonomy and equality will a thoroughly just society have and what will these things come to in a just society? Fairness

seems at least to require some kind of equality but what kind and how extensive is it to be? (Rawls 1971; Hare 1978; Barry 1989). Will it, as many conservatives believe, only be equality of opportunity? (Bell 1979; Frankel 1971). If so, what is that to come to? Or will it, as social democrats and people on the left believe, also require equality of condition? (Barry 1989; Nielsen 1985; Cohen 1989a, 1989b). And again, if so, how is that to be understood and how extensive is it to be? If we try to stick with a conception of equality of opportunity linked with meritocratic conceptions of justice, can we actually achieve or even reasonably approximate equality of opportunity? If people come to the starting gate in the struggle of life in various conditions of advantage and disadvantage, can there be anything like a fair start at the running gate in that struggle even if no one is constrained there by laws or regulations or discrimination? If everyone, advantaged and disadvantaged, were free to run, would we then actually have a condition of fair equality of opportunity? It is doubtful, to put it minimally, that we would (Nielsen 1985:104–87). Moreover, should equality of opportunity be construed simply as, or construed at all as, everyone being able to engage, without constraint, in a competitive struggle for who is to come out on top? That is a very narrow construal of equality of opportunity. To have fair equality of opportunity it would seem at least to require equal life chances for all and that would seem at least to require something like equality of condition. But, again, how is the latter to be achieved?

We cannot have equality of opportunity without equality of condition, or equality of condition without equality of opportunity. They require each other (Nielsen 1985:104–87). An equality of opportunity that merely allows people an unencumbered start at the gate is a mockery of the very idea of equality of opportunity. In trying to determine what fair equality of opportunity is, equality of condition is the central thing to focus on for without it there is hardly anything like equal life chances. But how are we to construe equality of condition? Given our (in part) differing needs and preferences, it can hardly be simple equality where everyone in every respect is treated exactly the same, has exactly the same stock of means and the like (Walzer 1983:14–16, 202–3). Not everyone needs a pacemaker or wants a surfboard or a course in Latin. The thing to aim at is, as far as it is possible, the equal meeting of the needs (*partly* various as they are) of everyone. This, even under conditions of abundance or (if you will) moderate scarcity, is not possible. However, under such conditions (say Switzerland was the world), it is something to be approximated. Where we cannot meet the needs of everyone, we must, as a second best, and with that equal meeting of needs as a heuristic, develop fair procedures for the unequal meeting of needs. For example, those most in need come first, or we should give priority in the meeting of certain needs to those who in turn are the more fruitful in satisfying the needs of others (violinist A gets the good violin rather than violinist B because A's

playing satisfies the needs of more people). Here we need to develop ways of ascertaining what our needs are and to develop meta-procedures (perhaps *à la* Habermas or Gauthier) for ascertaining when those particular procedures for the unequal meeting of needs are fair (Habermas 1983; Gauthier 1985, 1986). It is here that the stress on procedures given by Habermas is so central.

Simple equality will not do as a criterion of justice. We plainly need then a more nuanced conception of equality of condition, for without something approximating equality of condition we cannot achieve equality of opportunity, and without equality of opportunity human beings will not have equal life chances, and without an attempt to achieve that (or at least the attempt to approximate it as much as possible), people will not stand to each other in positions of moral equality (Nagel 1979:106–27). We cannot in such a circumstance have a society of equals (Dworkin 1985:181–204). Yet across the modern political spectrum there is a very well-entrenched belief in moral equality. This belief is that the life of everyone matters and matters equally and that politically speaking we should have a society of equals. But it appears at least to be the case that if there is no building of a world in which equality of condition can be approximated then there can be no moral equality. Libertarians and other conservatives reject equality of condition as a foolish and perhaps a dangerous bit of utopianism. Yet they are usually believers in moral equality and they want a democratic society of equals. It looks as though, given the soundness of the above argument, they should follow their conservative predecessors from a more aristocratic age and reject moral equality given their dismissal of any belief in equality of condition. Yet conservatives who are also libertarians usually take moral equality very seriously indeed (Nozick 1974). And, as Ronald Dworkin has pointed out, there is a sense in which contemporary conservatives as much as liberals and left wingers believe in a society of equals (Dworkin 1985). It looks at least as if such conservatives do not have their beliefs in reflective equilibrium. It looks, that is, as if they do not have a consistent and coherent pattern of beliefs. Without something approximating equality of condition there can be no moral equality.

