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THE FOUNDATIONS OF NATURAL RIGHTS

by

DIANA MEYERS

A dissertation submitted to the Graduate
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1978

This manuscript has been read and accepted for the Graduate Faculty in Philosophy in satisfaction of the dissertation requirement for the degree of Doctor of Philosophy.

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CHAPTER I

THE PROBLEM OF NATURAL RIGHTS

The idea of a natural right has exerted a powerful influence over the course of political history and the development of political theory. Yet, persistent doubts about the intelligibility of this concept have dogged natural rights whenever they have been invoked. In this essay, we will seek to allay these doubts by dealing with two interlocking problems: (1) how to analyze the concept of a natural right and (2) how to distinguish natural rights from other moral rights. Before we can address these central issues, however, we need to map out the approximate boundaries of our concern. In the first two sections of this chapter, we will make a preliminary examination of the problem of natural rights, and in the final section, we will outline our overall strategy for contending with the problems posed by natural rights.

1. Political Relevance and Natural Rights

Different perspectives render different sets of rights politically relevant. The politician encounters what he considers to be a politically relevant right every time an alleged moral right attracts enough popular support to generate a demand for its recognition in law. From this

standpoint, the range of politically relevant rights includes everything from the right to life to the right to enjoy parks free of canine feces. Thus, in this practical context politically relevant rights may be momentous or trivial, and they vary with the concerns of the politician's constituency.

A political theorist may have either of two perspectives. He may be interested in a set of rights on the basis of which some part of political theory can be constructed, or he may be interested in ascertaining which rights can be deduced from a given political theory. The second of these approaches is typically closest to the judge's concerns, but it also has a place in the politician's deliberations. The politician who uses any criterion other than his constituents' most vociferously expressed wishes in deciding what his position on rights issues should be must adopt a perspective similar to that of the theoretician seeking to determine which rights his theory admits and which it disallows.

Of course, political theories cannot conclude with complete lists of rights to be advocated any more than moral theories can end with complete lists of actions to be taken. Since no theorist can predict all of the configurations of circumstances in which his theory may be consulted, no theory can provide a complete catalogue of rights for all occasions. Most often it is a matter of ascertaining how

a theory applies to the general issue at hand and then how immediate circumstances affect the initial theoretical results. Thus, which rights are derivable from a theory depends in part on relevant circumstances, and since circumstances vary, theories may yield different rights consequences at different times and places.

The other theoretical approach diverges in an important respect from both of the perspectives we have considered so far. If a set of rights is to play a foundational role in political theory, it must be fixed at the outset and protected from subsequent revisions. Otherwise, the whole theory would shift with every adjustment made in the set of foundational rights. Sets of rights of this sort are politically relevant in two respects. Political theories that include a set of foundational rights generally appeal to these rights for purposes of establishing an account of justice. Though more complicated accounts of the relation between foundational rights and justice are typically given, a political theory might contend simply that respect for these rights is the necessary and sufficient condition for justice. Moreover, theories based on a set of foundational rights invariably consider possession of these rights a sufficient condition for membership in the moral community while some of these theories go further and establish possession of these rights as a necessary as well as sufficient condition for membership in

the moral community. From the standpoint of practical politics, any question as to whether to grant legal standing to these rights merely asks whether just legislation should be supported. And any question about who should be designated as possessors of these rights asks who should be admitted into the moral community. In this dissertation, we will be concerned exclusively with rights capable of filling these crucial roles in political theory.

2. Natural Rights and Human Rights

The terminological problems connected with what we have called foundational rights arise as a result of more fundamental controversies. The main contenders for linguistic preeminence are 'natural rights' and 'human rights.' The expression 'natural rights' is commonly associated with theologically based natural law doctrines or with the state of nature component in contract theories. But, these are not the only meta-ethical positions compatible with the normative load carried by natural rights. Reacting against the theoretical and meta-ethical reverberations set up by the expression 'natural rights,' many philosophers, including William Frankena, Maurice Cranston, and Richard Wasserstrom, have adopted the alternative 'human rights.'¹ By making this terminological shift, they

¹Other expressions, such as 'fundamental rights,' 'basic rights,' and 'inalienable rights' have been considerably less successful in attracting a following.

have sought to avoid independent issues concerning natural law doctrine and state of nature theory while retaining the conceptual capability to talk about non-legal, politically relevant rights. Still, the question remains as to whether or not all human rights are suited to serve as foundational rights. It will be our contention that the class of human rights is broader than the class of foundational rights but that the class of natural rights coincides with the class of foundational rights.

Frankena explains human rights by saying, ". . . the concept of human rights is the doctrine of natural rights without its meta-ethics."² By "the doctrine of natural rights without its meta-ethics," Frankena seems to mean the belief that there are certain "universal and fundamental rights" which "belong to a man by virtue of his nature as a man."³ In a later paper, Frankena quotes from the Virginia Bill of Rights to illustrate his idea of a traditional natural rights theory: "'All men are by nature free and independent, and have certain inherent rights, . . . namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and

²W. K. Frankena, "The Concept of Universal Human Rights," in Science, Language and Human Rights (Philadelphia: University of Pennsylvania Press, 1952), p. 193.

³Ibid., pp. 192-193.

pursuing and obtaining happiness and safety.'"⁴ This passage brings to mind Locke's earlier advocacy of natural rights to life, liberty, and possessions, but we should note that Hobbes's natural right of every man to every thing can also be characterized as universal, fundamental, and predicated on human nature. This should alert us to the fact that there is no single traditional doctrine of natural rights that we can turn to for edification regarding the normative content of human rights.

Furthermore, Frankena actually mentions only civil rights and social and economic rights in his presentation of the main features of human rights.⁵ Examples of civil rights might be the right to a voice in the election of legislators and the right to a fair trial. Examples of social and economic rights might be the right to work and the right to a decent standard of living. The roots of civil, social, and economic rights can be traced back to Locke's classic natural rights position. However, Locke clearly considered civil rights to be derivative since they have no place in his account of the state of nature; and what little he has to say about matters pertinent to social and economic rights indicates that he would consider them

⁴W. K. Frankena, "Natural and Inalienable Rights," Philosophical Review 64 (1955): 212; the deletion is Frankena's.

⁵"The Concept of Universal Human Rights," p. 192.

to be secondary, if he would admit them at all.⁶ The prominent position accorded to civil, social, and economic rights in human rights doctrines as compared with natural rights doctrines suggests that the scope of human rights lists may differ significantly from that of their natural rights predecessors.

The preceding observations justify some degree of wariness in regard to this apparently minor terminological matter. Thus, we are reluctant to interpret the switch from talk of natural rights to talk of human rights as a purely terminological maneuver executed for the sole purpose of ridding non-legal, politically relevant rights of unnecessary and controversial meta-ethical baggage. Current usage licenses referring to any moral right that ought, allegedly, to be legally recognized as a human right. Opponents of capital punishment insist that the right to life ought to be respected despite an individual's prior transgressions. Supporters of Soviet Jews stand on the right to emigrate. American minority groups seek equality in part by asserting the rights to work and to non-discriminatory hiring. Readers of the New York Times Op-Ed page are accustomed to seeing these diverse rights labeled human rights, and this broad usage has the United Nations Universal Declaration of Human Rights for a precedent.

⁶ John Locke, The Second Treatise of Government (New York: The Bobbs-Merrill Company, Inc., 1952), chap. II, par. 6 and chap. XI, pars. 135-136.

Recalling for a moment our earlier distinction between rights deducible from a theory and foundational rights, it is evident that different moral rights that ought to be legal rights could fall into either category. For example, a political theory that did not presuppose some form of right to life would be inconceivable unless it were stipulated that the theory would apply only to a species of innate pacifists; whereas, a political theory that presupposed a right to emigrate would be thought to be taking too much for granted. Furthermore, there are moral rights, like the right to work, that ought to be legally recognized only when certain propitious circumstances prevail. These latter are clearly not foundational in the sense we have specified. Nor are those moral rights that ought to be made legal on the grounds that they are deducible from an accepted political theory. Although any complete list of human rights would include foundational rights, typical lists of human rights include derivative rights as well. Thus, human rights need not occupy a foundational position in political theory, but natural rights always function in this way.

The fact that natural rights are always cast in a foundational role in political theories is, in part, sheer historical coincidence. But, there is also a conceptual explanation that backs up the historical facts. Traditionally, the idea of a natural right has been construed so

that the objects of natural rights turn out to be goods of the utmost importance to human beings. The importance of the objects of these rights is reflected in the view that natural rights are in some way essential to human beings.

Natural rights philosophers share the belief that all people have natural rights by virtue of their humanity.⁷ The claim that all people have these rights is summed up in the claim that these rights are universal. The idea of rights possession based on humanity is fleshed out in terms of the concept of absoluteness or the concept of inalienability. Thus, universality, absoluteness, or inalienability (or some combination of these concepts) is established as a test for natural rights. It is evident that, if there are any universal, absolute, or inalienable rights, political theory must presuppose them and include them in its foundational structure.

Human rights, too, are often analyzed in terms of universality, absoluteness, or inalienability. Sometimes

⁷For example, Locke's frequently followed view is that reason is the distinctive feature of human nature and that reason supplies persons with the natural law which is the basis for natural rights. (The Second Treatise of Government, chap. II, par. 6) Hobbes holds that human nature compels people to secure their own preservation which in combination with their approximately equal ability to succeed in this endeavor generates a natural right to everything. (Leviathan (Baltimore: Penguin, 1972), pt. I, chaps. 13 and 14) Rousseau holds that both the urge to self-preservation and reason are essential to human nature and that a natural right to liberty is a consequence of these characteristics. (The Social Contract (New York: Hafner, 1947), bk. I, chap. II)

the result is only a terminological difference between natural and human rights. But, quite frequently these concepts are given such broad and flexible interpretations that they exclude almost nothing.⁸ When this happens, some human rights may require programs for the provision of such goods as sophisticated medical care and guaranteed employment opportunities which only economically advanced societies are capable of sustaining while others represent minimal and inescapable conditions of justice. In this case, important conceptual developments accompany the terminological switch. These changes render human rights a more versatile and useful tool for the purposes of practical politics; however, this is typically achieved at the price of sacrificing a foundational position for human rights in political theory. We will use the nomenclature of human rights to refer to this expanded conception of non-legal,

⁸See, for example, D. D. Raphael's account of universality:

The expression 'a universal moral right' may be used in a stronger sense or in a weaker sense. In the stronger sense it means a right of all men against all men; in the weaker sense it means simply a right of all men, but not necessarily against all men.

("Human Rights, Old and New," in Political Theory and the Rights of Man, ed. D. D. Raphael (Bloomington: Indiana University Press, 1967), p. 65) Initially, Raphael restricts the use of the term 'human rights' to rights that are universal in the strong sense, but he later revises his position and insists that any right that is universal in either sense is a human right. (Compare "Human Rights, Old and New," p. 66 with "The Rights of Man and the Rights of the Citizen," also in the volume cited above, p. 115.)

politically relevant rights and reserve the term 'natural' for a narrower conception.

3. Subdivision of the Problem of Natural Rights

As we have indicated, natural rights have traditionally been explicated in terms of the concepts of universality, absoluteness, and inalienability. We will adopt these categories as a way of structuring our problem. Chapters II-V, will canvass various proposals from the literature for analyzing these concepts, and Chapters VI-IX will present our account of natural rights as universal inalienable rights.

Chapters II and III will be devoted to the concept of a universal right, that is, a right that all persons possess by virtue of human nature. In the course of our investigation of this concept, we will clarify what is meant by possession of natural rights and provide some guidelines for identifying suitable grounds for possession of natural rights. In addition, we will criticize the view that all universal rights are natural rights while defending the claim that all natural rights are universal. Chapter IV will take up the concept of an absolute right. We will consider two main suggestions about how the idea of a right that ought always to be respected could be construed so as to meet the objection that there is no right for which circumstances cannot be conceived that would justify

violating it. Although absoluteness will be rejected as a criterion for natural rights, the concept of a prima facie natural right will be adopted.

Chapter V will survey three types of analysis of the concept of an inalienable right in preparation for the presentation of our analysis of inalienable rights. In Chapter VI, we will define inalienable rights, defend our definition, and enumerate the rights that satisfy it. Initially, we will focus on the question of what prevents individuals from renouncing certain rights, but in Chapter VII we will proceed to the question of how these rights contribute to moral interaction. It will be argued that enjoyment of inalienable rights enables individuals to realize the capacity for moral agency and therefore to participate in a moral community. In Chapter VIII, we will return to the problem of universality in order to show that inalienable rights meet the requirement that natural rights be universal. This will provide us with an opportunity to discuss various positions that different types of individuals could occupy with respect to moral communities. Finally, in Chapter IX, we will defend our account of inalienable rights as being, in effect, an account of natural rights.

CHAPTER II

UNIVERSAL RIGHTS

Natural rights are typically linked with universality through the concept of human nature. If human beings are what they are by virtue of human nature and if individuals have natural rights by virtue of human nature, natural rights must be universal within the domain of human beings. This seemingly simple bit of reasoning opens numerous questions, and we will attempt to settle some of them in the chapter that follows. In particular, we will ask what it means to say that a person has a right and how this might be connected with human nature. This inquiry will ultimately lead us to give a refined account of the concept of a universal right.

1. Conditional Possession and Actual Possession of Rights

Advocates of human rights have both expanded and truncated the sense in which natural rights are said to be universal. Increasing numbers of human rights advocates are coming out in favor of extending the protection of human rights to nonhumans. Classic natural rights theorists may not have even contemplated this possibility. Under the influence of the doctrine that no nonhuman has an immortal

soul, they were content to attribute natural rights equally to all human beings.¹ And so the question of natural rights for animals is not given serious attention until late in the 19th century.² Now the burden of proof seems to have shifted to those who would deny animal rights. Thus, some proponents of human rights take the position that these rights belong to all, but not necessarily only human beings.³ In this way, the scope of the class of potential possessors of human rights has been opened to include all sentient creatures and presumably cannot be further expanded.

Still, it also seems to be the case that some human rights cannot even be attributed to all human beings. The United Nations Universal Declaration of Human Rights proclaims an often debated right to periodic holidays with pay. This right has attracted the attention of critics

¹However, we will soon see that this account of the classic natural rights position is something of an oversimplification since it is not obvious what constitutes humanity. See p. 15 and Chap. III, Sec. 6 below.

²D. G. Ritchie discusses animal rights in Natural Rights (New York: Macmillan and Co., 1895), pp. 107-111; but he rejects the possibility. Later, W. D. Ross concurs in The Right and the Good (London: Oxford University Press, 1930), pp. 49-52. Shortly thereafter, J. P. Plamenatz defends the idea of attributing natural rights to animals in Consent, Freedom and Political Obligation (London: Oxford University Press, 1938), pp. 91-94.

³For example, see Joel Feinberg's Social Philosophy (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1973), p. 85.

because it obviously is not universal inasmuch as it can only be attributed to persons who are employed.⁴ In contrast to this, persons are said to qualify as possessors of natural rights by virtue of some characteristic or set of characteristics thought to be constitutive of personhood. At first glance, it appears that no one could fail to qualify and therefore that natural rights must be unequivocally universal within the domain of human beings. But this initial impression is mistaken as reflection on Locke's discussion of children and the natural right to liberty reveals.

Children, according to Locke, only conditionally possess the natural right to liberty.⁵ Full enjoyment of this right depends on the realization of their rational capabilities without which liberty would be an intolerable burden. On the same grounds, Locke says that an idiot ought never to be allowed to exercise the right to liberty and that a person whose reason fails him ought to be prevented from continuing to exercise his right to liberty. For Locke, a person actually possesses the right to liberty if and only if he is rational, and he conditionally

⁴This is one of Maurice Cranston's objections to the right to paid holidays as well as to other economic and social rights; see "Human Rights, Real and Supposed," in Political Theory and the Rights of Man, ed. D. D. Raphael (Bloomington: Indiana University Press, 1967), p. 51.

⁵John Locke, The Second Treatise of Government, chap. VI, pars. 54-63.

possesses this right if and only if he is capable of becoming rational.

Similarly, we might say that the unemployed conditionally possess the human right to paid holidays. That is, a person will conditionally possess a right to paid holidays if and only if he could be employed. The possibility of employment is sufficient for a person to conditionally possess this right though he may never in fact be employed. If he finds employment, he would actually possess a right to paid holidays. Just as a person can fail to meet the rationality requirement for the right to liberty, so a person may fail to meet the employment requirement for the human right to paid holidays. If a child can be "born to"⁶ a natural right to liberty though he is not yet and may never be in a position to exercise it, a person may have a human right to paid holidays though he may never be able to take advantage of it.

This brief discussion of the right to liberty and the right to paid holidays reveals that the expression 'Person P has a right to x' may mask an equivocation. On the one hand, it can mean that P conditionally possesses a right to x. If so, his relation to the right can be fleshed out as follows:

⁶Ibid., chap VI, par. 55.

P has a right to x since A, B, C, etc. (where these are qualifications for the right) could be the case.

On the other hand, we often say that P has a right to x when we mean that he actually possesses this right. Then we are saying:

P has a right to x since A, B, C, etc. (where these are qualifications for the right) are the case.

To say, then, that a person actually possesses a right is to acknowledge that he may legitimately assert it because he has met the qualifications for the right; whereas, to say that a person conditionally possesses a right is only to recognize the possibility that he may eventually meet the qualifications for the right.

In connection with the distinction we have drawn, there are a couple of difficulties we must dispense with before proceeding. In particular, we must note that an actually possessed right is not to be confused with either a legal right or what William Frankena calls an actual right. Actual possession of a right is independent of the right's legal status. In saying that a person actually possesses a right, we are saying that he is morally entitled to assert it regardless of any legal system's position vis-a-vis the right. Actually possessed rights are moral rights, some of which ought to be incorporated into legal systems though they may not in fact be legally recognized. Furthermore, a person may actually possess a

right and make claims on that basis which others are not obligated to respect when overriding considerations are present. In other words, an actually possessed right may be either a prima facie right or an actual right and may be respected as a prima facie right or as an actual right.⁷ Accordingly, we do not settle the question of how a person should be treated by admitting that he actually possesses the right he is asserting. To sum up, a person who actually possesses a right is morally entitled, though not necessarily legally entitled, to assert it, but others may nevertheless be morally justified in refusing to act in accordance with his claims.

Our distinction between conditional and actual possession of rights indicates that the idea of a universal right may be a more complicated matter than it is ordinarily assumed to be. Evidently, Locke's right to liberty is universally actually possessed by rational beings, but not universally actually possessed by human beings. Some human beings, e.g., children and the insane, only conditionally possess the right to liberty. In light of these observations, we need to clarify what is meant by the claim that natural rights are universal. We can begin to do this by considering the suggestion that universal conditional possession is a sufficient condition for natural rights.

⁷See Ch. IV, Sec. 2 below for a complete account of prima facie and actual rights. Also, see W. K. Frankena, "The Concept of Universal Human Rights," pp. 196-197.

2. Internal and External Qualifications for Rights

The account we have given of the controversial human right to paid holidays as a conditionally possessed right shows that it is possible to save the universality of human rights, at least to the extent that a promising candidate for natural rights status can claim to be universal. Those persons who fail to qualify for actual possession of these rights qualify for conditional possession instead. In addition, this analysis shows that the human rights approach can appropriately be understood as an extension of, rather than a break with a widely accepted position regarding the universality of natural rights. Nevertheless, as we will note below, an almost unlimited assortment of rights qualify as universal once the idea of conditional possession is introduced, and a proliferation of qualifications for these rights accompanies the substitution of human rights for natural rights.

Very few rights would be eliminated from contention if we were to rely on universal conditional possession as a criterion for natural rights. Laughable suggestions, such as the right to buy books at a 70% discount provided that you become a member of The Joy through Bargains Book Club, would not be ruled out. Assuming that The Joy through Bargains Book Club is the sole purveyor of books at this rate and that it is willing to sign up anyone who wishes to join, this right would count as a universal conditionally

possessed right. Only highly particularized (and to that extent suspect) rights, like Balthazar K. Parapluie's right to purchase books at a 70% discount through The Joy through Bargains Book Club, would fail to qualify as universal conditionally possessed rights. Evidently, universal conditional possession is too inclusive a concept to discriminate natural rights.

Further support for this point is provided by the fact that lists of human rights admit rights associated with qualifications that would seem out of place on a list of natural rights. A cursory inspection of the UN Declaration of Human Rights supplies numerous examples. Article 11 declares that persons charged with penal offenses have a right to be presumed innocent until proved guilty. Article 21 declares the citizen's right to participate in his government. Article 23 declares that workers have a right to a fair and decent wage. A person must be either a defendant, a citizen, or a worker before these rights come into play. These qualifications strike us as curious because they focus attention on the fact that mere humanity does not suffice for enjoyment of many human rights.

The source of the proliferation of qualifications for human rights noted above can be found in the introduction of factors external to the individual as qualifications for possession of human rights. Needless to say, respect for a person's rights always depends on factors external to

that person. For any right to be respected, persons other than the person who possesses the right must take suitable measures. These may be in the form of private commitments to act or refrain from acting in some appropriate way or in the form of participation in or support for institutional arrangements. In contrast to this, whether or not a person possesses a right is not necessarily dependent on any facts concerning other persons or environmental occurrences.

As we have pointed out, a person who is in no position to exercise a right may nonetheless possess the right conditionally. Still, actual possession of the right depends on meeting whatever conditions are set, and whether or not a person meets these conditions may or may not be within his control. We will say that an external qualification for a right is one that is not subject to the will of the person who possesses the right conditionally. If circumstances conspire to enable a person to meet any external qualifications attached to a right and he chooses to meet any internal qualifications (those which are in his power), we will say that he actually possesses the right from a moral point of view.

In practice a person who actually possesses a right may be barred from exercising it. The prohibition could be a justifiable one resulting from an unresolvable conflict between unequally weighted rights or an unjustifiable denial imposed arbitrarily or for reasons of

expediency. In neither case is the person's possession of the right affected by his inability to exercise it.

Qualifying for a right is sufficient for actual possession of the right, and actual possession of a right justifies a person in making claims based on the right though he may not succeed in getting these claims enforced. He retains actual possession of the right regardless of the response others may make to his attempts to exercise it.

The right to work illustrates the distinction we have drawn between internal and external qualifications. A person can only actually possess a moral right to work if he is employable. This qualification for employment can be divided into internal and external elements. For while a person's obtaining and keeping a job depends in part on his willingness to do so, it also depends on the state of the relevant economic system--which skills are in demand and whether the economy can support full employment--which is independent of the individual worker. Accordingly, it is possible for conditions in which the individual has no share to determine whether or not he will qualify for actual possession of certain human rights.

Another kind of right is one for which a person may qualify willy-nilly. An example is the right to a fair trial. Though the following view runs contrary to the belief that accused persons ought to be considered innocent until proven guilty, we might be inclined to think of the

right to a fair trial as having both an internal and an external qualification. That is, we might suppose that a person must commit a crime and be indicted for it in order actually to possess a right to a fair trial. However, this fails to take into account the possibility that a completely innocent person could be indicted for someone else's crime. In such a case, circumstances over which the individual has no control put him in actual possession of the right to a fair trial.

The impact of external conditions as qualifications for rights is less in evidence in classic natural rights doctrines. In at least one instance, namely, Locke's right to life, external considerations do not enter in at all. It is only by deliberately doing an action that warrants capital punishment that a person can forfeit his life.⁸ According to Locke, persons qualify for the right to life automatically. It is the only birthright simpliciter. In order for any violation of this right to be justified, a person must demonstrate his refusal to meet the minimal internal qualification for this right by committing a crime so heinous that it demands the perpetrator's execution. Of course, a pacifist would argue that there are no internal or external qualifications for this right and therefore that neither capital punishment nor killing in self-defense

⁸ John Locke, The Second Treatise of Government, chap. IV, par. 23 and chap. VI, par. 65.

can be justified, but we leave these complications aside. What needs emphasis is that persons are born in full possession of this right, and only their subsequent voluntary actions can jeopardize it.

The case of Locke's right to liberty is a bit different. It is not clear whether Locke thought that a person could only fail to achieve and maintain a degree of rationality sufficient for exercising the right to liberty as a result of some constitutional defect, or whether he was aware of the possible effects of independent forces.⁹ Nevertheless, we have come to appreciate the crucial importance of nurture in human development and the effects of social and economic conditions on psychological stability. Therefore, we must see an individual's ability to measure up to Locke's rationality requirement as partially independent of his will. In adopting this view of Locke's rationality requirement, we insert an intermediate level between Locke's natural right to life, which is inviolable except as a result of the agent's deliberate actions, and the UN Declaration's human right to work, enjoyment of which a person may fail to qualify for through no fault whatsoever of his own.

Here the difference between traditional natural rights and some human rights proves to be a question of

⁹Ibid., chap. VI, par. 60.

degree rather than of kind. Natural rights cannot be represented as admitting internal qualifications exclusively, and human rights frequently depend on internal as well as external qualifications. Indeed, it is often difficult to tell whether a qualification is internal or external. In order to fix this distinction, we will sketch a paradigm case and then outline a policy for handling more problematic qualifications.

The right to a book borrowed from a public library depends on both internal and external qualifications. The original process of borrowing the book--obtaining a card, selecting a book, and checking it out--constitutes a complex internal qualification since anyone can effectively choose to follow these procedures. However, the expiration of the right on a specified date is a consequence of an external qualification since no one can effectively choose to prevent this. Of course, the borrower may be allowed to renew the book thereby initiating another cycle of internal and external qualifications, or he may be required to return it because someone else has requested it. But notice that his right to renew if he wishes to do so depends entirely on external qualifications in the form of regulations which allow him no choice in the matter.

Qualifications which require a person to do or refrain from doing an action or a series of actions are internal qualifications. We will classify all other

qualifications for rights as external. Exclusionary rules that govern who is permitted to meet the internal qualifications are clear cases of external qualifications. A private club's rule that candidates for membership must be nominated by a member is an example of this kind of external qualification. In addition, a person's social or economic milieu can have effects similar to exclusionary rules. A child's educational opportunities usually reflect his family's economic circumstances, and his educational background will influence the range of his subsequent options. Thus, educational qualifications are external unless they are such that everyone has a fair opportunity to meet them.

Roughly, we will say that qualifications that require a person to be a certain way, as opposed to ones that require him to do or not to do a certain thing, are external unless they can be divided into independent internal and external elements. Although the development of character traits, talents, and other faculties is partly dependent on the individual's resolve, numerous factors over which he has no control also enter in. Because such factors often play a decisive role over the course of a person's development, we will classify these troublesome qualifications as external.

We are adopting the above policy on the assumption that it is better to err on the side of underrating the

extent of the individual's control where qualifications for rights are concerned. If we overrate his powers in this regard, we risk supposing that a person chooses not to qualify for rights when in reality we have set qualifications he is helpless to meet. It is more important that we avoid unwittingly preventing people from qualifying for actual possession of rights by overestimating the control they exercise over their lives than that we accord human powers all due recognition. For a tendency to deny rights to persons who ought to have them is a more serious flaw in a theory of rights than a tendency to grant rights too freely.

3. Universal Conditional Possession and Internal Qualifications

Now we can ask whether the distinction between internal and external qualifications can be used to separate natural rights from other rights that can be construed as conditionally possessed rights. In order to do this, we must contend with our discovery that classic natural rights theory allows circumstances beyond the control of the individual to be instrumental in preventing him from actually possessing certain natural rights. Either we can reject this view and tighten our criterion for natural rights, or we can follow the lead of tradition and attempt to explicate the position in terms of the distinction between internal and external qualifications.

One approach would be to stipulate that natural rights are those associated with qualifications that are completely subject to the will of the person who possesses the right, in other words, those associated only with internal qualifications. The guiding insight behind this proposal is an interpretation of the idea of natural rights as essential to human nature in terms of the mastery a person who conditionally possesses the right has over his ability to qualify for actual possession. Though this suggestion has some plausibility, we cannot accept it because it arbitrarily restricts the class of natural rights too much.

The only viable candidate for natural rights status on this criterion would be the right to life, understood as requiring persons to refrain from killing other persons. If we adopt this right as the sole natural right, we end up with a natural right that is minimally useful from the standpoint of political theory. Once we have discovered it and introduced some elementary facts about human psychology, we can conclude that some type of protective apparatus is needed for stable social intercourse. But, this does not advance our understanding of the content of justice much, and it does not help us to see what form the protective system should take nor what limits should be placed upon its operations.

More importantly, there does not seem to be any reason, apart from purely formal considerations, for drawing the boundary so restrictively. If we say that this account expresses the thought that natural rights ought to protect only those things without which persons could not function socially, i.e., without which society would be strictly impossible, we are vulnerable to the charge that the right to life would not have to be universal for social intercourse to be possible. As long as some segment of the population succeeds in policing itself and in forcing others to respect the self-proclaimed rights of its members, a society would be possible in which some members enjoyed the right to life while explicitly denying it to others.

If we loosen our position a little and say that natural rights ought to secure those things without which social relations would be extremely difficult to maintain, the rights to liberty, to work, and to hold property emerge as plausible candidates. But, as we have seen, a person may not have complete control over the conditions which determine whether or not he qualifies for actual possession of the right to liberty and the right to work; and a parallel argument could be constructed for the right to property. This might lead us to suppose that some lower limit on the amount of control over the conditions attached to natural rights could be established. The idea would be to liberalize the criterion for internal qualifications

without obliterating the distinction between internal and external qualifications.

The presupposition behind this modification is that rights with qualifications that admit a high degree of control on the part of the possessor of the right will turn out to be ones that are connected with human nature in some crucial way. Unfortunately, to allow nearly complete control over nullifying circumstances is to generate an insoluble puzzle about how much control is enough. Moreover, this difficulty is exacerbated by the fact that the qualifications for trivial rights are often more tractable from the standpoint of individual mastery than the qualifications for important rights. We can see this clearly if we consider the problem from the perspective of a person who has trouble qualifying.

Suppose that a mental hospital uses the right to own tropical fish as part of its therapeutic program. As patients progress, they are allowed to acquire tropical fish and to assume responsibility for the care of their fish. The hospital staff believes that this arrangement provides a goal for patients to strive for, that it helps them to maintain contact with reality once they have gained the right, and that the fish have a desirable, non-chemically induced tranquilizing effect. Obviously, it would be easier for a patient to qualify for the right to own tropical fish than it would be for him to qualify for the

general right to property, especially if the latter is construed so as to include the right to acquire weapons.

The rights which we are inclined to pick out as natural rights are not necessarily identical with the rights associated with qualifications which are maximally subject to the individual's will. Worst of all, the degree of control over the circumstances relevant to the actual possession of any proposed right might vary significantly from person to person. If this were the case, establishing universal conditional possession with actual possession contingent upon internal qualifications as a criterion for natural rights would only serve to defeat the possibility of there being any.

4. Universal Conditional Possession and Legal Systems

Another conceivable approach to this problem of delimitation might start from the perspective of the social enforcement agencies rather than from that of the individual who possesses the rights. The idea would be to single out a definite kind of external qualification with which natural rights ought always to be associated. Along these lines, we might define natural rights as those universal conditionally possessed rights that every legal system ought to secure. This is to claim that we can ascertain which rights are natural rights by somehow deriving them from

the concept of a legal system. Natural rights would then be universal relative to legal systems.

Since there is no general agreement on the proper analysis of the concept of a legal system, we cannot simply inspect an analysis of this concept to see which rights, if any, it requires legal systems to enforce. Indeed, seeking to obtain an account of natural rights from an account of a legal system seems ill-advised if only because the former problem is the simpler and more accessible of the two. It is more likely that we will succeed in making a contribution to the analysis of a legal system by giving an adequate analysis of natural rights than the other way around. The most promising procedure involves investigating which rights every legal system ought to enforce given the needs of the members of communities and the special competencies of legal systems.¹⁰

Immediately, it is obvious that it is both practicable and desirable for legal systems to secure the right to life. Except in rare cases, people want to survive, and their vulnerability creates a need for protection which legal systems are well-suited to provide. Superficially, property rights appear to be justifiable on similar grounds. The need for basic goods like food and shelter lends support to the suggestion that there is a natural right to

¹⁰This procedure is similar to the one H. L. A. Hart uses to ascertain the minimum content of natural law in The Concept of Law (London: Oxford University Press, 1961), pp. 189-195.

acquire and use personal property. If a person has a right to the food he acquires and the shelter he builds, he can be reasonably confident that he will not be victimized by disastrous turns of fortune. In light of the fact that legal systems are competent to protect property, property rights would seem to be another clear case. However, we can only be satisfied with this result if we ignore the plight of persons who cannot satisfy their basic needs by exercising the right to acquire property. Correlatively, their needs must give rise either to a right to a job with a salary sufficient to cover basic expenses or to a right to welfare payments sufficient to cover these costs.¹¹

Now it is evident that a single type of need can generate different rights for differently situated persons. Unlike property rights, the right to a job and the right to welfare payments are not rights that legal systems are by themselves competent to sustain. The economy must be yielding funds in excess of what it needs to maintain itself and what it contributes to the maintenance of the legal system in order to defray the costs of these rights. Inasmuch as an economy could fail to meet this condition, it is apparent that compelling human needs and the

¹¹Virginia Held discusses this point in some detail in an unpublished manuscript.

competencies of legal systems do not necessarily coincide.¹² Moreover, we see that the same needs could found responsive natural rights for some persons but not for others if the competencies of legal systems are accepted as arbiters of natural rights status. Thus, universality construed in terms of the concept of a legal system is bound to result in arbitrary decisions about whose needs will be satisfied.

To recapitulate, we have questioned whether universality can distinguish natural rights from other moral rights once it is interpreted in terms of conditional possession of the rights. As we have seen, almost any right can qualify as a universal conditionally possessed right. Since many of these rights are clearly not essential to human nature on any plausible interpretation, we sought some special kind of condition that would single out a crucial subset of universal conditionally possessed rights. First, we tried the suggestion that natural rights are connected with conditions that agents may choose to meet or not at will. Then, we examined the proposal that the conditions must be within the competency of legal systems. In both cases, we found that the suggested method of identifying important universal conditionally possessed

¹² Notice that it would not be a valid objection to property rights to observe that an economy might not generate sufficient profits to fund a legal system. In discussing the suggestion that natural rights are universal relative to legal systems, we must assume the existence of legal systems.

rights violates our intuitions because each specifies an arbitrary boundary for the set of natural rights.

5. Universal Actual Possession of Rights

We have found that universal conditional possession is too inclusive a criterion for natural rights, but universal actual possession appears to be too exclusive. Any right that can be stated in the following form counts as universal from the standpoint of conditional possession:

P (where P is any person) conditionally possesses a right to x since A, B, C, etc. (where these are qualifications for the right) could be the case.

Universal actual possession only differs from universal conditional possession in requiring that the conditions be met:

P (where P is any person) actually possesses a right to x since A, B, C, etc. (where these are qualifications for the right) are the case.

An example will help to clarify these two possibilities.

The right to life can be expressed as a universal conditionally possessed right:

P conditionally possesses a right to life since it is possible for him not to be a soldier engaged in battle, not to be an assailant murderously attacking another person, and not to be a convicted criminal

who has committed a crime that warrants capital punishment.¹³

If the right to life is ever universally actually possessed, it is a fortuitous and undoubtedly momentary coincidence. For it is reasonable to assume that there is almost always someone who has violated at least one of the conditions attached to the right. The relation between the right to life and a person who does meet the qualifications for this right can be expressed as follows:

P_1 actually possesses a right to life since he is not a soldier engaged in battle, is not an assailant murderously attacking another person, and is not a criminal convicted of a crime that warrants capital punishment.

Because P_1 satisfies the qualifications for the right to life, he would be justified in demanding that anyone else refrain from killing him.

So far we have formulated the right to life as if actual possession of this right were an all-or-nothing matter. Our account of P_1 's actual possession of the right to life implies that a person who fails to meet one or more of the listed qualifications cannot legitimately assert this right. What makes this misleading is its omission of any specification of whom he can no longer assert the right

¹³Though I do not believe there are any crimes that warrant capital punishment and therefore believe that no one can fail to meet the third condition, I include it here for the sake of completeness and in recognition of the controversy surrounding this issue.

against, i.e., of who ceases to be obligated to refrain from killing the person who possesses the right, after he has violated one of the conditions for actual possession of the right.

A person who becomes a soldier and participates in combat loses his right to life as far as enemy soldiers are concerned since they are not obligated to refrain from killing him. But this does not entail that he has lost his right to life altogether. No one would be justified in executing him unless he has also been convicted of committing a sufficiently appalling crime. Similarly, in the case of a criminal convicted of a crime for which execution is a just punishment, the judicial sentence does not license anyone but the appointed agents of the state to implement the court's decision. Because the qualifications for the right to life are independent of one another, persons who lose the right to life as a result of actions they have taken only lose this right with respect to some other identifiable person or persons.

We might say that some rights admit degrees of actual possession because their objects are divisible. The divisibility of the right to life is concealed until we rephrase it and talk about the right not to be killed. What this expression loses in pithiness, it gains in informativeness. Most importantly, it elicits the question, 'not to be killed by whom?' Once we realize that one

person's obligation to refrain from killing a given person may lapse while other persons' similar obligations with respect to that person remain in force, we can see how the right to life can be split into components. Accordingly, a person could actually possess a right to one or several components of a complex right by virtue of his satisfying one or more but not all of the qualifications for that right. It would be inaccurate to say that such a person merely conditionally possesses the right, although he only actually possesses part of the right.

The preceding observations suggest the possibility that a complex right might have a core that is actually possessed by every human being by virtue of some characteristic (or set of characteristics) that is common to all human beings. Such rights could be expressed in the following form:

P (where P is any person) actually possesses a right to x_1 (where x_1 is some component of x) since A and B (where A and B are sufficient conditions for actual possession of the right to x_1 but are not sufficient for actual possession of the right to x) are the case.

This format presents us with two problems. One is the question of how to specify x_1 . The other is the question of what sorts of things can be used to instantiate 'A' and 'B'. We will take these in order.

6. Specification of the Object of a Universal

Actually Possessed Right

Basically, x_1 can be anything to which every person could actually possess a right. This is to say that x_1 must be something that every person could reasonably lay claim to in any circumstances.¹⁴ To describe such a thing, it is necessary to whittle the proposed object of the right so as to disengage it from conduct that would otherwise render the right void. This can best be clarified by means of an example. We will continue to use the right to life.

As we have indicated, the right to life stated in its most general form is not necessarily actually possessed by all persons. Since persons have sometimes been and will sometimes be soldiers engaged in battle, assailants attacking other persons, or criminals convicted of crimes that warrant capital punishment, it is not the case that all persons always have a right not to be killed by anyone. However, the following might hold:

P has a right not to be killed by anyone who is not an enemy soldier engaged in battle with P, the victim

¹⁴We should note that this account of x_1 does not purport to resolve the question as to whether a natural right that someone actually possesses is absolute, i.e., whether such a right can ever legitimately be violated. It could be the case that a person who actually possesses a right can reasonably assert it although others may ultimately be justified in declining to respect his claim. If this were not so, all conflicts between rights would be merely apparent, the products of irrationally asserted rights.

(or the defender of the victim) of a murderous attack launched by P, or the official executioner of a death sentence which has been justifiably imposed on P since A and B are the case.

Here, a list of the sorts of persons who could be justified in killing, i.e., who would not be obligated to refrain from killing, the person who possesses the right is appended to the general account of the object of the right. In effect, x_1 is arrived at by introducing certain qualifications for actual possession of the right to x into the description of the object of the right. How this can best be accomplished for other rights will depend on how these qualifications can be succinctly incorporated into the formulation without distorting their impact.

Before moving on to the question of what qualifications are suitable for universal actually possessed rights, we need to comment on a possible misunderstanding of the account we have given of the object of such rights. Our proposal should not be interpreted to mean that every sort of circumstance in which a person can justifiably be killed must be included in the description of the object of the right. It would be impossible to provide a definitive list of overriding considerations for each right since we cannot be certain that we have anticipated all of the possible circumstances in which the right could come into play. And what's more important, it would be a mistake to incorporate them into the object of the right because their

occurrence would then have the effect of neutralizing any protest the possessor of the right might raise. It would no longer be possible to say that it was regrettable but morally necessary to violate someone's right, for the person would not have a right under such circumstances. Overriding considerations do not strip a person of his right despite the fact that they do authorize others to violate it.

So, how are we to recognize qualifications that belong in the description of the object of the right? For this purpose, it will be helpful to recall our earlier distinction between internal and external qualifications.¹⁵ We said that internal qualifications consist of actions that persons can effectively choose to do or to refrain from doing. These qualifications can be incorporated into the description of the object of a right without any pretense that the disposition of all conflicts between the right and other pertinent moral considerations can be decided in advance.

A person who can do an action that is required for actual possession of a right or who can refrain from doing an action that is prohibited for actual possession of a right but who refuses to conform his behavior to the qualifications for the right cannot object that he is being

¹⁵See Chap. II, Sec. 2 above.

wronged if others do not respect his right. By his decision not to meet any of the internal qualifications for the right, he forfeits the right. If he meets some but not all of the internal qualifications for the right he may retain a partial right provided that the object of the right is divisible. Here, we are merely applying the principle that what a person competently chooses to do or not to do can be used against him. In contradistinction to this, circumstances over which he has no control cannot be allowed to affect the content of his right. Thus, external qualifications cannot be incorporated into the account of the object of any right because they would float the protection afforded by the right on unpredictable circumstantial vicissitudes.

7. Qualifications for Universal

Actually Possessed Rights

Having moved the familiar qualifications for the right to life into the description of the object of the right, we must ask what remains to instantiate 'A' and 'B'. We can approach this problem by examining the effects of our re-conceptualization of the right itself. Most obviously, we have obtained a right that anyone could have occasion to assert. Even a soldier engaged in combat would have grounds to object if some personal enemy were to enter the fray for the sole purpose of seeking him out, killing him and slipping away under the cover of battle. He retains

an assertible, albeit partial, right that only releases a definite set of persons from their obligation not to kill him.

Our modified right to life may prove to be universal in a stronger sense than the broadly conceived original right; for everyone could actually possess our restricted right as opposed to merely conditionally possessing it. As a result, the qualifications for this right cannot concern particular acts, but instead must concern constant conditions. If unique or intermittent occurrences were allowed as conditions for this right, there would be hiatuses in a person's actual possession of the right, in other words, periods during which a person would only conditionally possess the right. This would reduce the right's universality to the level of conditional possession. Thus, we must look for qualifications for this right that are consonant with the right's being universally actually possessed. In this connection, it makes sense to investigate the foundations of the right.

Rights invariably require two kinds of support because there are two questions that must be answered before any proposed right can be appraised. The first is 'who is to possess the right?' and the second is 'what for?' Either a queer match between a proposed right and its alleged possessors, e.g., a right to a daily chocolate bar attributed to a group that includes ferns, or a purpose

unworthy of a right, e.g., satisfaction of the craving for sweets, casts doubt on the right. Accordingly, 'A' must represent some characteristic (or set of characteristics) that identifies those who will qualify for actual possession of the right, and 'B' must be replaced by a description of the purpose (or purposes) that will be served through possession and exercise of the right.

Perhaps, it goes without saying that the way in which the would-be possessors of a right are identified is intimately bound up with the purpose the right is said to serve. Obviously, all of the individuals singled out by the first condition must share the purpose stated in the second condition. Unintelligible associations between rights and the individuals who are supposed to possess them result when the right aims to achieve some purpose that is alien to some of its possessors. Still, beyond this there may be a more powerful form of interdependence.

The claim that natural rights are those that persons possess by virtue of their nature can be explicated in terms of the qualifications for these rights. If condition A gives a characteristic essential to those who possess the right and condition B states a purpose that must be achieved in order for an individual to meet condition A, the right will be a natural right. On this account, respect for natural rights enables those who possess them to flourish in accordance with their common

nature as specified by condition A and reinforced by condition B. In the case of a natural right, the two conditions embody a hierarchical structure of justification. The right directly serves the purpose presented in condition B, and this purpose is thought to be compelling because condition A, which must be accepted as ultimate, depends upon it.

Locke's views regarding the right to life illustrate what we have been saying. Despite his tendency to discuss rights in terms of their correlative obligations, we can discern how he would account for the right to life (and other natural rights, as well). According to Locke, people are naturally free and equal because they are rational.¹⁶ They are free because reason enables them to discover a law of nature to guide their conduct and thereby prevent freedom from creating havoc. They are equal because they are endowed with the same faculties, reason being distinctive to them. Because there is no natural subordination of one person to another, Locke concludes that no person can be justified in killing another (except in special circumstances, as we have already pointed out). As those who are rational are prohibited from killing their fellows, so those who are rational have a right not to be killed.

¹⁶ John Locke, The Second Treatise of Government, chap. II, pars. 4-7.

It is not as evident how Locke would fill in the second condition. In The Second Treatise of Government he emphasizes self-preservation as the motivational force behind natural rights.¹⁷ Elsewhere he states that happiness is the one thing that moves desire and therefore determines action.¹⁸ These positions interlock neatly if we interpret them as representing, on the one hand, the viewpoint of the person who possesses the right and, on the other, the viewpoint of the person who may be called on to respect the right.