However, there are standard difficulties for the egalitarian as well, for if we seek to establish within society something approximating equality of condition, (a) can we do this without a uniformity of ethos that would undermine autonomy and individuality, and (b) would it not require state intervention in the lives of people that would also be destructive of autonomy? Can we, beyond the most minimal and, as we have seen, inadequate conception of equality of opportunity, have both equality and autonomy? Libertarians and other theoreticians of the right have thought that we cannot (Nozick 1974; Hayek 1960; Narveson 1988). A free society, they believe, cannot aim at an egalitarian conception of distributive justice any more than it can aim at an aristocratic conception of justice where in a 'genuine community' people will have their

assigned stations and duties. Caste is destructive of justice but so is equality of condition. Societies of both types are paternalistic and at least in effect, if not in intention, authoritarian.

Social justice, or, as with Fredrich Hayek and Robert Nozick, its alleged impossibility, has been at the centre of contemporary discussions of justice. John Rawls, Brian Barry, Thomas Scanlon, Kai Nielsen and Ronald Dworkin have been at the forefront of contemporary discussions of distributive justice and a defence of some egalitarian conception of social justice (Scanlon 1982). It is not that they deny the reality and importance of questions of individual justice (how individuals should treat one another to be fair to each other or what entitlements they should have), but, they argue, that pride of place should be given to questions of social justice: to the articulation of a correct conceptualization of how social institutions are to be arranged and to what must be done to create and sustain just institutions (Rawls 1978). Once those questions are reasonably answered–once we know what just social institutions should be like and how that is to be achieved–then it is easier to settle questions of individual justice. If we could come to understand what a just society would be like we could better understand what our individual responsibilities should be to each other and what we could rightly expect and require of each other.

The Lockean tradition, as against the liberal social democratic tradition of Rawls and Barry and the (broadly speaking) Aristotelian tradition of Alasdair MacIntyre and Charles Taylor, has, by contrast, stressed instead questions of individual justice and most particularly questions of the rights of individuals (Locke 1970; Nozick 1974).[1] Justice from this perspective consists principally in protecting the inalienable rights of individuals: that is, with respect to all individuals, protecting their turf from boundary crossings that are illegitimate. Individuals are seen by this Lockean tradition to be self-sufficient. The principal aim of justice, and the very concept of a well-ordered society, should be to protect their self-ownership (Nozick 1974).

The Aristotelian tradition, by contrast, conceptualizes a just society, including its conception of a well-ordered society, in terms of some comprehensive theory of the good for human beings (MacIntyre 1988; Taylor 1985; Sandel 1982). As well, and again by contrast, the liberal social democratic tradition of Rawls, Barry and Scanlon, though it eschews in its conceptualization of a just society any comprehensive theory of the good, works with a minimal or thin theory of the good. In Rawls's case it comes principally to giving an account of the primary social and natural goods which any person would have to have assured to be able to realize any rational life plan they might have or any comprehensive conception of the good they might have that would similarly respect others.

For both Aristotelians and liberal social democrats, the determining of what rights we have requires a conception of the good. But only the former require a

full-blown theory of the good for human beings. Both think against the Lockeans that an account of justice that approaches adequacy cannot just rely on some doctrine of inalienable rights that are recognized on reflection or in intuition to be self-evident. What rights we have and their importance in our lives is determined by conceptions of the good, for social democrats minimal ones, for communitarians a comprehensive theory of the good (Barber 1988:54–90).