Locke contends that people have self-interested reasons for respecting the natural rights of others. His image of God seems to be that of a bureaucrat administering the law of nature by meting out punishments for disobedience and rewards for obedience.¹⁹ The ultimate reward for scrupulous adherence to the law of nature, which requires among other things respect for the natural rights of others, is eternal happiness. Shifting to the viewpoint of the person who possesses the right, there is no question but that the right to life provides the individual who possesses it with a moral weapon to use to secure his own survival.

¹⁷ Ibid., chap. III, par. 19, chap. V, par. 26, and chap. IX, par. 131.

¹⁸ John Locke, Selections from An Essay Concerning Human Understanding, in British Moralists, ed. L. A. Selby-Bigge (New York: The Bobbs-Merrill Company, Inc., 1964), par. 981.

¹⁹ Ibid., par. 994.

Thus, Locke holds that rationality along with a desire to survive characterizes the individuals who actually possess the right to life and that these characteristics can be adduced in support of the claim that there is a natural right to life.

To sum up, a Lockean version of the right to life formulated as a universal actually possessed right would look like the following:

P actually possesses a right not to be killed by anyone who is not a soldier engaged in battle with P, who is not the victim (or the defender of a victim) of an apparently homicidal attack launched by P, or who is not the official executioner of a death sentence which has been justifiably imposed on P, since P is a rational being and P wants to survive.

There are a number of problems concerning this account. We will sketch two of them by way of clarifying some of the issues underlying natural rights, but we will not attempt to deal with these issues until later.²⁰

The definition of a rational being is troublesome. Presumably, the capacity for rationality, as opposed to a rational state of mind or a display of rational behavior, is intended. But, if we delineate this capacity broadly enough to include all human beings, we are apt to catch some animals in our net; whereas, if we arrange to keep animals out, we will probably exclude some people, too.

²⁰See Chap. III, Secs. 4-7, Chap. VI, Sec. 2, and Chap. VIII below.

This difficulty is not peculiar to Locke's account. Regardless of how we propose to characterize the individuals who possess natural rights, there will be hard decisions about borderline cases waiting. It will be necessary to choose between cold-bloodedly refusing to grant natural rights to marginally qualified human beings or revising our conceptions of those rights so that they can be sensibly attributed to qualified animals.²¹

Another problem concerns the relation between the two conditions. In particular, must there be a necessary connection between condition A and condition B? This issue arises because allowing a contingent connection to suffice would make it possible for those who possess natural rights to lose them without there being any ramifications with regard to their former possessors' nature. Locke's right to life illustrates this problem. Although it is undoubtedly true that most rational beings want to survive, it seems to be the case that some do not share this desire. The tactic of defining 'rational being' in such a way that it becomes analytic that all rational beings want to survive merely evades the issue. Again, we risk denying

²¹A hint of the conceptual complications that await us if we grant the right to life to animals: how can this right be formulated so that it is not a matter of indifference whether Mikhail Baryshnikov or a chimpanzee trained to talk through a computer is killed when the dancer, the chimp, and the pilot who has a loaded revolver have survived a plane crash in the desolate, snow-bound Andes and will all starve if two of them do not kill and eat the third?

certain human beings the right to life while possibly attributing it to countless animals.²² Although a contingent connection between the two conditions seems too weak because it does not provide adequate security for those who possess the right, we must beware of stipulated necessary connections that can yield equally disastrous consequences.

8. Summation

We began this chapter with the discovery that our accustomed terminology concerning possession of rights conceals an important distinction. When we say that a person has a right, we may mean this in a weak or a strong sense. For a person may conditionally possess a right, or he may actually possess it. As a result of this discovery, we found it necessary to entertain two possible accounts of the universality of natural rights.

We have argued that the class of universal conditionally possessed rights is broader than the class of natural rights and that there is no satisfactory way to delineate a subclass of this category that would contain

²²Whether or not animals will gain a right to life depends on what relation is established between rationality and the desire to survive. If this desire is said to be one of several necessary and together sufficient conditions for rationality, some animals could qualify provided that no strenuous tests are imposed. Of course, if the claim is merely that rationality entails a desire to survive, animals will not qualify unless they can meet whatever independent criteria are set for rationality. Here, the gamble is that some people will fail to satisfy the more stringent of the criteria.

every natural right and no other moral rights. The failure of this proposal led us to develop an account of the concept of a universal actually possessed right. In Chapter III we will inquire into the bearing this concept has on natural rights.

CHAPTER III

UNIVERSALITY AND NATURAL RIGHTS

Late in the preceding chapter we claimed that the idea of natural rights as deriving from the essence of human nature can be expressed by the idea of a universal actually possessed right associated with two distinctive kinds of condition. Again, the first condition for the right must state some essential characteristic of those who possess the right, and the second condition must indicate some purpose that must be achieved if an individual is to meet the first condition. All of this sounds exceedingly mysterious, and, if anything, this mystery is deepened, not dispelled, by our account of Locke's right to life. We suggest that this obscurity can be traced to the fact that universal actual possession is a necessary, but not a sufficient condition for natural rights.

The problems we encounter once we apply the formula for universal actually possessed rights to Locke's right to life concern the content of conditions A and B. We know in advance that 'A' and 'B' must represent invariable and uninterrupted conditions which would justify granting the right in question to whoever meets them. But, we do not know how to tell whether or not a proposed set of

qualifications succeeds in justifying the right to which it is attached. In the chapter that follows, we will basically be concerned with explicating the limited, but crucial connections between universality and natural rights. In short, we will argue that any right that can be expressed as a universal actually possessed right qualifies as a candidate for natural rights status but not necessarily as a natural right.

1. Omnipotent Rights

The most serious challenge to universal actual possession as a sufficient condition for natural rights comes from a group of exceptionally powerful rights. These rights purport to endow each of their possessors with such boundless powers that they end up providing those who possess them with nothing at all. If a right counts as a universal actually possessed right but fails to entitle anyone to anything, its candidacy for natural rights status is seriously compromised. As we have indicated, natural rights are thought to be instrumental in sustaining human nature.¹ An individual who chooses to exercise his natural rights protects himself from destruction insofar as he instantiates human nature (or some essential part of human nature). But a right that assures no one of anything cannot perform this function. In this section, we will

¹See Chap. II, Sec. 7 above.

consider some rights that satisfy our account of a universal actually possessed right but, nevertheless, cannot be admitted as natural rights.

The only well-known example of a right that pretends to omnipotence is to be found in one interpretation of Hobbes's natural right:

P has a right to everything since P is impelled to protect his own interests and P is vulnerable as a result of the scarcity of needed commodities.

But if each person has a right to everything, no person securely possesses anything. Of course, Hobbes claims that people only universally actually possess this right in a state of nature and that they must relinquish it in order to form societies. Nevertheless, this restriction does not solve the problem presented by the overly powerful universal actually possessed right.

Parallel rights can be constructed for persons within societies. In fact, one problem for Hobbes's political theory is that he never satisfactorily explains why all of the members of societies do not possess the following right:

P has a right to rule since P is impelled to protect his own interests and P is vulnerable to adverse governmental rulings.

Hobbes's contention that none of the sovereign's actions can count as injuries to any of his subjects since they have

authorized him to rule and could not act so as to injure themselves is uncharacteristically disingenuous.² The same reasoning that produces everyone's right to everything in the state of nature would doom societies to ongoing subversion of and rebellion against political authority. Clearly, this is another case of a right that is so powerful that it undermines the very interests it is designed to protect.

It might be objected that our overly powerful rights fail to meet the qualifications for universal actual possession. That is, although these rights are expressed in accordance with the formula for universal actually possessed rights, this can only be accomplished by suppressing the crucial information that each right operates only in a special context. The right to everything is only universally actually possessed within the domain of persons if all persons are in a state of nature, and the right to rule is only similarly universal if all persons have entered into societies.

This oversight is easily remedied by supplying a more general account:

P has a right to act self-interestedly since P is impelled to protect his own interests and P is vulnerable.³

²Thomas Hobbes, Leviathan, pt. II, chap. 18.

³This right is a variant of the right to liberty.

By leaving the nature of P's vulnerability and the kind of behavior countenanced by the right unspecified, we obtain a right that is not tied to any particular social arrangement. This right will authorize different sorts of conduct depending both on circumstances and on how people think they can best advance their own interests. Again, given that human interests are not in perfect harmony and often conflict unresolvably, this right can be expected to work more to the detriment than to the advantage of its possessors.

If it is objected that there is no natural right to act self-interestedly except within the bounds of morality, this complaint can be given either of two possible interpretations. Either being impelled to protect private interests and vulnerability do not give rise to any natural right, or these conditions can only give rise to nonconflicting natural rights. Whichever is intended by this demurral, it amounts to insisting that universal actual possession cannot be a sufficient condition for natural rights.

Building compatibility into the concept of universality is not an acceptable solution. If we say that only a right that can be exercised by every person without generating conflict can be a universal actually possessed right, we will find that we have set such a stringent standard that no right can meet it. Obviously, when more

than one person aspires to a single goal which only a lesser number can achieve, one's exercising his right to act self-interestedly within the bounds of morality can be incompatible with the others' exercising their right.

Suppose that two people, P_1 and P_2 , have interview appointments for the same job, that they both want this job, and that neither of them has any other prospects. P_1 is interviewed first and impresses the interviewer so much that the interviewer decides to hire P_1 without further ado and to cancel his appointment to see P_2 . Though P_1 has competed fairly, his exercising his right to act self-interestedly with respect to this job has stymied P_2 in his ability to exercise this right. Of course, the conflict does not involve false pretenses or physical threats, and P_2 is not free to attempt to sabotage P_1 's success by illicit means. Still, this does not entail that there is no conflict between the rights.

We might try to refine our concept of compatibility so as to exclude only rights that are capable of generating especially noxious kinds of conflict. But then it becomes evident that this fine discrimination requires more content than the concept of universality could possibly contain. A universal actually possessed right is one on the basis of which everyone within a given domain is entitled to make claims. These claims may not all be realizable. Universal actual possession does not guarantee universal successful

exercise. But universality gives us no clue as to why certain kinds of claims might prevail over others nor what kinds of conflicts between claims can be tolerated. For these decisions we need additional criteria that establish priorities among rights and confine the permissible exercise of rights to manageable dimensions.

Going on to the possibility that someone might reject one or both of the qualifications for the right to act self-interestedly, we find that this objection also reflects the inadequacy of universal actual possession as a sufficient condition for natural rights. Arguing that being impelled to protect private interests or vulnerability is not a universal and constant condition among people is not a very promising approach. Surely, it is indisputable that every person is vulnerable in some respect; however, the claim that all people are impelled to protect their own interests does seem to be open to attack. If our objector points out that people sometimes disregard danger and act altruistically by way of showing that people are not always impelled to protect their own interests, we can reply that this argument conflates two senses in which many terms that concern motivation are used.

Because motivational expressions are used to refer to both chronic and periodic conditions, we can easily reach for the wrong kind of argument in our efforts to defeat claims pertaining to the motivation of action.

Consider the assertion, 'All people need food.' We cannot show that this is false by pointing to a person who is neither eating nor professing a desire to eat. The statement concerns a chronic condition, a disposition, that is activated occasionally. We can only disprove it by finding a person who never eats (whether by the normal means of ingestion or intravenously), never exhibits signs of hunger, and suffers no ill effects from his abstention. Similarly, an instance of altruism does not show that people are not impelled to protect their own interests. Only a person with unimpaired faculties who invariably declines to take advantage of opportunities to advance what he believes to be his interests (including occasions when he could act without altering anyone else's situation) will suffice as a counter-example. It seems unlikely that such a person can be found.

A different way to criticize the qualifications for the right to act self-interestedly would admit that they are universal and constant conditions but deny that they are the right sort of universal and constant conditions to support a natural right. The intuitive objection might be that natural rights should be based on human strengths not weaknesses. And this may be so, but we must ask why. Universal actual possession requires that the qualifications for the right be universal and constant conditions; it does not involve a preference for any special kind of universal

and constant condition. Thus, some other basis must be found for deciding which universal and constant conditions can be invoked in support of natural rights. This returns us to the problem of explaining what we mean in talking of essential characteristics.

2. The Inadequacy of Universal Actual Possession as a Sufficient Condition for Natural Rights

When the classic natural rights theorists spoke of rights that every person possesses regardless of circumstances and by virtue of human nature, they intended to distinguish rights that could be incorporated into the social order. Even in Hobbes we find that key elements of the right to everything are retained by individuals after the formation of societies.⁴ Our conception of a universal actually possessed right supplies us with an explanation of the idea that every person always possesses natural rights, but it does not account for the alleged relationship between natural rights and human nature. In particular, it does not specify which parts of the complex that we loosely refer to as human nature can function as the foundations for natural rights.

This question remains unanswered after the implications of the concept of a universal actually possessed

⁴These are the right to resist physical threats and the right to refuse to incriminate oneself. (Leviathan, pt. I, chap. 14)

right are exhausted because universality is a purely formal quantitative concept. Obvious as this point may seem, it is sometimes overlooked because the long association between natural rights and universality has infused the latter with some qualitative connotations. Thus, it is easy to slip into thinking that the only universal rights are ones that people possess because they are essential to human nature or because of their inherent importance. Still, close analysis reveals that these are merely incidental associations. If we discover that a right can be formulated as a universal actually possessed right within a given domain, we learn how many individuals would be in a position to make claims based on the right if the right were allowed; but we learn nothing about what kind of right it is nor about why anyone might have the right. The right may be of momentous importance because its widespread exercise would probably breed chaos, or it may be utterly inconsequential because its object is trivial.

Universal actually possessed rights range over a spectrum. We have just examined three versions of the right to liberty that qualify as universal actually possessed rights though they would probably lead to catastrophe. At the opposite end of the spectrum might be a universal

actually possessed right to finger paint.⁵ This right might prove to be universal within the domain of human beings because there happen to be no reasons against it, rather than because of its dependence on any essential human characteristic. Clearly, what we need is an enumeration of the characteristics upon which natural rights can be founded, and until we obtain this list, we can only rely on our intuitions when we designate some rights as more important or central than others.⁶

3. The Problem of the Domain of Universality

Despite the shortcomings of universality as a sufficient condition for natural rights, there is an explanation for the fact that natural rights and universality are almost invariably mentioned together. Universality is a necessary condition for natural rights. From one

⁵Notice that this trivial right cannot simply be subsumed under the right to liberty because the domain in which these rights are universal is not the same. Because finger painting is a safe activity for the painter and because it is not likely to result in harm to others, a right to finger paint could be actually possessed by very young children. However, since the right to liberty is usually understood roughly as the right to decide the course of one's own life and thus includes both potentially dangerous and inconsequential options, we do not attribute it to very young children except conditionally due to the hazards actual possession would pose. The qualifications for the right to liberty are more restrictive than the ones for the right to finger paint.

⁶See Chap. VI below for my account of the bases of natural rights.

perspective, the explanation is self-evident if a little too simplistic. If natural rights are based on human nature and possession of these rights does not depend on anything extraneous to human nature, then everyone who shares that nature must possess natural rights, and natural rights must be universally actually possessed within the domain of human beings. At the outset of our discussion of universal rights, we suggested that this seemingly elementary bit of reasoning intimates a fundamental problem about universality and natural rights.

This problem can be seen from either of two sides. First, the argument given above does not state which components of human nature provide the foundations for natural rights. We have already considered how this lack can create difficulties concerning the selection of natural rights, and before that we mentioned that this lack also creates difficulties about who the possessors of natural rights are. The aspects of human nature that are chosen as foundations for natural rights will determine the domain in which universality holds.

The second way of seeing the problem raised by our argument is to notice that the transformation of the conclusion from a statement about everyone who shares a certain characteristic into a statement about all human beings may be unacceptably facile. For some characteristics that might properly be identified as integral to human nature may not

be realized until rather late in a human being's developmental process. If any of these characteristics are used to found natural rights, the rights will be universally actually possessed within the domain of human beings who have reached the required stage of development, but not within the domain of human beings.

4. Capacities as Qualifications for Natural Rights

At this point, it is worth reiterating one of our earlier contentions in order to elaborate on it. We have argued that the category of universal conditionally possessed rights includes many rights that cannot possibly be natural rights and that there is no satisfactory way to delimit any sub-group of this category that would include only natural rights.⁷ If we reflect on the relation between universality and the characteristics that might be given in support of natural rights, we can see why universal conditional possession fails as a necessary condition for natural rights.

Consider Locke's rationality qualification. We have suggested that Locke must hold that the capacity for rationality, as opposed to rationality itself, qualifies persons for natural rights since he explicitly states that children have a right to liberty which they should, nevertheless, be prevented from exercising until they

⁷See Chap. II, Secs. 2-4 above.

reach maturity.⁸ From this standpoint, the capacity for rationality must be the capacity to become a rational being. But what qualifies sane adults for the right to liberty? They have the capacity to conduct themselves rationally. But it is nonsense to say that they have the capacity yet to become rational beings in light of the fact that they are rational beings. For Locke, the capacity to become rational qualifies some human beings for conditional possession of the right to liberty while the capacity to act rationally qualifies others for actual possession of this right. Accordingly, the right to liberty, on Locke's view, cannot be either universally conditionally possessed or universally actually possessed within the domain of human beings.

Capacities are often invoked as constant conditions that characterize all human beings and support natural rights.⁹ This ploy aims to insure that natural rights will not be withheld from any human being. Moreover, it seems to save the universality of natural rights with respect to the class of human beings. However, this approach could not succeed unless we were to ignore the shifting usage of

⁸ John Locke, The Second Treatise of Government, chap. VI, pars. 60-61.

⁹ Richard Wasserstrom appeals to the capacity to enjoy goods like relief from acute physical pain. ("Rights, Human Rights, and Racial Discrimination," in Moral Problems, ed. James Rachels (New York: Harper and Row, 1971), p. 120) John Rawls uses the capacity for moral personality. (A Theory of Justice (Cambridge: Harvard University Press, 1971), p. 505)

the term 'capacity' which we have exhibited in the case of the capacity for rationality. Capacities may be abilities or potentialities. Where potentialities precede abilities, children typically have the potentiality to become able to do such and such, whereas normal adults have the ability to do it. Conditional possession of a right depends on having the relevant potentiality, and actual possession depends on having the relevant ability.

This ambiguity in the use of 'capacity' manifests the divergence between conditional possession of rights and actual possession in a particularly stark way. When a right is attributed to someone conditionally, possibilities are being acknowledged, viz., the possibility that the individual will eventually meet the qualifications for the right and therefore be entitled to exercise it. Confronted by a potential possessor of a right, we are not obligated to behave as if he were an actual possessor of the right.

If we have any obligation to a conditional possessor of natural rights apart from those generated by a special relationship with him, it must consist of an obligation not to wreck his chances of qualifying for these rights by attempting to stunt the development of his potentialities or by neglecting to provide what he needs in order for his potentialities to develop. Perhaps, he actually possesses a right not to be hindered and to be supported in the development of those of his potentialities that pertain to

actual possession of natural rights.¹⁰ In any case, he does not actually possess any right associated with qualifications he has not yet satisfied.

What emerges from the preceding remarks is that a person's conditional possession of a given right and actual possession of the same right by the same person are mutually exclusive. If a person conditionally possesses a right, he cannot actually possess it, and conversely if a person actually possesses a right, he cannot conditionally possess it. It follows that any right that is universally conditionally possessed cannot be universally actually possessed within the same domain.

But a conditionally possessed right that is universal within the domain of human beings does no one any good because no one can legitimately exercise it. Its value is purely speculative and depends on the expectation that crucial possibilities will be transformed into actualities. A universal conditionally possessed right is a precursor of a right. Strictly speaking, it is not a right because no one can be justified in asserting it or, in other words, because no one actually possesses it. Since it is safe to assume that natural rights are not mere precursors of rights but really are rights, we must conclude that

¹⁰ See Chap. VIII, Sec. 2 below for a full discussion of this suggestion.

universal conditional possession cannot be a necessary condition for natural rights.

5. Equity and Natural Rights

Still, what we have said about universal conditional possession does not show that universal actual possession is a necessary condition for natural rights. Maybe it has been a persistent mistake to associate universality with natural rights. There may not be any rights that every human being actually possesses, and the remedy provided by universality within a restricted domain may prove unacceptable. Unfortunately, we will only be able to address these issues hypothetically at this point. In order to argue conclusively, we would need to examine a proposed set of natural rights and their qualifications. Then, we could ascertain who would actually possess them and evaluate this distribution.¹¹ Without a list of natural rights and an account of them, we must adopt an oblique approach. We need to inquire what it would mean to accept a natural right that is not actually possessed by all human beings.

The uneasiness with which we greet the suggestion that there might be a natural right that some human beings do not actually possess stems from our supposition that any

¹¹Once we have obtained a list of natural rights, we will appraise them from the standpoint of universality. See Chap. VIII, especially Sec. 4, below.

distribution short of universal actual possession within the domain of human beings would violate the principle that like cases ought to be treated alike. But this distress is unfounded unless the right is denied to some human beings although it is based on properties that characterize every human being. For example, if the ability to register signs of neural activity on an electroencephalograph and vulnerability are given as the qualifications for the right to life, we would be rightfully outraged if we discovered that this right was not granted to children or, for that matter, to puppies.

The operant principle regarding the domain of universality is that all individuals who meet the qualifications for a right ought to be recognized as actual possessors of the right. Thus, there seems to be no objection to a natural right that is universal within a domain larger than the class of human beings or universal relative to some subset of the class of human beings provided that the right is not denied to anyone who qualifies.

Though what we have said is correct as far as it goes, we have not considered a particularly insidious device for manipulating the domain in which a right is universal. Morally irrelevant qualifications can be tacked onto a right in order to restrict the extent to which the right is actually possessed. For example, having white skin could be added to the list of qualifications for

the right to liberty. This kind of contrivance emphasizes the danger of admitting natural rights that are only universal within a restricted class of human beings, but it does not show that natural rights must be actually possessed by all human beings. In order to avoid violating the principle that like cases ought to be treated alike, we must eliminate arbitrary qualifications from our accounts of natural rights in addition to recognizing the entitlements of all who satisfy the qualifications.

6. Morally Relevant Qualifications for Natural Rights

Though we will not be able to obtain a general criterion of moral relevance for the qualifications for rights, it will be useful to set minimal standards with regard to natural rights. One safeguard against attaching morally irrelevant qualifications to our accounts of natural rights is the requirement that any qualification for a natural right be one that every human being starts with the potential to meet. This would rule out many arbitrary qualifications for natural rights including having white skin, being male, and having an IQ of 190. What this criterion says, in effect, is that any human being who does not actually possess a given natural right must conditionally possess it.

Of course, allowances must be made for aberrations caused by genetic damage if moral theory is not to be held

hostage to the ingenuity of scientists and the accidents of technology. As the science of genetics progresses, it will become increasingly possible to say exactly what potentialities are ordinarily encoded in the human complement of genetic material. But the advance of applied science simultaneously exposes human beings to ever increasing risk of genetic damage which may be transmitted to subsequent generations. Though mutations are not an invention of modern radiology, pharmacology, or atomic physics, these sciences have imposed an unprecedented degree of liability to genetic abnormalities upon the human species while medical science has developed methods for keeping many of these victims alive. Confronted by the prospect of frequent and severe, artificially induced disruptions of basic potentialities, we are forced to take refuge in the problematic concept of normal human endowment.

The specter of the ideal type is the main obstacle to introducing an account of normal human endowment into political theory. Hitlerian fantasies of blue-eyed, blond, stalwart devotees of Nazism cloud our objectivity with regard to this concept. But our approach to these matters will obviate such reservations. For we propose to conceive of normal endowment solely in terms of capabilities that concern action.

Fixed and stable properties provide the nexus through which a person conceives a fundamental part of his

self-image, that which distinguishes him from the rest of his physical environment. These kinds of properties--the selection that is represented and the way in which the elements are combined--give each person an identity as an entity among others. In contrast to this, capabilities primarily bear on a person's identity as an agent because they are associated with two characteristic types of experience, namely satisfaction and deprivation.¹² These basic experience types may take a variety of forms including self-fulfillment, contribution, repression, and self-sacrifice, but the crucial thing to notice is that such experiences link capabilities with action. They bridge the gap between what people are and what they do. For changes in fixed or stable properties to give rise to action, they must operate indirectly by activating a sympathetic capability.

Because capabilities are the basis for agency, they can be relevant to rights. Rights provide justifications for acting or for demanding that others act. A right protects or promotes the realization of certain capabilities if the person who possesses it chooses to exercise it. Accordingly, a capability can be relevant to a right by

¹²Notice that our distinction between fixed and stable properties, on the one hand, and capabilities, on the other, is not the same as the distinction between occurrences and dispositions. Stable properties, like hair color and rigid bones, are functions of dispositions. Capabilities are themselves dispositions; however, they constitute a distinct kind of disposition as specified above.

virtue of being the reason or part of the reason for acknowledging the right. The need for food and vulnerability to starvation are relevant to a right to adequate nourishment in this sense. But capabilities can also be relevant to rights in a less obvious way. Capabilities that are necessary for agency can be relevant to rights because they are necessary for making use of rights. These capabilities enable persons to participate in the moral universe. For Locke, rationality is one such capability.

No fixed or stable property can be relevant to a right in either of these ways. Consider the property of having at least one functional eye. If this property is connected with any rights, it is because sight ordinarily plays a crucial role in the realization of various human capabilities and these capabilities are thought worthy of the kind of protection afforded by rights. Since the property of having at least one blue eye plays no similar role with respect to capabilities, it is hard to imagine any but labyrinthine connections between it and any rights. Fixed and stable properties can only be relevant to rights through the mediation of capabilities. Thus, our conception of normal endowment can ignore them without loss and can focus exclusively on potentialities for developing capabilities.

Though it may be said that any genetic coding represents a potentiality--whether for blue eyes, a height of six feet, a need for food, or a desire to help others--some of these give rise to fixed or stable properties while others provide for responding to environmental stimuli and initiating action. The danger in talking of normal endowment lies in specifying what is usually a self-serving set of fixed or stable properties and requiring that individuals match this morphological type in order to be considered normal. In talking of normal endowment in terms of capabilities, we cannot fall into this trap.

Unlike fixed or stable properties, human capabilities that concern action are elusive partly because they provide for a range of possible experience or conduct.¹³ Since they are manifested in various ways depending on circumstances as well as on the individual's own inclinations, it is impossible to enforce rigid standards for their operation. If we set a fairly high standard of intelligence, we will find that everyone who ostensibly meets it will occasionally succumb to foolishness in practice. Similarly, we cannot legislate in advance precisely how character traits are to be realized in action because we cannot foresee all of the options with which circumstances

¹³ Gilbert Ryle aptly describes these capabilities as "indefinitely heterogeneous" in The Concept of Mind (New York: Barnes and Noble, Inc., 1949), p. 44.

may present us. Even perceptual apparatus defies standardization except superficially. For it is not top-notch sensory equipment that is at issue but rather a person's awareness of his surroundings, and this depends to a large extent on consolidating and interpreting information regardless of how it is obtained and in what form. Because human capabilities are not directly observable and their manifestations cannot be neatly measured or classified, we are compelled to accept a wide range of experience and conduct as normal.

Human capabilities with regard to action are just too complicated to lend themselves to arbitrary discriminatory patterns. And fortunately, they are the only characteristics we need to consider because fixed and stable properties have no direct bearing on rights. By eliminating fixed and stable properties from our account of normal endowment, we dispense with the major moral objection to the concept of normal endowment. Once this is done, the issue reduces to a factual question about what potential to develop capabilities people ordinarily have and, indeed, need in order eventually to conduct their lives autonomously. Accordingly, we will say that the qualifications for natural rights must be such that every normally endowed human being will have the potential to meet them.

Still, a lingering uncertainty about what is meant by a potential with which every normally endowed human

being starts has yet to be confronted. A comparison between two cases will bring out the problem. Suppose that a greedy medical researcher developed a technique for implanting a supplemental brain device that would enable anyone willing to submit to the surgery to achieve an IQ score of 190. Could we, then, say that all human beings start out with the potential to have an IQ of 190? Once again, suppose that an educational program has been devised through which every normally endowed child can achieve a degree of competence (measured by some suitable intelligence score) adequate for independent existence. Could this level of intelligence be allowed as a qualification for a natural right? Both of these cases are somewhat suspect because they involve intervention in the natural course of events, but the second is less dubious than the first. The reason for this is that educational programs are methods for cultivating natural endowments; whereas, surgical intelligence grafting would be a method for changing a person's natural endowment altogether.

These cases compel us to decide whether or not any form of interference with the development of potentialities is admissible with regard to qualifications for natural rights. If we refuse to allow any qualification that presupposes educational interference with development, we must view people as if they were no different from animals for purposes of appraising their qualifications for natural

rights. This would severely reduce the kinds of natural rights that human beings could have. Among others, there could not be a natural right to liberty because education is needed for people to learn to keep their exercise of this right within tolerable bounds.¹⁴

Education fosters the emergence of capabilities that the student is presumed already to possess in the form of potentialities as opposed to transmuting his innate potentialities. For this reason, it may figure in the qualifications for natural rights without opening the door to bizarre metamorphoses. Thus, the qualifications for conditional possession of natural rights must depend upon potentialities with which all human beings are naturally, as well as normally, endowed, although development of these potentialities through education may be required for actual possession of these rights.

Insisting that the qualifications for natural rights be such that any human being could conditionally possess the right by virtue of natural potentialities that human beings normally have rules out those qualifications that are morally arbitrary with respect to natural rights because, in principle, they exclude some normally endowed people from actual possession of natural rights. Still,

¹⁴In Sections 1-3 of this chapter, we examined several accounts of the right to liberty that made no appeal to educationally induced curbs and discussed some of the resulting difficulties.

this requirement does not guarantee that the qualifications attached to a right will be morally relevant. For instance, the ability to reproduce could be included among the qualifications for the right to life, and nothing we have said would necessarily call it into question. Our criterion for moral relevance only deals with the grossest abuses concerning the qualifications for natural rights. It remains possible to draw distinctions among people that have no genuine bearing on a right and to incorporate them into the account of the right without defying our criterion.

Which qualifications are morally relevant to a right depends on what the object of the right is. Largely because of the enormous variety of things that may be objects of rights, it is impossible to formulate a single test of relevance applicable to all rights. Our impulse is to say something like: the attributes mentioned in the qualifications must be necessary conditions for exercising the right or for benefiting from exercising the right. However, the idea of a necessary condition is much stronger than the idea of relevance. For example, it is arguable that Locke's rationality qualification is morally relevant to the right to life, but it is clearly not a necessary condition for exercising or for benefiting from exercise of the right. In order to maintain a concept of moral relevance that does not arbitrarily exclude appropriate proposals for qualifications, we are finally

obliged to leave the most difficult decisions about moral relevance to argument and good judgment.¹⁵

7. Species and Natural Rights

We have pointed out some disadvantages attendant upon accepting natural rights that are universally actually possessed within a subset of the class of human beings. All of the problems we have found in this connection revolve around the question of moral relevance, and this concept ultimately resists explication in terms of mechanical decision procedures. Nevertheless, we have succeeded in obtaining a negative test for the moral relevance of qualifications for natural rights. Although this criterion

¹⁵It is worth noting that the criteria for moral relevance offered by Marcus Singer and R. M. Hare are seriously flawed. Singer contends, "Hence what is relevant in one situation must be relevant in all similar situations." (Generalization in Ethics (New York: Alfred A. Knopf, 1961), p. 138) Hare also holds that allegedly relevant differences can be shown to be relevant or not by applying the test of universalizability. (Freedom and Reason (London: Oxford University Press, 1963), pp. 215-219) Construing their positions in terms of the qualifications for rights, we would get the following rule: a qualification is morally relevant to a right if and only if it is acknowledged that the qualification must be met by anyone who actually possesses the right. But, imagine a person who believes that the fundamental purpose of life is to reproduce the species. Surely, his willingness to agree that he too ought to be denied the right to life if he becomes sterile is not sufficient to show that the ability to reproduce is a morally relevant qualification with respect to the right to life. Universalizability is a better test of sincerity and depth of conviction than it is a test of moral relevance. Though a qualification that is not universalizable cannot be a qualification for a natural right, the fact that a qualification is universalizable does not show that it is morally relevant to a natural right.

cannot quell all doubts about the acceptability of natural rights that are not actually possessed by all human beings, it does rule out many of the most objectionable violations of fundamental principles of equity in this regard. Now we need to consider the matter from a different viewpoint. Instead of asking how we can be sure that natural rights that are universal with respect to a subset of the class of human beings will not violate the principle that like cases ought to be treated alike, we need to ask how this form of universality upholds this principle.

We can begin to see the advantage in accepting a restricted account of universality by examining the alternative. We are inclined to suppose that natural rights must be universally actually possessed within the domain of human beings because we assume that equity is assured once we have tied universality to the species. But universal actual possession within the domain of human beings does not make much sense as a necessary condition for natural rights just because it encompasses too diverse a group. Mere membership in a species is surely not relevant to the possession of rights. This becomes considerably more obvious if we stop thinking about members of the human species and reflect on some other species, like gophers and robins. Let us grant for the sake of argument that animals can possess rights and then ask on what grounds they might possess some right.

Suppose that most gophers have a right to a burrow because digging a burrow is the normal gopher's natural way of providing himself with shelter. Along the same lines, suppose that robins have a right to a nest. Now, we can ask whether membership in these species is the basis for our attribution of rights. Would we, for example, attribute a right to a burrow to a mutant gopher who instinctively climbs a tree and constructs a nest of twigs and leaves? Obviously, if we are going to grant this creature a right of this sort, we should make it a right to a nest despite the fact that he is a gopher. Evidently, the properties that usually characterize gophers, not gopherhood, would constitute the basis of our attribution of rights to gophers. In general, the widespread need among animals for shelter and for a place to give birth to and protect young is what stirs us to consider granting rights to burrows or nests to these animals; and in particular, the normal shelter building propensities of a given species is what inclines us to grant a right to a definite type of shelter to most, if not all, members of that species.

The biological definitions of species are too sparse to provide us with the information we need to establish conclusions about rights possession. We need to know about the capabilities of the individual members of the species before we can decide how a right should be distributed. Our tendency to think in terms of species

reflects the fact that there are characteristics that the vast majority of the members of each species share. However, it is a mistake to let this observation turn into a dogma to the effect that natural rights must be identified with species membership as opposed to the attributes normally possessed by the members of the species. If there are individuals who satisfy the biological definition of the species but cannot satisfy demonstrably relevant qualifications for a natural right, though most members of the species to which they belong are able to satisfy these qualifications, we do no one an injustice in refusing to grant this right to these individuals.

Once we recognize that natural rights are predicated upon capabilities and that the range of these capabilities may not coincide with a species, we can see how natural rights that are not universally actually possessed within the domain of human beings serve the principle that like cases ought to be treated alike. In setting out a list of natural rights and the qualifications for them, we need not limit ourselves to protecting whichever capabilities constitute common denominators for the human species. When we set about looking for attributes shared by every member of the human species, we are apt to settle on ones that characterize most living things or, at any rate, most mammals. There are not many attributes that characterize every human being (infants as well as adults), and those

that do turn out to be so basic that they extend to similar forms of life as well. Respiration, the ability to register signs of neural activity, and the need for nourishment may satisfy the requirement of attributes shared by all human beings, but all goldfish share these attributes, too. As a result, reliance on capabilities that characterize all human beings as qualifications for natural rights precipitously diminishes the force of natural rights in moral deliberation.

To illustrate this point, we will recall two accounts of the right to life to which we have already alluded. Locke holds that the capacity for rationality and vulnerability are necessary and together sufficient conditions for actual possession of the right to life, and we improvised an account that says the capacity to register signs of neural activity and vulnerability are necessary and together sufficient conditions for actual possession of the right to life. Compare the role of these two rights in the deliberations of a person who must decide whether to kill an average goldfish or an innocent, normally endowed, adult human being. Locke's version is decisive, whereas our imaginary version leaves the issue unresolved. Admittedly, Locke's account may decide matters on the wrong grounds, but, at least, he seems to be on the right track.

The trouble with founding the right to life on a capability that represents a common denominator for the

members of the human species is that it will not turn out to be a capability that we have compelling reasons to protect. The ability to register signs of neural activity may seem consequential when we consider the Quinlan case, but if so, this is because we take this ability as a sign of other potentialities that are known to characterize her species. The triviality of this capacity taken by itself becomes evident when we notice that she shares it with goldfish as well as with other people. No doubt there is a good deal to be said on behalf of goldfish, but their virtues are quite distinct from any attribute they happen to share with humans. Indeed, what worse sort of speciesism could there be than the attitude that members of other species can only gain rights insofar as they resemble humans? There are better ways of handling the problems raised by the areas of overlap among species.

If we were to decide that animals other than human beings can have natural rights, we could grant these rights on the basis of qualifications appropriate to each species. Of course, it only makes sense to bestow a right to life on living creatures. And so some sign of life must be included among the qualifications. Still, this need not be the sole reason, or even the central reason, for acknowledging the right.

The mature members of each species may normally be endowed with capabilities that merit protection. These

can be given as the primary grounds for granting a right to life in each case. One advantage of this view is that the right to life could retain its power as a moral consideration. Because it would be granted to different creatures on the basis of different qualifications, the value of the capabilities mentioned in these qualifications could be appraised and used as a basis for assigning a degree of stringency to the right. This device would incorporate our intuition that a goldfish's right to life is less compelling than a human's into the accounts of their respective rights, and this refinement would prevent the moral force of natural rights from being dissipated by indiscriminate distribution.

In effect, what we have been saying is that the capacity to benefit from a right does not adequately explain the grounds on which it is attributed. This is obvious in the case of rights that are generated by transactions. If a person, P_1 , agrees to pay another person, P_2 , \$10 for ten bales of hay, P_2 gains a right to \$10 from P_1 . P_2 's neighbor, P_3 , who happens to need \$10 but who has no role in this bargain, cannot gain a right to P_1 's payment by virtue of the fact that he would benefit more from having the money than P_2 , who is too rich to notice \$10 one way or the other. Since P_3 is not a party to the agreement, he has no claim on P_1 's money unless he can establish such a claim on independent grounds. Still, an implicit

assumption that the capacity to benefit from the right is a compelling reason to acknowledge actual possession of the right lies behind many recent discussions of natural rights.¹⁶

That this assumption overlooks a basic feature of the way rights function in moral discourse can be seen if we examine an extreme case. Imagine a small patch of gray living stuff that hovers ten feet above the roof of the White House. It has no impulses; it is self-sustaining; it neither eats, drinks, breathes, nor excretes. Since it does nothing, it has no ecological function. It merely occupies a small volume of space. All that it requires for continued survival is that no one crush it. Can it have a right to life? And if so, what would its status be?

The fact that it is alive renders granting a right to life to it intelligible. (We are ignoring problems about attributing rights to creatures that are in principle incapable of asserting their rights as well as incapable of respecting the rights of others.) Moreover, the fact that it is harmless improves its prospects. If it exuded lethal

¹⁶H. J. McCloskey construes the capacity to benefit in terms of interests. ("Rights," Philosophical Quarterly 15 (1965): 125-126) Also, Robert Nozick's discussion of the treatment of animals implicitly appeals to the ability of animals to benefit from what he calls stringent side constraints which are constitutive of rights (Anarchy, State, and Utopia (New York: Basic Books, 1974), pp. 35-42). For an illuminating general discussion of the relation between rights and benefits, see David Lyons, "Rights, Claimants, and Beneficiaries," American Philosophical Quarterly 6 (1969): 173-185.

quantities of poisonous fumes, we would refuse to grant it a right to life for the same reasons that we allow the victim of a human assailant to violate his attacker's right to life. But what can be said in favor of granting the gray patch a right to life? It might be pointed out that it nicely complements the architecture of the White House, but the aesthetic purpose could be accomplished just as well by an artificial replacement. Similarly, its symbolic function as an ever-present cloud suspended above the White House could be performed by a lifeless imitation if it were thought desirable to prolong the joke. If the gray patch had any minor ecological function for which it needed to be alive, we would be able to adduce that in support of securing its life. But because it is inert, it is impossible to conceive of any grounds for supposing that it has a right to life.

Our bit of gray life is a borderline case because no reason can be found to justify granting it a right to life beyond the fact that it is alive. It would be the most expendable form of life if it existed. Consequently, its right to life, if we attribute one to it, is a borderline case of a right. A right to life would afford the patch of gray almost no protection because any reason at all would be sufficient to override it. The patch of gray is at the vanishing point of the spectrum of living things, and its right to life balances at the point where rights

fade into non-rights. The force of a right in moral deliberation depends on the reasons for granting the right over and above the capacity of its possessor to benefit from the right: the more compelling the reasons, the more stringent the right.¹⁷ Just as different kinds of right can have different degrees of stringency, so any given kind of right will have different degrees of stringency if it is attributed to different kinds of creature for different reasons.

Someone might object to our line of argument by saying that it subordinates rights to the needs of the community. In other words, if the patch of gray's right to life is as weak as we have claimed it is because the living patch of gray makes no contribution to the eco-system, what is to stop us from prorating the rights of persons to reflect the contributions they are capable of making? If we remind our objector that we have stipulated that the qualifications for natural rights must be such that any normally endowed human being naturally has the potential to meet them, he can reply that we must have imposed this requirement arbitrarily since it contradicts our view that the

¹⁷ This point is borne out by our belief that the likelihood that a person will misuse a right so as to harm himself does not constitute a sufficient reason for depriving him of his right. Our reasons for acknowledging his right apart from his capacity to benefit from possessing it block subsequent reconsideration of his possession of the right. A disappointing estimate of the benefits likely to accrue from an individual's possession of a right does not justify us in denying his right.

stringency of a right depends on the compellingness of the reasons for granting the right in a particular case. This objection focuses attention on the peculiar relation between natural rights and the individuals who possess them.

Natural rights establish a moral line of defense for individuals against two kinds of onslaught. They protect the individual from the designs of other individuals and also from the demands that might be made on him to help promote some conception of the common good. Although the primary function of these rights is to secure the individual's autonomy, this cannot be achieved if the distinctive attributes of individuals are taken as the basis for assigning a stringency rating to their natural rights. Paradoxically humanity must be viewed in the aggregate in order for natural rights to function effectively on behalf of the individual.

The value of an individual's distinctive combination of capabilities depends on historical conditions and on the special circumstances of his own biography. While we can say in general that physical endurance, intellectual perspicacity, emotional stamina, and subtle sensibility are desirable, individuals are not endowed with these capabilities in general. Rather, each is endowed with a definite configuration of them made up of different kinds and proportions of strengths and weaknesses in different

degrees.¹⁸ Precisely how desirable any given endowment is will be relative to the circumstances in which the individual finds himself.

There is no single ideal endowment. Under some circumstances maximal physical endurance or emotional stamina would be preferable to a high degree of development in other faculties. In fact, it is easy to imagine situations in which great intellectual powers or acute sensibility would probably be handicaps. But there are also circumstances in which physical endurance or emotional stamina would be of minor importance or could prove to be liabilities. Thus, any particular mix of strengths and weaknesses will be appraised as more or less desirable depending on circumstances. Consequently, the stringency of an individual's natural rights would vary with circumstances if we were to link the stringency of these rights to the value of an individual's distinctive endowment. This would neutralize the protection afforded by natural rights since anyone bent on destroying another could manipulate circumstances so as to reduce the stringency of his enemy's rights thereby removing the moral obstacles to his plan.

In order to prevent natural rights from being

¹⁸ This is not to say that it is possible to delineate sharply the limits of a person's capabilities or to predict exactly how his capabilities will be realized. We are making a comparatively commonplace point to the effect that human capabilities are never unlimited and different persons have characteristically different capabilities.

buffeted about by such schemes, we must set qualifications for natural rights which concern capabilities the value of which is not subject to variable circumstantial impact. We can find such qualifications by looking at the normal potentialities of species and by disregarding the distinctive ways in which individuals manifest them. The basic capabilities that typify a species account for the timeless function (or functions) that the members of the species are capable of undertaking.¹⁹ If we adopt reasons at this level of generality for granting natural rights, we free them from circumstantial vicissitudes.

We cannot adequately account for natural rights by appealing to the most minimal qualifications, but we subvert natural rights completely if we go too far in the opposite direction. Natural rights have been traditionally associated with species because the concept of a species provides a resting place between the concept of a living thing which is so broad that it extends the equal

¹⁹Our distinction between permanently valuable and occasionally valuable capabilities is admittedly relative. If the universe were suddenly transformed into an Eden-like place, many of the capabilities we now prize would lose their value. But presumably there would be no need for a system of natural rights any longer. At the opposite extreme, if the universe suddenly changed so that it became impossible for any extant species to perform its allotted function, our system of natural rights would be thrown into disarray. Thus, the fundamental stability of the universe is a presupposition we must make in order to account for natural rights.

protection of natural rights indiscriminately and the concept of a unique individual which is so detailed that it thwarts the protective purpose of natural rights altogether. The concept of universal actual possession of natural rights based on qualifications that all normally endowed members of a species naturally have the potential to meet establishes an intermediate position which enables natural rights to retain their force in moral discourse without purporting to set up a definitive ranking of individuals.