For theories mainly concerned with justice as a property of basic social institutions there are still two quite different stresses. One stress, as with Rawls or Barry, is that the function of justice is to provide a reasonable basis of agreement among people who seek to take due account of *the interests of all;* the other stress, as discussed by David Gauthier and Jan Narveson, sees the function of justice as the construction of social devices which enable people who are essentially egoists to get along better with one another (Gauthier 1986; Narveson 1988).[2] The first conceives of justice as *impartiality,* the second of justice as *mutual advantage*. Both accounts in their most powerful contemporary formulations are constructivist accounts, not relying on moral realist beliefs of either an intuitionist or naturalist variety in which moral truths are discovered as some antecedent reality not dependent on human construction. Constructivist accounts, as with Gauthier, reject such meta-ethical claims or, as with Rawls, do not rely on such claims (meta-ethical claims rejecting other sorts of meta-ethical claims) but proceed in a contractarian manner by selecting criteria for the correct principles of justice or for just social practices by ascertaining what people, bent on achieving a consensus concerning what to regard as principles of justice and just social practices, would agree on in some suitable hypothetical situation or what they actually would agree on when reasoning under certain constraints and in conditions of undistorted discourse (Habermas 1983; Rawls 1980, 1985).[3] Both accounts are contractarian and both constructivist. What Gauthier rejects, Rawls, more prudently, sets aside as unnecessary for the articulation of a theory of justice.

Historically speaking, the tradition conceiving of justice as impartiality has a broadly Kantian source and that of conceiving of justice as mutual advantage has a Hobbesian source. Brian Barry and Will Kymlicka have recently argued powerfully that these two traditions are in conflict, a conflict of such a sort that they cannot be reconciled (Barry 1989; Kymlicka 1989, 1990). They further claim that in much contemporary theorizing about justice, including most importantly that of John Rawls, these two at least arguably incompatible traditions stand in conflict. We cannot, they maintain, have it both ways, as Rawls in effect argues. The correct move, Barry and Kymlicka assert, is to reject the Hobbesian mutual advantage tradition. The way to go is to accept and clarify the tradition stressing that justice is the impartial consideration of the interests of everyone. That, they argue, is the account to be elucidated and developed.

Influential formulations of both accounts, as seen paradigmatically in the work of Rawls and Gauthier, share the belief, a belief also held by Habermas, that 'justice is what everyone could in principle reach a rational agreement on' (Barry 1989:7). This, of course, is standardly taken as being partially definitive of social contract theories. The justice as impartiality view and the mutual advantage view have, of course, a different conception of why people are trying to reach agreement. Indeed, when we see what these conceptions are with their differing rationales, we will recognize that they are deeply different theories. The mutual advantage view says that the motive for justice is the pursuit of individual advantage. People in societies such as ours, and more generally in societies in what Hume and Rawls regard as the circumstances of justice (circumstances of limited material resources and conflicting interests or goals), pursue justice, they claim, for mutual advantage. In the circumstances of justice, which are the actual conditions of human life or at least for most human life, people can expect to advance their interests most efficiently through co-operating with other members of society rather than living with them in conditions of conflict. On such a view, rational people will agree on certain constraints—say the ones Gauthier specifies—as the minimum price that has to be paid in order to obtain the co-operation of others.

By contrast the motive for behaving justly on the justice as impartiality view is not reducible to even a sophisticated and indirect self-interest. Rather, the correct motive for behaving justly, on that view, is the belief that what happens to other people matters in and of itself. This being so people should not look at things from their own point of view *alone* but should seek to find a basis for agreement that is acceptable from all points of view (Kymlicka 1990). People, as Rawls puts it in a Kantian vein, are all self-originating sources of valid claims. We accept their claims because we think their interests are as important as our own and indeed that their interests are all equally important. We do not just, or perhaps even at all, take their interests into account because we are trying to promote our own interests. For the impartiality approach, at least on some of its formulations, justice would be the content of an agreement that would be reached under conditions that do not allow for bargaining power to be translated into advantage. By contrast, on the mutual advantage theory, justice can obtain even when people make agreements that are obtained by bargaining under conditions where the bargainers stand in differential power relations and have differential bargaining power. Indeed, where people are so differentially situated any agreement they come to for mutual advantage must reflect that fact. Such an approach is inescapable if appeal to self-interest is the motive for behaving justly. As Barry puts it in characterizing that position, 'If the terms of agreement failed to reflect differential bargaining power, those whose power was disproportionate to their share under the agreement would have an incentive to seek to upset it'

(Barry 1989:9). They would have no sufficient reason for sticking with the agreement. By contrast, the impartiality approach uncouples justice from bargaining power, since it does not require that everyone find it in their advantage to be just. They can have good reasons for being just even when being just is neither in their short-run nor their long-run advantage.