8. Restricted Universal Actual Possession as a Necessary Condition for Natural Rights

In adopting the requirement that natural rights be universally actually possessed within a subclass of the class of humans and, in conjunction with this, insisting that actual possession of these rights be based on qualifications that any normally endowed human naturally has the potential to meet, we leave the domain of universality dependent on which qualifications are determined to be morally relevant with respect to each right. By allowing the domain of universal actual possession to be restricted in this way, we disentangle the concept of universality from the concept of a species and tie it instead to capabilities pertaining to action that warrant protection. This approach prevents the forcefulness of natural rights claims from being diminished by an inappropriately

extensive distribution of natural rights. In our preceding discussion of these matters, we have alluded to some aspects of the problem of attributing natural rights to nonhumans. In what follows, we will restrict our inquiry to the search for an adequate account of natural rights for normally endowed humans.

CHAPTER IV

ABSOLUTE RIGHTS

Discussions of absolute rights are fundamentally concerned with universality, but they take up this question from a perspective which is the reverse of the one we have been considering. Whereas we have been examining universality from the standpoint of rights possession, absoluteness introduces the possibility of universal respect for certain rights. The idea is that the combination of universal possession and unexceptionable respect will select out a group of preeminently important rights--rights which everyone has and which no one can legitimately disregard. This suggestion raises two problems. Initially, the puzzle about how there can be at least one right that always ought to be respected demands a solution. This problem can be handled either in terms of a special conception of the right or in terms of a suitably weak account of respect. We will consider both of these approaches. Beyond this, there is the ultimate question as to whether any version of absoluteness can serve as a criterion for natural rights. We will argue that absoluteness involves inescapable conceptual difficulties that preclude this function.

1. A Unique Absolute Right

The standard way of showing that the idea of absolute rights is conceptually incoherent is to construct a pair of cases in which two allegedly absolute rights conflict with each other and thereby force one to yield to the other. In each of the cases, a different right must prevail. Our admission that each of these rights ought sometimes to be overridden by another shows that neither of them is absolute. Invariably successful applications of this mode of criticism to candidates for natural rights status have stimulated some efforts to formulate a right that is not vulnerable to this kind of criticism.

E. F. Carritt offers a typical solution. He contends that there is only one absolute right in order to eliminate the possibility of conflicts arising between different absolute rights. Nevertheless, if everyone possesses this absolute right, different people will be able to make conflicting demands based on this right unless obviating qualifications are built into it. Carritt's two formulations of his unique absolute right both incorporate such qualifying clauses. His right of all persons to be treated as persons, i.e., to have their claims considered provided they behave as persons should, merely assures individuals whose behavior meets unspecified

standards that their claims will be fairly appraised.¹ This seems to be the kind of thing that can be provided under any circumstances since what counts as satisfactory behavior and what counts as a fair appraisal depend in part on the circumstances in which these issues arise. Criteria for satisfactory behavior and for fair appraisals of claims can be relaxed or tightened in response to circumstances, and this sort of adjustment can be used to settle apparent conflicts between persons who are both asserting the same absolute right.

In a later book, Carritt gives a somewhat different account: the right to equal treatment in like circumstances.² This proposal leaves open the notorious question as to which circumstances are relevantly different. Obviously, any two situations differ in some respects; otherwise, they would be indistinguishable. The problem is to decide which, if any, of those differences ought to be allowed to influence the outcome. But Carritt does not tell us how we are to deal with this problem. He does not supply criteria for relevant differences, nor does he supply a method for ascertaining what effects various differences ought to have. Evidently, absoluteness can only be retained

¹E. F. Carritt, Morals and Politics (London: Oxford University Press, 1935), pp. 187-188.

²E. F. Carritt, Ethical and Political Thinking (London: Oxford University Press, 1947), p. 79. Richard Wasserstrom, also, claims that this right is absolute. ("Rights, Human Rights, and Racial Discrimination," p. 117)

at the price of such extreme vagueness that we are left unenlightened with regard to what outcome the absolute natural right would impose in any real situation.

One consequence of adopting this approach seems to be the relegation of the sole natural right to the status of a procedural principle and the concomitant denial of its status as a substantive moral claim. But such procedural principles are vacuous until we know what sorts of claims are to be recognized for consideration or what sorts of circumstances are to be weighed into the decision. Our willingness to accept either of Carritt's proposals must wait on answers to these questions lest we find ourselves insisting that some pathological killer's self-proclaimed right to perform ritual murders on unwary citizens or some despot's alleged right to violate the law when convenient be given serious judicial consideration. This suggests that our conviction that these procedural principles ought to be followed rests on our prior adherence to the substantive principles in adjudication of which the procedural principles are to be applied.³ In denying that

³J. P. Plamenatz criticizes the absolute right to consideration along similar lines. (Consent, Freedom and Political Obligation, pp. 85-86)

any absolute right is constitutive of the class of natural rights, Carritt accepts this argument.⁴

On closer inspection, it appears that a list of the rights that absoluteness was supposed to pick out would provide a partial answer to the question as to which claims ought to be given standing with respect to Carritt's procedural rights. But, if this is so, we haven't gotten anywhere by seeking a unique absolute right because that right only reiterates the original problem, namely that no substantive right is impervious to infringement as a result of conflicts with other rights. Carritt's absolute right amounts to nothing more than a ground rule for deciding between conflicting substantive rights. But again, we must find a way to decide which rights to take seriously and on what grounds before we can be confident that implementation of this procedural principle will not yield unacceptable results.

Before we leave the subject of absolute procedural rights, we should note how this conception might be used to

⁴In his discussion of the right to be treated as a person, Carritt remarks, "So the formula does not, As Kant thought, justify the responsibilities we generally recognize, but presupposes them." (Morals and Politics, pp. 187-188) Though there may be an absolute right to be treated as a person or to equal treatment in like circumstances and such a right may have a profound impact on the solutions we find for controversial moral and political issues, it is important to recognize the limitations of a right of this sort. A procedural principle formulated as a right cannot be the only natural right; and consequently, we cannot extract an account of natural rights by studying such a right.

expand the purview of natural rights. It might be suggested that any rights that can be deduced from the procedural principle in conjunction with relevant facts should count as natural rights. For example, if the right to equal treatment in like circumstances is understood to entail a right to equal shares in the benefits accruing from social cooperation and economic conditions are favorable, the result might be a natural right to paid holidays or to medical care. The hope, here, is that some measure of the universality of the original right will somehow filter down to any rights derived from it.

Though there is nothing wrong with this procedure as a sketch of how many rights might be explained, it is counter-productive to admit whatever rights can be obtained through this or similar procedures as natural rights. By the same token, if the right to equal treatment in like circumstances is understood to entail a right to compensation commensurate with services rendered and George has taken care of Mary's cat for a week, then George would have a natural right to Mary's cat-sitting services when it is his turn to go on vacation. Whereas rights to paid holidays and medical care looked like they might be acceptable as natural rights, George's right to Mary's reciprocation clearly is not.

The trouble with this approach is that it obliterates the distinction between rights that people have

because of what they are and rights that they have because of what they have agreed to or done. Once this distinction is gone, the distinction between universal actually possessed rights and non-universal rights disappears, too. The concept of universality cancels out because we have removed the peg on which it hangs.⁵ We are left with a universally applicable procedural principle and its innumerable consequences in assorted circumstances at various levels of generality. But, we lack any basis for identifying some of these results as natural rights while rejecting others.

The idea of a unique absolute right is inadequate as an account of natural rights in two respects. On the one hand, the only rights that can survive as absolute rights are vague procedural principles, and we cannot accept such principles without first learning how they will be implemented. On the other hand, a unique absolute right cannot be used as a premise from which natural rights can be deduced because all sorts of rights can be obtained in this way and there is no way of telling which are the natural rights.

2. Prima Facie Rights

Recently, challenges to the viability of natural rights have taken a form different from the one we outlined

⁵For an analysis of universality in terms of potentialities and capabilities, see Chap. III, Secs. 6-8 above.

above. As we have seen, those earlier critiques encouraged a misguided search for a single universal absolute right. More importantly, they led to a new analysis of the status of rights. Frankena, following Ross's account of duties, divided rights into prima facie rights and actual rights.⁶ According to Frankena, a person has a prima facie right to x if and only if he has an actual right to x unless someone's (it can be another of his rights or someone else's) stronger prima facie right overrides it. A person retains his prima facie right even when his actual right is denied. Thus, Frankena's analysis of rights opens up the possibility that some prima facie rights are absolute, though no actual rights are. Consequently, objections to absolute

⁶W. D. Ross, The Right and the Good, pp. 19-20 and W. K. Frankena, "The Concept of Universal Human Rights," pp. 196-200. Bernard H. Baumrin elucidates Ross's view in "Prima Facie Duties," The Journal of Philosophy 62 (1965): 736-739. Also, Richard Brandt gives a version of this analysis of the status of rights, but he contrasts the expression 'prima facie right' with 'absolute right.' (Ethical Theory (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1959), p. 438) This terminology has its advantages, e.g., it does not suggest that a prima facie right is not really a right; however, since it would only confuse matters in the present context, we will adopt Frankena's language. Finally, we should note an asymmetry between Ross's concepts of a prima facie duty and an actual duty and Frankena's concepts of a prima facie right and an actual right. According to Ross, an act's status as a prima facie duty is a consequence of "some one component in its nature," while its status as an actual duty is a consequence of "its whole nature and of nothing less than this." (The Right and the Good, p. 28) Although an act of respect for a right could be characterized in this way, the right itself could not. A right's status as an actual right depends on its nature as a right but also on surrounding circumstances and the moral considerations to which these circumstances give rise. Thus, the concepts of a right action and a right are not perfectly congruent.

rights need to be aimed at absolute prima facie rights, rather than at the more vulnerable target provided by actual rights.

The obvious strategy for attacking absolute prima facie rights is to produce an acknowledged right that cannot always be respected even as a prima facie right. The so-called social ideal or manifesto end of the moral rights spectrum supplies plausible examples. One is the right to paid holidays. The fact that it only makes sense for workers to assert this right in economic systems that are profitable enough to sustain such practices raises doubts about the status of this right where its recognition would lead to the collapse of a shaky economy. If we say that it remains a prima facie right, it can still be asked how this prima facie right can be respected when corresponding policies cannot be implemented. The possibility of some sort of universal respect is required for a prima facie right to qualify as absolute. Especially in circumstances so remote from those required for the realization of a social ideal that we cannot reasonably expect it to figure into the decision-making process in any efficacious way, it is hard to see what respect for such a right could mean.

Before we attempt to explain how a distant social ideal might be respected, it is worth noting that the problem posed by this kind of right is not entirely foreign to classic natural rights doctrine. Social ideals are

peculiar rights (assuming that this is not a misnomer) because they don't seem to require respect until a certain stage of social and economic development has been attained. Along similar lines, we find that Hobbes's and Locke's natural rights are not operative in the state of nature unless specified social and economic conditions are met.

In Hobbes, it is just in case there is no sovereign to enforce agreements along with a scarcity of needed commodities that everyone has a natural right to everything.⁷ In Locke, natural rights cannot govern conduct in the state of nature unless each person's survival is compatible with everyone else's; here a certain degree of abundance makes it possible for people to enjoy their natural rights in the absence of institutionalized coercive powers.⁸ Of course, Hobbes and Locke each thought he was simply giving an accurate description of the conditions that would prevail in a state of nature, and this differs from proposing that social and economic conditions be manipulated to accommodate some proposed right. Nevertheless, it is clear that respect for natural rights depends on contingent social and economic conditions as well as on a definition of human nature in classic natural rights theories.

⁷Leviathan, pt I, chaps. 13-15.

⁸The Second Treatise Government, chap. II, par. 6 and chap. 5, par. 36.

Returning to the problem created by construing some rights as social ideals, critics regard this as a questionable solution because it seems to establish a category of natural rights that cannot be respected under some circumstances. If they are correct, they thereby prove either that absoluteness is not a necessary condition for natural rights or that social ideals are not natural rights. This is the weakness inherent in relying on an example taken from the far reaches of the rights spectrum. Still, the critical program represented by this approach is basically sound, and in what follows we will adapt it so as to point out more perspicaciously the problems involved in the concept of absoluteness.

We will begin by showing that it is possible for social ideals, indeed for virtually all rights proposals, to be respected if they are analyzed as prima facie rights. We will then present an account of absolute prima facie rights. If there are any absolute prima facie rights, it would be not only possible but obligatory to respect them under all conceivable circumstances. Since we agree that many social ideals do not require invariable respect as prima facie rights, we will switch to an appraisal of whether a right central to the natural rights tradition, namely, the right to life, can be satisfactorily construed as an absolute prima facie right. If there are circumstances in which this right may be justifiably violated,

then absoluteness cannot be accepted as a criterion for natural rights.

3. Respect for Prima Facie Rights

Whether social ideals can be analyzed as prima facie rights depends on what counts as respect for a prima facie right. Frankena provides minimal guidance in this regard. Nevertheless, it is clear that a prima facie right can be respected while its correlative actual right is abridged or denied.⁹ But, what would this respect consist of? In a later discussion of the prima facie rights to life, liberty and happiness, he says that interference in others' enjoyment of these rights "always requires a moral justification, that is, it is always wrong unless some other moral consideration outweighs its wrongness."¹⁰ This indicates that we can respect a prima facie right by being prepared to give a moral justification of our failure to respect the correlative actual right. In other words, where prima facie rights are at stake, it is sufficient to give them due consideration in the course of deliberation, and a person can show that he has given due consideration either by respecting the correlative actual right or by

⁹W. K. Frankena, "The Concept of Universal Human Rights," p. 197.

¹⁰W. K. Frankena, "Natural and Inalienable Rights," pp. 229-230.

producing a moral justification for his decision to violate the correlative actual right.

We are left with the question as to what constitutes a satisfactory moral justification in this context. But our present purposes require only that we determine whether it is possible to give moral justifications for ignoring social ideals in practice. Therefore, we will restrict our inquiry to this more manageable question.

The type of justification Frankena contemplates-- P_1 's (where P_1 may be an individual or a group) prima facie right to x should not be respected because P_2 's conflicting prima facie right to y (where x and y may be identical) is stronger--is suitable for handling the kind of case in which circumstances force us to choose between realizing different parts of a complex social ideal. For example, if a society is able to provide paid holidays for workers on the condition that it ceases to provide unemployment benefits for laid-off workers, it would be proper to argue that the right of the unemployed to minimal temporary support is more stringent than the right of workers to paid holidays and consequently the former ought to take precedence over the latter. This kind of case poses no difficulty for Frankena. Indeed, it seems to be just the sort of thing he has in mind.

Another kind of case does not seem to fit into Frankena's schema so neatly. It is not certain what he

would do with cases in which circumstances render social ideals distant, virtually unapproachable dreams as opposed to problematic, but plausible goals. In this kind of case, due consideration of social ideals would seem to consist of no consideration at all because speculation about such rights could only be idle. Here, the level at which moral justification is required must be one step prior to the level at which it is required in cases of the kind considered in the preceding paragraph. Instead of justifying a choice between prima facie rights, preliminary elimination of a prima facie right from consideration must be morally justified. Such a justification could take the form-- P_1 's (where P_1 may be an individual or a group) prima facie right to x ought to be ignored because we are not yet capable of according full respect to P_2 's (where P_1 and P_2 may be identical) much stronger prima facie right to y .

Here, we are not confronted by an assortment of conflicting options amongst which we are obliged to choose because circumstances will not permit us to realize all of our goals simultaneously. Rather, we are faced with the temporary impossibility of realizing some of our goals and therefore the obligation to set them aside in order to attend to immediate, pressing needs. It is this decision to ignore a social ideal for which our second model of moral justification is designed. If Frankena can accept this model (and there does not appear to be any reason for him

to reject it), we can account for legitimately ignored social ideals as extremely weak prima facie rights, ones that are in the running only long enough to be excluded. Accordingly, we can conclude that it is possible for even the most utopian rights to be respected provided that we understand them to be prima facie rights.

Although it is clear that refusals to consider social ideals in the process of deliberation can be morally justified, the kind of justification sketched above leaves one wondering why legitimately disregarded social ideals should even be granted the status of weak prima facie rights. If a right is so weak under certain circumstances that it deserves no attention whatsoever, can it have any strength? Is it only rights that ought never to be respected that have no strength? This appears to be Frankena's position. As long as there are conceivable circumstances in which a right could be respected without violating any stronger rights and there is someone who could satisfy some need or desire by exercising the right, Frankena's conception of prima facie rights will encompass it. Thus, any person can be presumed to have innumerable prima facie rights many of which others will probably never be obligated to respect.

It is worth noting that it makes no difference whether we construe prima facie rights as occurrences which may or may not demand respect depending on the circumstances

in which they are asserted or dispositions which may or may not be realizable as a result of the circumstances that obtain. We can say either that every prima facie right is a moral entity characterized by an appropriate degree of stringency or that each is a more or less compelling moral disposition that can be more or less easily barred from realization. The important thing is to analyze prima facie rights so as to make their different strengths intelligible.

On other grounds, the language of occurrences seems preferable. If we consider prima facie rights to be dispositions, we suggest that they are mere tendencies to become rights. To hold that prima facie rights are not really rights unless circumstances are constellated in the required manner is to confuse the distinction between prima facie rights and actual rights with the distinction between conditionally possessed rights and actually possessed rights. A person who conditionally possesses a right could meet the qualifications for the right, but he has not yet and may not ever meet them. He actually possesses neither a prima facie nor an actual right and, consequently, has no claim on the object of the right. If he meets the qualifications for the right, we can say that he actually possesses a prima facie right and that this right is an actual right except in the event of overriding circumstances. It is misleading to suggest that actual possession of a prima facie right may fail to guarantee the legitimacy of a

person's claim and therefore his moral standing with regard to the object of the right.

Frankena's position can be summed up in terms of three continua: degree of universality, degree of urgency, and degree of circumstantial impact.¹¹ The strength of a give prima facie right depends on the sum (perhaps a weighted sum) of its ratings on these three scales. The scales look like the following:

Degree of Universality--

0	10
No one could possess or exercise the right.	Everyone does possess and could exercise the right.

Degree of Urgency--

0	10
The right pertains to no needs or desires.	The right pertains to needs, the fulfillment of which is necessary for life.

¹¹That Frankena recognizes that rights may have varying degrees of universality is implicit in his contention that people have some rights simply because they are human ("The Concept of Universal Human Rights," p. 202 and "Natural and Inalienable Rights," p. 225) and in his apparent acceptance of Hart's distinction between general and special rights ("Natural and Inalienable Rights," p. 219). His appreciation of a spectrum of urgency is evident in his claim that any interest is a sufficient condition of a prima facie right though some rights are rights to "high order goods" (Ibid., pp. 227 and 231). Finally, Frankena entertains the possibility that there could be rights which have no corresponding circumstances in which they can be sensibly asserted, moral rights to a variety of benefits, prima facie rights to high order goods, and one absolute actual right to institutions that protect high order goods (Ibid., pp. 226, 219 and 231). He thereby sets out a range of circumstantial impact on rights.

Degree of Circumstantial Impact--

0	10
There are no circumstances in which the right ought to be respected.	The right ought to be respected in all circum- stances.

Frankena's view seems to be that any proposed right that obtains a rating greater than 0 on each of these scales qualifies as a prima facie right. This schematization of Frankena's account emphasizes how much the class of prima facie rights includes and how little it excludes. In effect, it reveals how much conceptual work the addition of the concept of absoluteness will be required to handle if it is to succeed in separating a select group of natural rights from the sea of prima facie rights.

Needless to say, Frankena does not think that every prima facie right is a natural right. Unfortunately, his main impulse seems to be to fall back on universality in order to draw the needed distinction. In his earlier piece, he distinguishes natural rights (he uses the term 'human' merely as a sign of meta-ethical neutrality) from other moral rights as follows:

A person has, it is said, a moral right to an act or forbearance on the part of others when it is the duty of others so to act or forbear (or wrong or unjust for them not to). I should myself accept some such definition of moral rights, and then go on to define a human right as a moral right which every person has

simply because he is human, whatever his race, creed or color.¹²

Obviously, Frankena is only sketching the rough outlines of his thoughts here, but he fills in these ideas a bit in a later article. There he says that traditional natural rights theories hold that having some non-ethical property which all people possess is a sufficient condition of having natural rights, and he mentions the capacities for choice, reason, happiness and unhappiness as examples of suitable non-ethical properties.¹³ Apparently, he agrees with those of his predecessors, who think that universality predicated upon some distinctively human trait suffices to delineate the class of natural rights.

In the preceding chapter, we examined some problems attendant upon relying on universality for this purpose. Here, we will add that it is notoriously difficult to tell what rights a person has by virtue of having any or all of the abovementioned properties. Furthermore, it is not at all obvious that natural rights alone depend on possession of these properties.

Frankena thinks that there are moral rights to have promises kept and to be told the truth, but he does

¹²W. K. Frankena, "The Concept of Universal Human Rights," p. 202.

¹³W. K. Frankena, "Natural and Inalienable Rights," pp. 224-225.

not think that these are natural rights.¹⁴ Locke asserts that "truth and keeping of faith belong to men as men, and not as members of society."¹⁵ If telling the truth and keeping promises are natural obligations, i.e., obligations founded upon human nature, then being told the truth and having promises kept are surely natural rights in the relevant sense. We will discuss Locke's reasons for excluding these rights from the class of natural rights later.¹⁶ Now, we must seek some basis for Frankena's exclusion of these prima facie moral rights from the class of natural rights. He toys with two potentially relevant dichotomies--general rights vs. special rights and absolute rights vs. non-absolute rights. We will argue first that Frankena cannot legitimately invoke Hart's concept of a general right and second that Frankena's concept of an absolute right won't work to draw the needed distinction.

4. Natural Rights as Prima Facie

General Rights

Problems arise at two levels if we attempt to handle the difficulty in delimiting the class of natural rights by appealing to Hart's concept of a general right.

¹⁴Ibid., pp. 218-219, 212, and 229-231.

¹⁵The Second Treatise of Government, chap. II, par. 14.

¹⁶See Chap. V., Sec. 1 below.

Initially, it appears that general rights must coincide with natural rights. Hart tells us that general rights are those "which are thought of as rights against (i.e., as imposing obligations upon) everyone."¹⁷ And Frankena says that natural rights are those correlated with the duties others have to a person simply because he is human.¹⁸ Evidently, Hart's general rights and Frankena's natural rights share the same degree of universality.

Still, to assume their equivalence would prove too much because Hart identifies general rights with liberties and explains that they "are asserted defensively, when some unjustified interference is anticipated or threatened, in order to point out that the interference is unjustified."¹⁹ On Hart's view, universal rights to have promises kept and to be told the truth, neither of which functions as a barrier to interference, are excluded from the class of general rights by definition. Frankena cannot accept this solution because he believes that some natural rights grant positive benefits like fair trials and social security.²⁰ He believes that these rights are necessarily universal,

¹⁷H. L. A. Hart, "Are There Any Natural Rights?" Philosophical Review 64 (1955): 183.

¹⁸"The Concept of Universal Human Rights," p. 202.

¹⁹"Are There Any Natural Rights?" p. 187.

²⁰"The Concept of Universal Human Rights," p. 192.

but they cannot be construed as liberties. For Frankena, the crux of the problem is to separate politically relevant rights from other formally similar rights; therefore, he cannot simply appeal to a distinction like the one between rights and liberties in order to separate natural rights from other moral rights.

Nevertheless, we will briefly pursue Hart's approach to find out what the outcome for Frankena would be if he were to identify natural rights with general rights. Since Hart admits only general rights and special rights, the moral rights to have promises kept and to be told the truth must be some sort of special right. Special rights "arise out of special transactions between individuals or out of some special relationship in which they stand to each other."²¹ For Hart, P_1 's right to have the promise P_2 made to him kept (where P_1 and P_2 are specified persons) is the paradigm case of a special right.²² But Frankena's rights to have promises kept and to be told the truth involve no mention of individuals.

The only classification in Hart's system that might admit our troublesome rights is the class of special rights founded on mutuality of restrictions. Hart says that these special rights arise as follows: ". . .when a

²¹H. L. A. Hart, "Are There Any Natural Rights?" p. 183.

²²Ibid., pp. 183-184.

number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission."²³ We might say that when a group of persons are engaged in mutually beneficial social intercourse, those who have kept their promises and told the truth thereby acquire special rights to have promises kept by other members of the group and to be told the truth by those same people; however, they hold these rights against no one outside the group.

Frankena cannot accept this account without conceding too much to Hart's system. Hart is prepared to say either that there is no right to have promises kept apart from those rights created by acts of promise-making or that this right is only possessed by members of a group who have kept their promises to others. Frankena does not agree to this radical conventionalism.

Frankena holds that the rule that promises ought to be kept is what justifies a person to whom a promise has been made in insisting that the promisor keep his promise, and he does not add any qualifications about the promisee's cumulative promise-keeping record.²⁴ Elsewhere

²³Ibid., p. 185.

²⁴"Natural and Inalienable Rights," p. 218.

he states, "Even though I think that no such rules [rules of action] are absolute, as Fletcher does, I do still believe, as against him, that some kinds of action are intrinsically wrong, for example, killing people and lying to them."²⁵ Breaking promises is roughly the same order of infraction as telling lies. Consequently, it is reasonable to suppose that Frankena would regard both kinds of action as intrinsically wrong though the rules proscribing them are not without exceptions. This is to say that, other things being equal, everyone ought to keep his promises and tell the truth to others and that others have a moral right to such treatment unless there are strong overriding considerations. Frankena believes, contrary to Hart, that those moral rights that are not natural rights are as universal as general rights, but do not take the form of liberties.²⁶

²⁵W. K. Frankena, *Ethics*, 2nd ed. (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1973), p. 55, parenthetical material mine.

²⁶It should be noted that Hart's position cannot tolerate the introduction of general rights that are not liberties because a general right is "a particular exemplification of the equal right to be free" which is itself a liberty. ("Are There Any Natural Rights?" p. 188). Hart's overall point would be lost if his system were adjusted to help out Frankena. Furthermore, this adjustment would only allow Frankena's problem to repeat itself within the category of general rights which, having been expanded to accommodate Frankena's moral rights, would then be unable to provide any solution to his differentiation problem.

5. Natural Rights as Absolute Prima

Facie Rights

Since Frankena cannot accept Hart's account of moral rights other than general rights without contradicting his own expressly stated views regarding the status of the moral rules that confer moral rights other than natural rights, he must rely on his concept of an absolute prima facie right to delineate the class of natural rights. Here, the difficulty lies in explaining what force the term 'absolute' could have when added to the expression 'prima facie rights.' Still, if this difficulty can be overcome and if absoluteness can be shown to be necessarily linked with those rights that concern morally fundamental goods, it will suffice as a criterion for natural rights. Natural rights would, then, be those moral rights that are universal by virtue of an exceptionless obligation to respect them.

Occasionally, Frankena writes as if he may be thinking that a suitable qualification of the notion of a prima facie right will do this job, but he never actually proposes any criterion. Still, his concept of an absolute prima facie right is suggestive despite the fact that the term 'absolute' seems at first glance incapable of curbing the force of the overpowering expression 'prima facie.' If a right is a prima facie right, it ought to be respected in the absence of overriding considerations, but it may never merit respect since overriding conditions may

constantly be present. All that 'absolute' seems to add to this conception is the requirement that failure to respect a prima facie right be morally justified, and this seems to be implicit in the overriding considerations clause of the original conception. At most, the term 'absolute' enjoins persons actually to justify their violations of absolute prima facie rights.

Taking a clue from the above result, we might say that natural rights are those the denial of which always may legitimately precipitate a demand for a morally convincing justification.²⁷ This is not to suggest that every person whose natural rights have been or will be violated either has demanded or will demand a justification, but only that any person in this position would be justified in demanding one. This account of absolute prima facie rights counterbalances the more common scepticism about there being any difference between a prima facie right and an absolute prima facie right inasmuch as it indicates a

²⁷Michael Walzer adumbrates this proposal in a discussion of the revolutionary's right to withdraw from the revolutionary enterprise. Walzer construes the problem as follows: other members of a political organization come to rely on a person as a result of his past active commitment; this pattern of expectations engenders a right to his continued participation; and yet, that person has a right to withdraw from the group if he can no longer accept its politics and his leave-taking will not endanger other members. Walzer resolves this conflict by saying that the person who intends to leave the group owes the other members an explanation of his decision and is obligated to listen to their response. (See Michael Walzer, Obligations: Essays on Disobedience, War, and Citizenship (New York: Simon and Schuster, 1970), p. 182.)

sense in which natural rights might prove to be more binding than other kinds of rights. Again, on our suggestion an absolute prima facie right would differ from other prima facie rights in imposing a duty of self-justification on its violators and in granting a corresponding right to be given a justification to the victims of violations.

It is important to notice that nothing would be gained if we were to say that violations of absolute prima facie rights must be justifiable in the judgment of an impartial observer. The trouble with this approach stems from the fact that impartial observers are either hypothetical creatures or the creations of a legal system. The latter alternative would explain absoluteness in terms of a judiciary and would thereby assimilate natural rights to legal rights. If we say that the justification of a violation of a natural right must be accepted by a court, we make the stringency of natural rights relative to the views of the judges who happen to be sitting at the time and place the case comes up and the rules that seek to insure impartiality that happen to be in force in the court that has jurisdiction over the case. This is unacceptable because it entails the absurd conclusion that Daniel Ellsberg's right to liberty and that of a Soviet dissident who has been repeatedly "hospitalized" for his opinions have been accorded equal respect. If we say that the justification of a violation of a natural right must be such

that a court should accept it, we are transforming the proposal into one about hypothetical observers.

We must now ask what we would be adding to the concept of a prima facie right in saying that violations of absolute prima facie rights must be justified from the standpoint of a hypothetical impartial observer. In practical terms, the best available approximation of the views of an impartial observer would be the conscientiously arrived at and sincerely held convictions of the individual who must decide whether or not to violate someone's natural rights. Of course, this person may be prejudiced or confused, but this is true of anyone to whom we could refer the issue. Thus, it turns out that satisfying an impartial observer that a violation of a natural right is justified, is, for practical purposes, the same as morally satisfying oneself that there are overriding considerations that justify the proposed violations.

As we have seen, violating any prima facie right requires the sort of justification sketched above.²⁸ Consequently, we must find someone to whom this justification is owed in order to distinguish absolute prima facie rights from other prima facie rights. Though the intended victim may be incapable of recognizing or accepting a reasonable

²⁸For a detailed account of how violations of prima facie rights can be justified, see Chap. IV, Sec. 3 above.

justification, it may nonetheless be the case that the violator of one of his natural rights is obligated to offer the justification to him. If there are any rights that cannot legitimately be violated unless the justification for the violation has been or will be presented to the victim, these rights would require a kind of respect beyond that required in connection with most prima facie rights and could be designated absolute prima facie rights.

Just as prima facie rights can be rated according to strength, so they can be appraised in terms of the stringency of the derived rights to be given a justification with which they may be associated.²⁹ There are two things to consider in this regard. First, do violations of a right always generate a right to be given a justification? And second, how stringent is the derived right? A pair of contrasting examples will clarify our suggested account of absolute prima facie rights.

²⁹For an account of the spectrum of strengths that prima facie rights may have, see Chap. IV, Sec. III above.

Consider two moral rights--the right to life and the right to charity.³⁰ Most people would readily grant that there are circumstances under which it is morally permissible to kill another person. There is disagreement about what those circumstances are--is it all right to kill a person to punish him for a crime or only to save one's own life when no other defense is available? But few would maintain that self-defense cannot justify a person's failure to respect another's right to life, and we will suppose that this is a defensible justification. In any case, it is important to notice first that there are

³⁰I am assuming Frankena's definition of a moral right which would allow the right to charity (see p. 108 above). It is not difficult to think of circumstances in which it would be morally obligatory to give charity. Any time a person is aware that someone else is being unfairly and severely harmed and the former can easily remedy the situation, charity loses its supererogatory character. Even if we assume a welfare state which underwrites the satisfaction of the basic needs of the members of the community, occasions can still arise in which charity is morally obligatory. For example, if person P_1 who has a full refrigerator and no one but himself to feed discovers his destitute neighbor P_2 suffering from advanced malnutrition and takes P_2 to the welfare office only to learn that bureaucratic details will delay P_2 's obtaining any benefits for several days, P_1 is surely obligated to feed P_2 in the meantime. Another kind of case concerns contributions to organizations that are working to correct injustices. It can be morally obligatory for a person who recognizes that a grave injustice is being committed but is unable to aid the cause in any other way to make a monetary donation to an organization that is engaged in effective efforts to stop the injustice. As long as we do not posit a utopian world in which no one is ever unfairly victimized or a wretched world in which no one is ever in a position to alleviate the misery inflicted on others, there will at least occasionally be persons and organizations that have a right to charity.

only a few justifications that anyone would accept, second that invariably unjustifiable violations are codified as crimes, and third that justifiable violations are subject to government review. Nothing is left to the individual's discretion with regard to the right to life because this right is so important that self-justification cannot be left to private conscience.

Compare this with the right to charity. It is only under special circumstances that someone who denies another person's or an organization's right to charity owes that person or organization a justification. No pedestrian on New York's 42nd Street is obligated to pause to explain each failure to honor the plethora of averred rights to charity. A person's assertion that his right to charity is being violated does not necessarily impose an obligation of self-justification on the accused violator. Consequently, an alleged violation of the right to charity cannot always give the self-proclaimed victim a right to be given a justification in the absence of some other form of satisfaction.

Still, it could be argued that an organization or a person whose right to charity has been violated does gain a right to be given a justification when harm can be expected to occur as a result of failure to respect this right. Even so, the stringency of this derived right will vary with the seriousness of the predicted harm and also

with the violator's ability to prevent it. A person who can only afford to contribute a penny toward eradicating world hunger oughtn't to feel guilty if he decides to keep his penny and refuses to justify his uncharitable behavior. One upshot of this is that the obligation to justify one's failure to give charity proves to be the exception rather than the rule, and the government accordingly provides only mild encouragement to donors.

Evidently, there are moral rights which we may violate only if we are prepared to justify our conduct or be punished, and at the opposite extreme, there are moral rights violations (or alleged violations) of which rarely require justification. Such rights establish the poles of a spectrum. Between these poles we find a continuum of moral rights. This continuum reflects the different degrees of stringency that characterize the derived rights to be given a justification that persons whose primary rights are violated may gain. The rights to have promises kept and to be told the truth seem to fall somewhere between the right to life and the right to charity.

It is doubtful that every deliberate failure to tell the truth or to keep a promise generates a duty to provide a justification and a right to be given a justification. When one person lies to another in order somehow to protect the other person, the purpose of the lie would be thwarted if the perpetrator were obligated to justify

himself to the person to whom he had lied. Furthermore, the liar may not be required to supply an honest justification for his conduct even after his lie has been found out, for there may be compelling grounds to misrepresent his original reasons. In many other cases, our sense that we owe someone a justification seems to stem from politeness rather than from morality. A case in point is our feeling that we must thoroughly explain why we cannot possibly keep a date when we call to break it. Apparently, lies can be told that obligate the liar never to reveal his reasons to the deceived person, and some promises can be broken without any moral justification.

Nevertheless, there are cases of lying and neglecting promises that do morally call for justification. When a person's failure to keep a promise does not merely disappoint, but positively harms another person, the latter is surely justified in demanding that the former account for his behavior, and only exceptional circumstances could excuse him from complying. Also, slanderous lies are thought to be sufficiently serious to warrant legal attention. Thus, it is clear that we treat some kinds of lies and failures to keep promises as minor discourtesies; other kinds are viewed as moral offenses and may generate quite stringent rights to be given a justification; and a select group of these moral offenses are given standing in the civil law.

These intermediate rights that span the gap between the right to charity and the right to life force a pair of decisions upon us. Are we to say that absolute prima facie rights are those which invariably yield derived rights to be given a justification? Or are we to limit ourselves to saying that absolute prima facie rights may yield such derived rights? Moreover, are we to characterize the rights generated by violations of absolute prima facie rights as prima facie rights or as actual rights?

We are obliged to say that violations of absolute prima facie rights always entitle the victim to a justification in order to avoid sapping the force of the term 'absolute' and rendering natural rights equivalent to moral rights. This identification would be unsatisfactory because it conflicts violently with ordinary usage, because it puts an end to the powerful political impact of natural rights claims, and most importantly because it is utterly incredible to suggest that every moral right must be incorporated into the foundation of political theory. Thus, any violation of an absolute prima facie right must generate a right to be given a justification.

This derived right cannot be a prima facie right. If it is an ordinary prima facie right, other considerations could override the obligation to respect it in which case the corresponding primary right might as well have been a non-absolute prima facie right, too. The position of a

person whose absolute prima facie primary right has been violated and whose derived prima facie right to be given a justification can legitimately be disregarded is no different from the position of a person whose prima facie right has been violated and who has no recourse of any sort.

We cannot make amends by claiming that the derived right must be an absolute prima facie right because this will only serve to initiate an infinite regress. If a person's primary absolute prima facie right is violated, he gains a derived absolute prima facie right to be given a justification for the violation; and if his derived absolute prima facie right is violated, he will gain yet another derived absolute prima facie right to be given a justification for this second violation, and so forth indefinitely.

The only remaining alternative is to say that the derived right to be given a justification must be an actual right, that is to say, a right that ought to be respected despite considerations to the contrary. But, we would only accept this position if we could satisfy ourselves that it will not rule out all of the candidates for natural rights status. Therefore, we need to inquire as to whether we will restrict the range of natural rights too harshly by saying that failure to respect a natural right invariably generates an actual right to be given a justification.

A brief digression will help to elucidate our handling of the problem of absolute prima facie rights. It

is worth noticing that the conclusion we have just obtained--that is, the derived right generated by a violation of an absolute prima facie right must be an actual right in order for there to be any distinction between absolute prima facie rights and prima facie rights--rules out any more powerful derived right than the one we have proposed.

We cannot, for example, say that a violation of an absolute prima facie right confers an actual right to resist on the victim since there are many situations in which we would say that the victim oughtn't to be allowed to exercise this right in deference to overriding considerations. When a person's resistance would almost certainly not succeed in preventing or rectifying the violation but probably would have calamitous consequences for many other innocent persons, we cannot allow that he nevertheless has an actual right to resist. The right to be given a justification may seem paltry compared with the magnitude of a violation of a natural right, but it appears to be the only candidate with a chance of succeeding as an actual derived right.

6. The Inadequacy of Absoluteness as a Criterion for Natural Rights

Are there any rights with corresponding inviolable rights to be given a justification for infractions? This is

to ask whether there are any absolute actual derived rights to such justifications. Violations of the right to life would seem to be the most promising source of absolute actual rights to be given a justification. However, this case is somewhat complicated by the facts that the victim is often not available to hear the justification after the violation has occurred and that the need for immediate action frequently precludes providing a justification prior to the violation. To evade these difficulties, we can say that the victim's derived right may accrue instead to a member of his family or to some concerned friend if necessary.³¹ But, even so is this right absolute?

Needless to say, only the most extraordinary, perhaps farfetched, circumstances could justify the violator of someone's right to life in refusing to supply a justification to concerned parties. Nevertheless, appropriate cases are conceivable. The most plentiful source of such cases involves the infliction of capital punishment under circumstances that require secrecy both before and after the event. However, in light of the fact that capital punishment is itself a questionable violation of the right to life, our case will be based on an act of killing in self-defense. Science fiction supplies another kind of example:

³¹The state could be included among the possible recipients of the justification if we understand the state to be receiving the justification on behalf of the victim, as opposed to obtaining it in order to secure social order or for some other social purpose.

because the nation's president has been possessed by an evil monster from outer space, he becomes determined to start a nuclear war and must be killed to prevent this catastrophe, but the reason for the killing cannot be made public for fear that the populace would panic upon discovering that their society had been penetrated by extra-terrestrial monsters. Still, since the supposition that monsters from outer space can take over human bodies is highly dubious, we will confine our example to the melodramatic genre.

Imagine a society with well-established traditions of democracy and protection for civil liberties. As a result of a severe and seemingly incurable economic depression, the country is racked by internal political agitation and social degeneration. Unbeknownst to anyone the nation's President is a compulsive killer who slips out every night to take another victim. Finally, while attempting to kill an army general, the President himself is slain. In order to prevent a widespread crisis of faith in democracy that would give the Vice-President, who has known designs on dictatorship, the perfect opportunity to execute his traitorous scheme, the general contrives to make the President's death look like the result of natural causes. The President's family correctly believes that the President was killed and that their right to be given a justification has been denied, but they can prove nothing.

For the sequence of events described above to succeed as a counter-example to the claim that every violation of any natural right generates an absolute right to be given a justification, we need four easily defended assumptions. First, if there are any natural rights, the right to life (or some close relative) will be among them. This is plausible because other rights would have little value without the right to life. Second, self-defense justifies violating the attacker's right to life. To deny this is to undermine any victim's right to life while paradoxically securing his assailant's right to life. Third, a false account of the facts pertaining to a violation of a right cannot legitimately be substituted for a justification of the event that actually took place regardless of whether or not it is believed. This is only to say that a person's rights can be violated without his realizing it, and this is obviously possible. Finally, we must grant that continued democracy and respect for civil liberties are more important than the family's right to be given a justification. And it is hard to see any basis for claiming that conduct aimed at preventing dissatisfaction and doubt suffered by a few individuals as a result of a lack of candor should supercede conduct aimed at ensuring the foundations of justice in the nation.

What the preceding discussion reveals is that the very problem that caused philosophers to give up the idea

of absolute actual primary rights simply reappears at the level of derived rights when absolute actual primary rights are replaced by absolute prima facie primary rights.

Ultimately, the trouble with appealing to absoluteness as a criterion for natural rights is that an absolute right just is a right that has no exceptions. This fact inevitably overtakes efforts to shift or limit the sphere in which absoluteness operates.

In the case of the account we have given of absolute prima facie rights, we find ourselves faced with the question as to whether the derived right to be given a justification must be an absolute actual right if the original right is to qualify as an absolute prima facie right. If we reject this requirement, we obliterate the distinction between prima facie rights and absolute prima facie rights and establish a vast, unwieldy and theoretically useless set of natural rights. If we accede to this new challenge, we end up denying that there are any natural rights because in at least one situation for every primary right compelling reasons for violating the derived right can obtain. The idea of an absolute actual derived right to be given a justification is as problematic as absolute actual primary rights since it is possible, as we have seen, to imagine circumstances in which the violation of the primary right is justifiable and yet violation of the derived right can be justified as well. Absoluteness

cannot work as a necessary or a sufficient condition for natural rights because the inescapable rigidity of the concept of absoluteness invalidates every conceivable application of this concept.

7. The Serviceability of the Concept of a Prima Facie Right

Before we continue our search for an account of natural rights, we need to compare two ways of construing non-absolute natural rights. Near the end of Chapter II, we outlined a method for formulating the objects of natural rights so as to confine the protection afforded by these rights to manageable proportions.³² The basic idea was to incorporate clear exceptions to the guarantees of the right into the formulation of the right. For example, we suggested that the right to life could be expressed as a right not to be killed by anyone who is not an enemy soldier engaged in battle with the person who possesses the right or the victim of an apparently homicidal attack perpetrated by the person who possesses the right. In effect, these qualifications of the object of the right acknowledge the acceptability of self-defense as a justification for killing another person. The same result can be achieved by saying that the right to life is a prima

³²See Chap. II, Sec. 6 above.

facie right and noting that self-defense counts as an overriding consideration. We need to appraise the relative advantages of these two approaches.

Including restrictions on when a right can be asserted in the concept of the right has the advantage of codifying a set of permissible infringements of the right. This device seems to reduce uncertainty about what the right grants, but it carries with it the disadvantage of suggesting that these are the only permissible infringements. Although we can construct rights that take into consideration familiar types of overriding circumstances, we will, nonetheless, be obliged to view these rights as prima facie rights since we cannot be sure that novel circumstances will not present us with new reasons to allow violations of the right. Despite their improved clarity, rights with built-in reservations can never attain the status of absolute rights. Thus, we cannot ultimately escape from the vagueness inherent in the concept of a prima facie right.

The advantage of minimizing the antecedent casuistic baggage attached to natural rights is that proposed violations of the rights must, then, be examined on a case by case basis. Starting with a rather broad formulation of a natural right prevents our decisions about permissible violations from becoming reflex reactions. By truncating the process of justificatory reflection, a comprehensive

treatment of the object of the right can blind us to unforeseen exceptions to the right's protection, or it can blind us to a gradual, unintentional expansion of the class of allowable exceptions. If we are compelled to probe the merits of individual cases because we lack handy formulas for facilely resolving problematic issues, the protection granted by natural rights will remain more stable and therefore more reliable.³³ Since natural rights provide a fundamental measure of security for the individuals who possess them, it is particularly important that they be formulated so as to reduce variability in their implementation. Accordingly, we will adopt a policy of excluding detailed specifications of permissible violations from our accounts of the objects of natural rights. Once we recognize that natural rights must be prima facie rights, there is no conflict between this approach to the problem of formulation and universal actual possession of natural rights.

³³This point is borne out by governmental appeals to well-entrenched exceptions to delude citizens into acquiescence. For example, American propaganda to the effect that our fighting in Vietnam was necessary for self-defense probably convinced some draft-age men that the draft's infringement of their liberty and the army's trifling with their lives was justified. A closer inspection of the situation at hand would have yielded different conclusions.