Given this difference in orientation, the kind of agreements for the impartialist that could count as just agreements do not allow bargaining power to be translated into advantage. Indeed, they specifically prohibit it. Both Barry and Kymlicka argue that the mutual advantage approach does not even count as a theory of *justice*. While the mutual advantage approach may generate some basic principles of social co-operation, these will not yield just agreements, since they allow as 'just agreements' agreements obtained under differential power situations. The resulting system of co-operation, with its resulting system of rights and duties, lacks one of the basic properties of a moral system, namely, the property of giving equal weight to the interests of all the parties to the agreement. So while it articulates a system of social co-operation, it is not a moral theory and it is not a theory of justice.

On the mutual advantage account some persons can fall outside the system of rights altogether. Unlike the Kantian impartiality approach, it holds that those without bargaining power will fall beyond the pale of morality. Not every individual will have an inherent moral status. Some, on such an account, can be treated as a means only. This would be true of young children and of the severely retarded and it would be true of future generations (if they are to be spoken of as persons at all). All these people lack bargaining power for they have no way of retaliating against those people who harm them or fail to take into consideration their well-being.

Those are the extreme cases, but sometimes at least the powerful in our class-divided and stratified societies can treat the weak without moral concern: they can exploit them and push them against the wall. Where the dominant class is very secure, as for a time it sometimes is, it can rationally proceed in this way knowing that the dominated class has no effective means of fighting back. If indeed some gain an irresistible, effectively unchallengeable power, then they have with such power, on Hobbes's account, as well as for contemporary Hobbesians, something which 'justifieth all actions really and properly in whomsoever it is found' (quoted in Riley 1982:39). But in a world so ordered the constraints of justice would have no place. We could have perhaps (given the circumstances) a rational system of co-operation and co-ordination. But we would not have a morality. There is no reasoning here in accordance with the moral point of view. Where the strong can and do enslave or exploit the weak to the advantage of the strong we have something which is paradigmatically unjust. Barry puts the point thus:

> This gives us the defining characteristic of the second approach, namely, that justice should be the content of an agreement that would be reached by rational people under conditions that do not allow for bargaining power to be translated into advantage.
>
> (Barry 1989:10)

Mutual advantage theory perhaps provides a good analysis of what genuinely rational, purely self-interested people would do. If we are going to engage in amoral *realpolitik* this is perhaps how we should proceed but it does not provide us with anything that even looks like a method of moral justification. A cluster of practices which could be correctly characterized as just practices could not be a set of practices which would sustain or even allow those with greater bargaining power to turn it into such an advantageous outcome that the weak would be killed, die of starvation or live in intolerable conditions of life when that could be avoided. Such practices are paradigmatically unjust practices. If they are not unjust then nothing is.

A mutual advantage theorist might respond that her/his theory could never allow those things to obtain, for, no matter how severe the power differentials, such things (as a matter of fact) would never be to the mutual advantage of the parties (neither the weak nor the strong). But that is clearly a rather chancy empirical claim.[4] Faced, under severe and relatively secure power differentials, with the possibility of starvation, the weak might rationally settle for subsistence wages. Faced with a very marginal subsistence living, families might find it to their advantage (including the children's advantage) to opt for child labour under harsh conditions. With one's back against the wall, one might even find it to one's advantage to sell oneself into slavery or to agree to play a kind of Russian roulette where one might be killed. It is itself a rather chancy empirical claim to say that none of these things would be to the advantage of people in positions of power because the likelihood of the weak sticking with such harshly driven bargains would be too slim. That this would be so in all realistic conditions is far from evident. We can hardly be very confident that positions of power might not be so secure that it would be to the advantage of the powerful to drive such hard bargains. But whatever is in fact the case here about mutual advantage, we can know, impartiality theorists claim, that such bargains are unjust. Thus even if they do turn out to be mutually advantageous, they remain morally unacceptable. To respond 'Well, maybe they won't be mutually advantageous' is not to meet the challenge to mutual advantage theory.

Let us now consider impartiality theories. They take several forms, but whether or not they require the postulation of an original position or a state of nature, such theories view moral reasoning not as a form of bargaining but as a