CHAPTER V

THREE ACCOUNTS OF INALIENABLE RIGHTS

In discussions of natural rights, the concept of an inalienable right is sometimes called upon to handle the problems left over by the concept of a universal right.¹ To recapitulate briefly, we found that the class of universal rights encompasses a wider range of rights than we are prepared to count as natural rights. Because both ridiculously inconsequential rights and rights which are so powerful that they are self-defeating can qualify as universal rights, we found it necessary to seek an additional criterion to eliminate such rights from the class of natural rights. We have seen that the concept of absoluteness cannot be used to draw the needed distinctions. We will now inquire whether a concept of inalienability can succeed where absoluteness failed.

In taking up the question of inalienable rights, a confusing ambiguity will enter our discussion unless we clear it up at the outset. In connection with rights, the term 'inalienable' can be used to assert either that

¹We will use the expression 'universal right' to refer to rights that are universally actually possessed within a restricted domain. This concept is given detailed treatment in Chap. III, Secs. 5-7 above, but for a summary, see Chap. III, Sec. 8 above.

no one could be justified in unilaterally voiding or otherwise encroaching upon another person's right or that no one possessing the right could consent to give it up. We have already considered the former meaning under the rubric of absolute rights. Now, we will only be concerned with inalienability from the standpoint of the possessor of the right. In what follows, an inalienable right will be one that cannot (in some appropriate sense) be relinquished by its possessors.

We will devote this chapter to a survey and critique of some major suggestions about how to interpret this definition. Included among them will be Locke's position and Herbert Morris's elaboration on it, Hobbes's account along with the similar one offered by Stuart Brown, and finally Martin Golding's innovative proposal. In subsequent chapters, we will present and defend our own interpretation.

1. Locke and Morris: The Distinctive Objects of Inalienable Rights

The basis for Locke's claim that some rights are inalienable is his belief that no one has the "power of his own life."² Apparently, people lack this power because they are "all the servants of one sovereign master, sent

²John Locke, The Second Treatise of Government, chap. IV, par. 23.

into the world by his order, and about his business--they are his property whose workmanship they are, made to last during his, not one another's, pleasure."³ This exemplifies fundamentally the same line of thought as Socrates' rejection of suicide in the Phaedo and as Aquinas's argument against suicide in the Summa Theologica. Always, the point is that the lowly recipients of God's gift of life have no right to destroy what he has bestowed upon them. For Locke, this entails that we have an inalienable right to life and also an inalienable right to liberty because consenting to slavery involves transferring power over our life to another person which is impossible since we don't have that power in the first place.⁴ Since some of the things that we obtain through labor are essential to life, it is easy to see why Locke considers the right to acquire property to be inalienable too.⁵ Morris sums it up in the following statement, "One stands, then, with respect to one's person as the nonowner of goods stands to those goods."⁶

Locke's interpretation of inalienability has
theological underpinnings, but it is hard to see what

³Ibid., chap. II, par. 6.

⁴Ibid., chap. IV, par. 23.

⁵Ibid., chap. V, par. 25.

⁶Herbert Morris, "Persons and Punishment," in Human Rights, ed. A. I. Melden (Belmont, Calif.: Wadsworth Publishing Company, Inc., 1970), p. 131.

reasons Morris might have for accepting the same interpretation. Instead of appealing to God's position relative to His creations, Morris says simply that the right to be treated as a person cannot be waived because the moral duties of others require that they refuse our permission to treat us like animals or to use us as instruments.⁷ This is merely Morris's application of the doctrine of the correlativity of rights and duties. If person P has an inalienable right to be treated as a person, then everyone else has a duty to treat P as a person; and likewise, if every person is prohibited from treating any other person as if he were not a person, then any given person P has an inalienable right to be treated as a person.

For this relation of mutual implication to work as an account of inalienability, there must be a rule that absolutely prohibits our treating others as nonpersons. If there are any circumstances in which we could be justified in violating another person's right to be treated as a person, we must wonder why the person whose right we intend to violate could not in principle agree to our proposed course of action. In light of the fact that Morris does acknowledge that there could be occasions that necessitate violations of this right, his appeal to moral

⁷Ibid.

rules that usually forbid such action does not explain why the correlative right is inalienable.⁸ In other words, since the duty correlated with Morris's inalienable right is a prima facie duty, his inalienable right can only be prima facie inalienable, which is to say that it is alienable.

Locke and Morris seem to have been snared by something like the following reasoning:

1. A person cannot consent to give up what is not in his power.
2. If he possesses a right, he has a legitimate claim.
3. Since the legitimacy of his claim is not in his power, he cannot alienate his right.

The logic of this argument is both seductive and disastrous. If we accept it, we end up committed to the view that all rights are inalienable unless we deny that possessing a right provides a person with a legitimate claim. However, as we will see, this version of inalienability is so weak and so out of keeping with the established use of the term that even its advocates feel obliged to bolster it. Both Locke and Morris try to do this by endowing the objects of inalienable rights with distinctive properties.

It is obvious that a person can refrain from pressing a legitimate claim. Therefore, we might suppose

⁸Ibid., p. 133.

that for some rights, namely, the alienable ones, refusal to assert them could constitute a waiver under suitable circumstances. Morris does not accept this solution. According to him, such a choice never affects the legitimacy of the claim, nor can it rid the person of the right. At most, by failing to assert his rights or by giving others permission to infringe them, a person places himself in a position such that he cannot justifiably complain if they are violated.⁹ In other words, a person may waive his right to object to some violation of his rights, but he cannot waive the rights that may give rise to his right to complain.

So far, Morris has left intact the claim that all primary rights are inalienable. But when he turns to the right to be treated as a person, we discover that a true inalienable right is, in addition, nontransferable and has a nonwaivable, derived right to complain attached.¹⁰ It is not at all clear that any right could give rise to an inalienable right to complain. In fact, we have already argued that Morris's approach cannot sustain this position. If he would deny that there is an absolute duty to respect the right to complain about rights violations (and the textual evidence strongly suggests that he would), then

⁹Ibid., p. 130.

¹⁰Ibid.

the right to complain is either alienable when the duty to respect it is superceded by other moral considerations or inalienable because of some special feature of this right. We cannot account for inalienable rights by reference to unexplained inalienable derived rights. This is no improvement over Locke's theological doctrine. Nevertheless, it might initially seem self-evident that the right to be treated as a person cannot be passed along from one individual to another.

Before we go on to Locke's dealings with these matters, we will consider Morris's observation that the right to be treated as a person is nontransferable in a special way. The intuition underlying this point is that the impossibility of conveying personhood from one individual to another renders the right to be treated as a person nontransferable. Thus, we might say that whenever the object of a right cannot be conveyed, the right is inalienable.

This proposal seems plausible when we consider cases like the following one. A person P_1 is bound to be thwarted in his efforts to transfer his right to be treated as a person to his pet python because P_1 cannot convey his status as a person to the python and without this the python cannot have a right to be treated as a person. This is the kind of case upon which Morris implicitly bases his

position.¹¹ But, when we look at Morris's definition of treating others as persons, it becomes questionable that personhood cannot be transferred. The definition runs as follows:

We treat a human being as a person provided: first, we permit the person to make the choices that determine what happens to him and second, when our responses to the person are responses respecting the person's choices.¹²

If P_1 had chosen to empower another person P_2 to make all of his decisions for him, it would be necessary to treat P_2 's choices on behalf of P_1 as if they were P_1 's in order to respect P_1 's right to be treated as a person. Evidently, P_1 's original choice does convey to P_2 that aspect of his personhood that is relevant to this right, and this act removes the obstacle to saying that P_1 can transfer his right to be treated as a person.

A person cannot turn over his personhood to a nonperson because a nonperson could not assume the role of decision-maker. Still, a person can concede his decision-making prerogative to another person, and to do this is to relinquish the very power that Morris considers definitive of personhood (at least, for purposes of

¹¹Morris also contends that an individual's life is nontransferable in the same way, i.e., P_1 could not transfer his right to life to his toaster because the toaster is not alive and cannot be vitalized by P_1 's life. (Ibid., p. 131)

¹²Ibid., p. 127.

explaining the right to be treated as a person). Morris could respond by insisting that his account of treating an individual as a person should not be converted into an account of personhood. He could, for instance, claim that a person cannot transfer his personal identity to another person on the grounds that it is impossible for one person to become two except as a form of psychopathology. Even if we agree not to entertain the possibility of exchanging personal identities, this adjustment will not help Morris out of his difficulties. For when we ask what feature of personal identity gives rise to the right to be treated as a person and what is involved in respecting this right, we will undoubtedly revert to the individual's status as an agent, that is, as choice-maker and actor, which distinguishes him from other creatures and from inanimate objects. Thus, explaining inalienable rights in terms of the nontransferability of their objects will not work unless we can find a right with an object that cannot be transferred, but no other right seems more likely to succeed in this regard than the right to be treated as a person.

Ultimately, what is wrong with calling in nontransferability to explain inalienability is that our inability to transfer certain things need not reflect their importance to us. We might each have a little pea-like thing floating around our abdominal cavity doing nothing. Because the

thing contributes nothing to our survival or well-being, it could be removed with impunity. Still, it might be the case that no two persons could under any circumstances trade floating peas. Perhaps, because each pea is the concentrated simulacrum of the unique individual who contains it, any other person's body would be incompatible with at least one of its elements and would therefore reject it.

Notice that a person's floating pea and his right to a floating pea would be related in the same way as his decision-making prerogative and his right to be treated as a person. The pea cannot, whereas agency can, be transferred. Whether or not the corresponding rights can be transferred depends on whether or not the objects of the rights can be transferred. It is possible for a person to transfer his right to be treated as a person because it is possible for him to transfer his decision-making prerogative. As a matter of fact, other persons exist who can assume these responsibilities for him, and in addition, our concept of agency allows for a person to decide to acquiesce invariably in the decisions of someone else and to refrain from making any decisions of his own.

Similarly, it would be impossible for a person to transfer his right to a floating pea because it would be impossible for him to transfer his pea. Since no two individuals could be exactly alike without coalescing and

each floating pea manifests whatever differences there are between individuals, it is logically impossible for different individuals to have the same pea, and therefore no one could receive anyone else's pea. In spite of this, we would not want to say that we have an inalienable right to a floating pea since the pea is utterly superfluous and we can get rid of it with impunity.

There is no reason to think that our inability to exchange something entails that it is essential to us and warrants an inalienable right. Taking it from the reverse standpoint, there also is no reason to think that we must be inextricably tied to the things that are most important to us. In fact, if there were no way in which we could sacrifice the objects of our rights on behalf of others and thereby transfer the benefits of these rights, there would be no reason for declaring the most important of these rights inalienable.

Locke addresses the problem of differentiating inalienable rights from other moral rights from a different point of view, but his solution is not very distant from Morris's. For Locke, an inalienable right is one the object of which a person can only lose through forfeiture.¹³ In

¹³It might be pointed out in opposition to this claim that Locke considers it possible for a person to agree to transfer his property and the rights that go with it. Of course, it is true that Locke thinks persons can waive, transfer, etc. their acquired rights to particular pieces of property, but this does not entail that persons can deliberately give up their natural right to property.

a widely discussed passage, Locke states that no person can choose to give up his life or liberty, but that others can acquire the right to violate a person's right to life or liberty as a result of some sufficiently heinous conduct on the part of that person.¹⁴ Thus, a person's conduct can result in forfeiture of his life or liberty (and presumably his property, too), but it cannot result in forfeiture of his rights to life, liberty or property--these are inalienable.

The initial plausibility of Locke's interpretation is based, in part, on the thought that a right must be crucial indeed if persons retain possession of the right even when they cease to enjoy its object and, in part, on the connotations of involuntariness associated with the idea of forfeiture. However, neither of these points moves us any closer to an adequate account of inalienability. The first just reminds us that possession of a moral right is not predicated on exercising it. The second is misleading: although forfeiture is often the unintentional by-product of other actions or inability to act, a person certainly can deliberately do actions that he knows will result in forfeiture. Thus, any intimation to the effect that a person could only lose the objects of natural rights

¹⁴The Second Treatise of Government, chap. IV, par. 23.

inadvertently, i.e., that he could not deliberately set out to forfeit them, should be ignored.

Whereas for Morris the object of an inalienable right must be nontransferable, for Locke the objects of such rights can only be lost through forfeiture. But forfeiture is as problematic as nontransferability. It merely insinuates the difficulties into the agent's character. Evidently, certain kinds of conduct result in forfeiture of the objects of natural rights because an agent's engaging in such conduct reveals that he is unworthy of exercising the corresponding right. We are, nonetheless, left with the problems of deciding what kinds of conduct are indicative of a mentality that fails to meet the minimum standards for exercising natural rights and of deciding which rights a person should continue to exercise except as a result of forfeiture. Obviously, these questions are interdependent. If the proper exercise of the rights we admit requires sophisticated judgment, we must set proportionately high qualifications for possession of the right and demand a high degree of reliability in regard to the exercise of the right. But if the proper exercise of our selection of rights requires only minimal awareness of the needs of other persons and understanding of the probable consequences of action, very few kinds of conduct would result in forfeiture. What we cannot escape noticing at this point is

that the idea of forfeiture does not guide us to choose an exacting or a loose set of standards and rights.

We can make a slightly different approach to this problem by asking what makes the right to life inalienable while the right to be told the truth is alienable. Locke counts the former as a natural right and the latter as a moral right though not as a natural right. Presumably, a person can only lose his life through forfeiture, whereas he can waive his right to be told the truth without doing anything to deserve dishonesty. Why? Couldn't we say that no one is ever entitled knowingly to transmit any falsehood unless the deceived person's prior conduct provides a justification for deception as opposed to merely allowing such treatment?

Perhaps our conception of a tactful lie is only a device which we invoke in bad faith to extricate ourselves from our disagreeable, though comparatively minor, duties to others. Perhaps our unreflective acceptance of this practice perpetuates an insidious form of alienation to which much needless unhappiness can be traced. Locke cannot ascertain that this is not so by adverting to the concept of forfeiture. He can only say that violating someone's right to be told the truth does not threaten God's gift of life to that person. Thus, Locke's concept of a right with an object that can only be lost through forfeiture does not disentangle his position from

theology because there is no independent way of identifying such objects.

Particularly in the case of Locke's interpretation, it is apparent that his handling of inalienability represents an internalization of the problem of absolute rights. Why would it be necessary to claim that certain acts result in forfeiture of the objects of natural rights if not to justify punishments that involve violations of natural rights?¹⁵ On Morris's view a person may waive or otherwise lose the right to exercise the right to complain about violations of the right to be treated as a person. This is quite a pile-up of rights, but what it amounts to is a rejection of the claim that any right is finally absolute.

Both Locke and Morris recognize that circumstances may require us to violate natural rights. Both take this to be the central problem for a theory of inalienable rights. Consequently, they emphasize the distinction between possessing a right and exercising it or, in their parlance, between losing a right and forfeiting the object of a right or giving up a derived right to protest. They orient their treatments of inalienable rights in this way

¹⁵ Hugo Bedau makes the same point in "The Right to Life," The Monist 52 (1968): 567-568. He does not distinguish, however, between forfeiting a right and forfeiting the object of a right. In a recent article, Joel Feinberg draws this distinction and uses it to clarify the difference between waiving a right and relinquishing a right. ("Voluntary Euthanasia and the Inalienable Right to Life," Philosophy and Public Affairs 7 (1978): 114-118)

for purposes of showing that rights need not be absolute to be inalienable. These are important distinctions. Unfortunately, they do not explain inalienability, and therefore, they cannot be used to separate inalienable rights from other moral rights; they only serve to account for the fact that the absence of absolute rights does not rule out the possibility of universal rights.

2. Hobbes and Brown: The Egoistic Approach

Hobbes and Brown focus exclusively on the issue that is peculiar to inalienable rights--what prevents people from giving them up? They both respond with essentially the same psychological explanation founded on their shared understanding of voluntary action. Hobbes tells us:

Whensoever a man Transferreth his Right, or Renounceth it; it is either in consideration of some right reciprocally transferred to himselfe; or for some other good he hopeth for thereby. For it is a voluntary act: and of the voluntary acts of every man, the object is some Good to himselfe.¹⁶

Brown makes the same point:

The necessary and sufficient reason for waiving, conveying, or forfeiting a good is the realization of some other, higher good.¹⁷

¹⁶Thomas Hobbes, Leviathan, pt. I, chap. 14, par. 8.

¹⁷Stuart M. Brown, Jr., "Inalienable Rights," Philosophical Review 64 (1955): 210. From the context it is clear that Brown, like Hobbes, is talking about goods for the individual.

Thus, an inalienable right is one that cannot be disowned because the loss of it can only be expected to bring harm upon the person who gives it up.

There is a remarkable similarity between the rights these philosophers consider to be inalienable. For Hobbes, the right to resist attackers and the companion right not to incriminate oneself without assurance of pardon are inalienable.¹⁸ For Brown, the right to institutions that protect high order goods, like life, liberty, and happiness, is inalienable.¹⁹ Hobbes's rights are rights to self-protection, and Brown's right is a right to be protected.

Because they agree in thinking that voluntary action aims to promote personal security and well-being, protection is central to both of their conceptions of inalienable rights. A final resemblance between these two positions reinforces this emphasis on protection. Hobbes and Brown both assert that anyone who acts so as to disown an inalienable right must be presumed to be ignorant of what he is doing or to be doing it out of fear.²⁰ Therefore, they agree that no person who seems to have relinquished an inalienable right is obligated to permit viola-

¹⁸Leviathan, pt. I, chap. 14, pars. 8 and 29-30.

¹⁹"Inalienable Rights," p. 210.

²⁰Leviathan, pt. I, chap. 14, par. 8 and "Inalienable Rights," p. 196.

tions of this right. This consolidates the protection already afforded by the rights themselves.

There are two perspectives from which we can see the difficulties with Hobbes's and Brown's interpretation of inalienability. Either we can question the egoism on which their account of voluntary action is based, or we can question their assertion that giving up inalienable rights is psychologically impossible regardless of behavioral appearances. These are merely alternative ways of getting at the same problem.

Acceptance of Hobbes's and Brown's account of voluntary action would compel us to declare all genuine acts of sacrifice involuntary because a genuine sacrifice cannot covertly aim to benefit the agent. On this view, self-sacrificial conduct should evoke pity rather than praise. For once we assume that any sacrificial gesture must have been made unintentionally, we can only feel sorry for those who stumble into such conduct. An additional problem is closely connected with this one. By establishing ignorance and fear as the only conceivable explanations for self-sacrifice, we rule out the possibility that courage, generosity, or affection could give rise to this kind of action.

One consequence of Hobbes's and Brown's position is that it transforms inclinations such as the ones mentioned above into vehicles for self-aggrandizement and

drains them of their customary moral significance. For example, voluntary acts of generosity would become acts in which the agent's anticipated self-satisfaction or other advantages he can reasonably expect to gain as a result of his behavior outweigh the loss he proposes to incur in the process of benefiting someone else. This account distorts our ordinary understanding of generosity beyond recognition since it is just the person who would do the generous thing especially when it represents an unmitigated loss for himself that we call generous. From a practical standpoint, to agree to the egoistic program for analyzing voluntary self-sacrificial conduct is ultimately to denigrate and discourage what is usually considered to be exemplary conduct. Our need for an interpretation of inalienability could not be construed as sufficiently urgent to overcome the severe practical and conceptual difficulties attendant upon accepting this radical egoism.

Moreover, Hobbes and Brown would commit us to a policy of ignoring behavioral evidence whenever it comes into conflict with our prior decisions about which rights are inalienable. This raises the question as to how we are to arrive at any conviction about which rights are inalienable. Once we conclude that some right cannot be traded off for a higher good and pronounce it inalienable, we foreclose the possibility of discovering that our appraisal of the value of our chosen right is mistaken

because we are now committed to the assumption that anyone who attempts to alienate this right is doing so involuntarily. In light of the fact that we are seeking a basis for determining which rights are so important that they must be included in the foundation of political theory, incorrigible choices are out of place.

The preceding paragraph points to the fundamental confusion underlying the psychological approach to inalienability. It is said that psychological obstacles are what make it impossible to disown inalienable rights. But, this claim only raises questions as to why these obstacles exist and why they are impenetrable. A psychological answer can be made. That is, Hobbes and Brown can say that instinct inexorably orients our desires toward a certain thing (or set of things) and that an uncontrollable aversion propels us away from relinquishing the right to this thing (or set of things). This explanation turns the problem of inalienability into an empirical issue. Accordingly, the selection of inalienable rights must be dictated by the empirical evidence and must in principle be subject to falsification in the light of conflicting data. In order to maintain a consistent position, Hobbes and Brown must admit that a psychologically based list of inalienable rights can only be tentative, and they must give up their claim that anyone who seems to be disowning an inalienable right must be acting involuntarily. This latter claim

illicitly shifts the problem of inalienability from the empirical to the axiomatic level and thereby renders the selection of inalienable rights impervious to falsifying evidence.

The only other option available to Hobbes and Brown would require them to substitute a conceptual account of the high value placed on the objects of natural rights.²¹ However, this change would necessitate eliminating the remaining psychological elements from their interpretation of inalienability. Their account of voluntary action would be ruined if psychological considerations were eliminated from their theory since the idea of a voluntary act that aims solely at someone else's good is not self-contradictory though such behavior may be rare. Without a concept of voluntary action that denies the possibility of willful self-sacrifice, Hobbes and Brown will not be able to explain why rights with exceptionally valuable objects cannot be alienated. Efforts such as Hobbes's and Brown's to analyze inalienability by blending the psychological with the conceptual cannot succeed.

²¹In the course of his attempt to extricate Hobbes from charges of psychological egoism, Bernard Gert implies that the concept of rationality provides the correct explanation of Hobbes's inalienable rights; however, Gert does not unpack the connection between rationality and self-preservation. ("Hobbes and Psychological Egoism," in Hobbes's "Leviathan," ed. Bernard H. Baumrin (Belmont, Calif.: Wadsworth Publishing Company, Inc., 1969), p. 123)

Before we go on to Golding's proposal, it is worth noticing a final difficulty with Hobbes's and Brown's interpretation. It rules out the possibility of a plurality of natural rights unless they are all of precisely equal value. There cannot be more than one right that cannot be given up in pursuit of a higher good if some of these rights are preferred by their possessors. If there are several natural rights which are of equal value, the less valuable ones can always be voluntarily exchanged for the most valuable one. But since by definition an inalienable right cannot be voluntarily relinquished, the less valuable rights would not count as natural rights if Hobbes's and Brown's version of inalienability were used as a criterion for natural rights. On the other hand, if the rights are of equal value, their possessors could not choose to give them up under any circumstances because there could not be any higher good to be gained by the sacrifice.

The implications of Hobbes's and Brown's position become evident when we reflect on Hobbes's two inalienable rights, the right to resist attackers and the right not to incriminate oneself without assurance of pardon. Surely, no one would consider them equally weighty if it came to a

choice. For example, it would be better for a prisoner who believes himself to be guilty to give up the right not to incriminate himself and keep the right to defend himself because he would retain a right to try to ward off punishment even if he is compelled to confess to a crime; whereas in opting for the right not to incriminate himself, he would become helplessly vulnerable to punishment whether or not he admits his crime. Hobbes's right of self-defense is more fundamental because it provides a wider range of protection for the individual. Indeed, refusing to incriminate oneself could be understood as a precautionary form of resisting attackers. Still, it seems clear that a right of self-defense would take precedence over a right to prevent attacks.

It seems unlikely that we will ever find two or more rights that are of exactly equal value. Yet, eliminating all but a single natural right seems arbitrary. With regard to Hobbes's pair of rights, there does not seem to be any reason for ruling out a right to act so as to prevent attacks, thereby compelling persons to rely solely on the right to resist attacks once those are in progress. The fact that Hobbes's and Brown's account of inalienable rights forces us to choose either a unique natural right or a set of equally valuable natural rights is not by itself sufficient to justify dismissing their position; however, it would impose what appear to be unduly

restrictive constraints on our selection of natural rights. When we add in the considerations we have already adduced against their view, Hobbes's and Brown's account of inalienable rights proves to be untenable as a criterion for natural rights.

3. Golding: The Requirements of a Social Ideal

Martin Golding suggests the last interpretation we will consider. He begins by denying that there are any rights that we cannot conceivably waive. He bases this view on the observation that good reasons for not permitting persons to waive certain rights do not make it logically impossible to waive them.²² He proceeds to say that whether or not a right can be disowned depends on the social ideal of a given community. As Golding puts it, "It is a matter of the self-sovereignty that the ideal accords to individuals."²³ In the case of rights that may be alienated, persons have waiver rights that enable them to give effect to their decisions regarding the corresponding primary rights. Thus, an inalienable right is one that is not associated with a waiver right because the community's social ideal does not allow for members who

²² Martin P. Golding, "Towards a Theory of Human Rights," The Monist 52 (1968): 544.

²³ Ibid., p. 545.

lack this right. According to Golding, what prevents people from giving up inalienable rights is community policy derived from a shared ideal. On this interpretation, there can be universal inalienable rights, that is to say natural rights, if it makes sense to talk about a unified human community with a single overriding social ideal.²⁴

It might be asked why an all-inclusive community is required for there to be natural rights. Golding's explanation is twofold. In the first place, he believes that rights talk is essentially forensic. Assertions of rights have no function unless persons are involved in relations with other persons with whom conflict may develop.²⁵ In addition, Golding holds that the rights that each member of the community has are derived from the social ideal he shares with the rest of the community.²⁶ Thus, a right can only be universal if it is assertible against all persons

²⁴ Ibid., p. 549. At this point, it is worth noting the resemblance between Golding's views and Margaret MacDonald's. She defines natural rights as "the conditions of a good society" and describes the objects of these rights as "the fundamental moral and social values which should be or should continue to be realized in any society fit for intelligent and responsible citizens." ("Natural Rights," in *Human Rights*, ed. A. I. Melden (Belmont, Calif.: Wadsworth Publishing Company, Inc., 1970), pp. 54 and 52) Although she presents her position in too sketchy a fashion to warrant separate consideration, many of our criticisms of Golding's views are equally applicable to hers.

²⁵ Ibid., pp. 528-529.

²⁶ Ibid., pp. 539-540.

as a result of being derived from an ideal acceptable to all persons. The extent of the community that upholds a single social ideal determines whether or not the rights that depend on it are universal.

From what has been said so far, one might suppose that Golding conceives of the world as a collection of discrete communities, each with its own set of members, its own social ideal, and its own set of recognized rights. Golding states baldly that a stranger has no rights, but this is tempered by his account of community membership. In an earlier paper, he describes this relation: ". . . the composition of a moral community is a partial function of the degree to which a social ideal has relevance for a set of individuals, given their conditions of life."²⁷ In other words, the fact that the goods conferred by a social ideal match those sought by an individual or group strengthens any claim they might make to community membership. Golding doesn't say what else it takes to be included in a moral community, but this does suggest a unified human community to the extent that social ideals overlap.

Nevertheless, Golding's notion of the relevance of a social ideal is obscure. He explains by saying, "The more remote the conditions of their lives from ours and the stranger they are, the less relevant does our social

²⁷ Martin P. Golding, "Ethical Issues in Biological Engineering," UCLA Law Review 15 (1968): 456.

ideal become for them and the farther they get pushed toward the fringes of our moral community."²⁸ This statement is made in the context of a defense of the greater urgency of domestic social welfare programs as compared with foreign aid and a rejection of cultural imperialism. But, citizenship in the same nation hardly guarantees homogeneous conditions of life. And besides, if the social ideal I believe in is shared by starving Appalachian indigents, there seems to be no reason to assume that it is not shared by the most desperate street dwellers of Calcutta as well. We are all more likely to disagree with Nelson Rockefeller than among ourselves if the conditions of our lives is the determining factor.

The problem comes to this: if the content of the social ideal is kept minimal, then it is possible that everyone could share it, constitute an all-encompassing community, and qualify for the rights that go with it. This is reminiscent of the predicament generated by Carritt's suggestions about absolute rights.²⁹ Just as we found that fundamental procedural principles of justice appear to be the only "rights" that ought never to be violated, we now realize that they are also the only ones that all persons might assent to as consequences of a single universally acceptable social ideal.

²⁸Ibid.

²⁹See Chap. IV, Sec. 1 above.

We cannot expect persons with diverse cultural and economic backgrounds and conflicting private goals to find mutually acceptable substantive principles of justice. Inevitably, there will be someone whose interests will be harmed rather than advanced by any proposed distribution as long as resources are not unlimited. Those who stand to lose as a result of a proposed distributive scheme have grounds for rejecting it. Consequently, it will never be possible to obtain unanimous agreement to any definite division of resources unless the human population is reduced so radically that the world's resources cease to be scarce or the world's resources multiply and become so plentiful that we cannot contrive to exhaust them. Because the practical consequences of procedural principles remain undecided until material issues have been formulated, persons might agree to such principles although this strategy would only serve to postpone the divisive controversy. When it becomes necessary to decide how to implement the procedural principles, the cultural and economic differences that originally barred agreement on substantive principles will reassert themselves.

We have already criticized the idea of construing natural rights as procedural principles and will not repeat these considerations here.³⁰ However, we should note how

³⁰See Chap. IV, Sec. 1 above.

disastrous this result is for Golding's position. Because he rests the prospects of universal rights entirely on his idea of a community based on a shared social ideal, he reduces the viability of natural rights in proportion to the heterogeneity of human interests. Ultimately, substantive natural rights could only be possible on this interpretation if the cultural and economic conditions under which people live were somehow made uniform. This seems neither probable nor desirable.

Before leaving Golding's position, we need to consider his interpretation of inalienability itself. Whereas the universality of rights depends on how widely accepted the social ideal from which they are derived is, the inalienability of rights depends on the conception of a member of the community embodied in the social ideal. Inalienable rights seem to be those that a social ideal deems necessary for community membership; persons are not allowed to disown rights without which they cease to be members of the community. Obviously, to the extent that social ideals vary from community to community and evolve along with the communities that uphold them, the inalienable rights picked out will differ. Thus, inalienability does not entail universality on Golding's interpretation. But, universality does not entail inalienability either. If we were to discover some right derivable from every conceivable social ideal, we would still be left with the

further question as to whether or not all of these social ideals deny waiver rights corresponding to the universal primary right. This raises the question as to why, apart from considerations of population maintenance, any social ideal should disallow waiver of any of the rights it confers.

Before attempting to answer the above question, we need to remind ourselves that inalienability concerns the possession of rights, not their exercise. If a social ideal requires that the members of the community exercise a right, it is really imposing a duty rather than granting a right. Any member of the community can choose not to exercise his inalienable rights, but he cannot choose not to have them. As a result, a social ideal that prescribes inalienable rights disallows certain kinds of complaints. It denies each member of the community the opportunity to complain that society has failed to provide him with the options or the goods that the inalienable rights confer.

It is helpful to think of the set of inalienable rights derived from a social ideal as determining a concept of adequate conditions of life for a member of the community. Although a social ideal could specify a set of inalienable rights that would insure some idea of the good life for the members of the community or a set that would insure only a part of the community's concept of adequate conditions of life, neither of these alternatives

is satisfactory. The former arrangement is unrealistically restrictive because it requires the diverse members of the community to settle on a single conception of the good life. The latter arrangement is unacceptable because any reasons that would justify inalienable rights to some things that the community considers necessary would apply equally to the complete package. Practicability and rationality would, therefore, require that communities obviate complaints about failures to guarantee what they consider to be adequate conditions of life, if they designate any inalienable rights at all.

Now, our inquiry turns to the problem of whether communities must confer inalienable rights on their members. Since inalienable rights must be universal if they are to count as natural rights, all communities must think of themselves as bestowing adequate conditions of life in the same spirit as Locke thought of God's bestowal of life if there are to be any natural rights.³¹ But, is it true that no social unit that fails to provide its members with this kind of inalienable rights package can count as a

³¹We should note that Golding seems to think that universality is a sufficient condition for natural rights. ("Towards a Theory of Human Rights," p. 549) Our earlier criticisms of this position are telling with respect to Golding's view too, and so we will inquire whether the combination of universality and inalienability will yield a more satisfactory result. See Chap. III above for our discussion of the inadequacy of universality as a sufficient criterion for natural rights.

community? Nozick would protest that any community that imposes inalienable rights without the consent of its members is condemnable for its paternalism.³² Needless to say, he believes that a non-paternalistic social superstructure that confers no inalienable rights is not only possible but good.

In support of the conception of community that includes inalienable rights, it might be pointed out that we would be reluctant to say that a community exists where we can find no signs of mutual concern among the ostensible members. Inalienable rights can function as a vehicle for institutionalizing mutual concern; however, they meanwhile exceed the requirements of mutual concern.

³²Nozick holds that a person who possesses a right can allow others to violate the right whatever the right is:

A person may choose to do to himself, I shall suppose, the things that would impinge across his boundaries when done without his consent by another . . . Voluntary consent opens the border for crossings. Locke, of course, would hold that there are things others may not do to you by your permission; namely, those things you have no right to do to yourself . . . My non-paternalistic position holds that someone may choose (or permit another) to do to himself anything, unless he has acquired an obligation to some third party not to do or allow it.

(Anarchy, State, and Utopia, p. 58) Nozick's basic view is that no one ought to be compelled to retain any right against his will. Thus, he would oppose any all-inclusive community that provided for inalienable rights. However, he finds the idea of paternalistic sub-communities acceptable provided that persons may freely join and leave them. (p. 320)

For a community can manifest mutual concern simply by guaranteeing alienable rights for those who wish to avail themselves of these rights.

We would also deny that a community exists if we cannot find evidence of mutual respect. But mutual respect among the members of a community would seem to require toleration of a member's decision to reject the rights allotted to him. If we consider a social ideal that confers an inalienable right to own slaves on all full-fledged members of the community, we can see why the option not to exercise this right might not provide an altogether satisfactory solution for a member with moral scruples about the right.³³ It is not just ownership of slaves but also the right that would enable him to acquire such property that the person finds repellant. Thus, inalienable rights are not needed to assure mutual concern, and they may violate the requirement of mutual respect among members of a community. And so we must conclude that the concept of a community does not supply grounds for conferring a set of inalienable rights designed to secure the community's conception of adequate conditions of life for those who choose to exercise them.

³³It is worth noting that Golding's account of a moral community and its social ideal does not rule out inalienable rights like the one we are considering.

Golding's conception of inalienable rights blocks its elaboration into an account of natural rights at two points. Although it is possible to conceive of a unified human community with a single social ideal, this shared ideal would be so elemental that it could not yield any substantive natural rights. If we try to compensate for this difficulty by focusing on individual communities and their respective social ideals, we discover that there can be communities that do not confer inalienable rights. Consequently, we can conclude that Golding's view fails to provide for inalienable rights that must be universal. Whether we start from the notion of a global community or from the notion of a world composed of discrete communities, we find that Golding's interpretation of inalienability cannot account for natural rights.

4. The Relevance of The Social Context to Inalienable Rights

Although our consideration of Locke's, Morris's, Hobbes's, Brown's, and Golding's views about inalienable rights has not supplied us with a satisfactory interpretation of inalienability, some elements from the preceding discussions are worth noting. Locke, Morris, and Golding call attention to the distinction between possessing a right and exercising it. This distinction is important because it allows us to conceive of inalienable rights that

are not absolute and because it enables us to attribute inalienable rights to persons who may prefer not to take advantage of them. This is to say that a person's possession of an inalienable right does not by itself prejudge any questions that may arise about how he ought to be treated or how he ought to act.

On the negative side, our discussion of Hobbes's and Brown's views reveals the dangers of a psychological approach to inalienability. This approach inevitably traps its adherents in a system of unfalsifiable commitments which can only be avoided by dismantling the conceptual apparatus upon which it is based. These commitments may turn out to be the right ones, but this can only be ascertained through the use of independent criteria.

Negotiating the relations between the individual and his social surroundings is a central difficulty for any account of inalienable rights. Because rights are understood as providing protection for individuals, it is tempting to try to explain inalienable rights entirely in terms of some relation to the individuals who possess them. Locke claims that inalienable rights have objects that individuals cannot divest themselves of except through forfeiture; Morris holds that the objects of these rights are such that individuals cannot transfer them; and Hobbes and Brown contend that persons are incapable of giving up inalienable rights because it is impossible to gain from

the sacrifice. If we attend exclusively to the individual because he possesses these rights, we neglect certain crucial features of inalienable rights, namely, that they are acknowledged, exercised, and respected or violated in a social context.

The intelligibility of inalienable rights must have social as well as individualistic dimensions. Thus, Golding's focus on the community as the conceptual foundation of inalienable rights seems promising despite the problems we encountered in his attempt to develop an analysis along these lines. This orientation avoids the pitfalls of psychologism and need not blind us to the individual's role as the locus of inalienable rights. Since Rousseau's interpretation of inalienability takes these points into account, we will begin the next chapter by examining his position.

CHAPTER VI

THE TIES BETWEEN INDIVIDUALS AND INALIENABLE RIGHTS

The fundamental problem presented by the idea of an inalienable right is to account for the bond between the individual who possesses the right and the right. We have seen that this bond cannot be satisfactorily explained as a psychological phenomenon or as an ordinance enforced by social groups, and we have rejected two analyses of the connection inalienable rights might have with essential properties of individuals. Despite the inadequacies we have exhibited in the accounts we have considered, we have not found it possible to dismiss any of these approaches summarily. It would, after all, be very surprising if we were to find an adequate account of inalienable rights that did not coordinate conceptual considerations with psychological and social support. Because Rousseau integrates these elements in his account, it provides a suggestive model for subsequent investigation.

1. Rousseau's Concept of an Inalienable Right

Rousseau offers an interpretation of inalienability in his discussion of liberty and slavery:

To renounce our liberty is to renounce our quality of man, and with it all the rights and duties of humanity. No adequate compensation can possibly be made for a sacrifice so complete. Such a renunciation is incompatible with the nature of man; whose actions, when once he is deprived of his free will, must be destitute of all morality. Finally, a convention which stipulates absolute authority on one side, and unlimited obedience on the other, must be considered as vain and contradictory.¹

Here, Rousseau equates a person's renunciation of his liberty with renunciation of his humanity because the loss of his liberty reduces him to amorality while, on Rousseau's view, morality is essential to humanity. At first glance, this passage seems to be comprised of a series of highly dubious speculative assertions. It can, however, be read in a commonsensical way. To understand Rousseau's point, there is no need to plunge into the thick of the human nature controversy; that is to say, there is no need to provide a detailed account of a fixed human nature. For Rousseau is merely sketching his views regarding the problem of community membership for individuals.

Interpreted as straightforwardly as possible, the above passage says that to disown one's liberty is to decide not to be counted among the responsible members of society.

¹The Social Contract, bk. I, chap. 4. Although Rousseau's discussion of the education of women makes it clear that he intends to identify manhood and humanity and to exclude women, we will set aside his virulent prejudices for the purposes of this essay. (Emile, trans. Barbara Foxley (New York: Dutton, 1974), bk. V)

that no one who makes this sacrifice can be adequately compensated for the consequences of his irremediable decision, and that no community can support such a choice. For Rousseau, it is only through participation in a community that a person avoids being a "circumscribed and stupid animal" and becomes an "intelligent being and a man."² Humanity is a product of sociality. But, sociality would be impossible without morality, i.e., without compliance with a code of conduct and responsibility. Thus, humanity and sociality are reciprocal concepts. The individual cannot realize his potential without the community, and the community cannot exist unless its members accept constraints and take responsibility for their actions. The loss of community membership is tantamount to the loss of humanity for the individual; this loss is so catastrophic that it is impossible to compensate. The refusal on the part of its members to conduct themselves responsibly is equally catastrophic for the community; its destruction is the inevitable result. Liberty, according to Rousseau, enables persons to function as members of communities and to profit from this form of social involvement.

Unlike other rights, the right to liberty and the qualification for it are inseparable according to Rousseau. The reciprocity that Rousseau asserts between humanity and

²The Social Contract, bk. I., chap. 8, par. 1.

sociality is reflected in the reciprocity between being moral and the right to liberty. A person must be moral in order to qualify for the right to liberty, and he cannot be moral unless he is free. Compare this with the relation between other rights and the qualifications for them. A person who is eighteen years old and a citizen qualifies for the right to vote, but voting has no effect on his ability to qualify for this right. Similarly, a person's purchase of a certain thing gives him a property right in that thing, but having that right is a consequence of making the purchase, not a prerequisite for it. The fact that a person has a property right in a thing shows that he has come to possess it in a legitimate way; however, his property right is not instrumental in his ability to make the acquisition. On Rousseau's view, liberty differs from other rights because enjoyment of the right to liberty is a necessary condition for a person to be moral while morality is itself a necessary condition for possession of the right to liberty.

This interdependence suggests a preliminary account of the qualifications for inalienable rights. Building on what we said in Chapter III, we can say that, in addition to being qualifications that any normally endowed human being naturally has the potential to meet, the qualifications for inalienable rights must be such that enjoying the protection afforded by the right enables the person to

satisfy them. This supplementary point indicates a possible source of psychological ties between inalienable rights and the individuals who possess them. In order for an individual to realize that aspect of his potential which is relevant to the right, he must at some suitable stage of his development acquire the right. He cannot subsequently give up the object of the right without undercutting the fulfillment of his own potentiality, that is, without engaging in a form of self-destruction. On this view, one obstacle to relinquishing an inalienable right would be the high price attached to loss of its protection.

Rousseau's views suggest a division of the problem of inalienable rights. He interprets this problem as one requiring three orientations which can be formulated as follows: (1) what is the bond between inalienable rights and the individuals who possess them; (2) how do these rights support the individual and enable individuals to maintain social relations; and (3) why is the partitioning of the moral universe effected by these rights legitimate. For Rousseau, these questions cannot be separated completely because the concept of moral agency enters into the answer to each. Nevertheless, they are helpful inasmuch as they delimit areas of focus for discussion and allow us to distinguish different relations between moral agency and inalienable rights. In the remainder of this chapter, we will only be concerned with the first of these

questions. We will take up the other two successively in Chapters VII and VIII.

2. The Definition of an Inalienable Right

As we noted at the beginning of this chapter, the fundamental problem for a theory of inalienable rights is to explain the relationship between these rights and the individuals who possess them. This relationship encompasses three subsidiary issues. One is the problem of specifying the sense in which individuals cannot give up these rights. The second is the problem of identifying the feature of the rights that accounts for this incapacity. And the last is the problem of explaining the incapacity from the perspective of human nature. The analysis of inalienable rights that follows is based on Rousseau's explication of the relation between persons and liberty.

We considered and rejected several accounts of the sense in which inalienable rights might be said to be inextricable from the individuals who possess them in the preceding chapter. Typical accounts deny that inalienable rights can be waived, transferred, or renounced and then launch into a description of some feature of the right, the individuals who possess the right, or the social environment in which the right is acknowledged which allegedly explains the aforementioned disability. We propose to dwell on the concept of renouncing a right enough to clarify

just what it is we are asserting in speculating that there may be some rights that persons cannot give up.

A renunciation sunders the connection between the renouncer and the thing renounced. In order to accomplish this separation, the renouncer must acknowledge an obligation not to lay claim to any privileged position with respect to the subsequent determination of the fate of the renounced thing. For example, if a person renounces his ownership of a piece of land, he must consider himself obligated to allow others to use the land as they see fit. Otherwise, he would retain at least partial control over the land and would, therefore, continue to hold a limited form of property right in the land.³ Thus, to renounce a right completely is to assume an obligation to refrain from interfering with any use to which others may decide to put the object of the right.

In the passage we quoted at the beginning of the preceding section, Rousseau asserts that "a convention which stipulates absolute authority on one side, and unlimited obedience on the other, must be considered as vain and contradictory." This is a powerful and puzzling claim that initially seems to rest on some obscure notion of the incompatibility of human dignity and total submission

³Various arrangements involving transfers of rights, including gifts, conditional donations, loans and the like, can be explicated in part by specifying what obligations the original holder of the right must accept in order to execute his intentions.

to authority. But we can begin to explicate this mystifying rhetoric by applying our analysis of the act of renouncing a right. A renunciation of a right could only be "vain and contradictory" if the person who possesses the right could not be obligated to tolerate the uses to which others might put the object of the right. Accordingly, an inalienable right must be a right that a person cannot obligate himself to allow others to violate.

Our account of what it means to say that a person who possesses an inalienable right cannot relinquish it raises a further question as to why it might be impossible to become obligated to suffer certain types of treatment. This problem directs our attention to the objects of inalienable rights. For if it is impossible for persons to renounce certain rights, this incapacity must be a consequence of the kind of objects these rights take since most rights can be renounced. Rousseau characterizes the objects of inalienable rights by appealing to the concept of compensation. He holds that "no adequate compensation can be made" for a person's loss of his liberty. This is to say that the reason no one can be obligated to allow any violation of an inalienable right is that restitution cannot be made for the suffering he would incur.

The connection between obligation and compensation is hard to unpack. Rousseau's foundational intuition seems to be that obligatory sacrifices must be amenable to full

compensation. This might be understood as an exemplification of Rousseau's announced goal of uniting "what right permits with what interest prescribes, that justice and utility may not be separated;" however, this approach raises as many problems as it solves.⁴ The trouble is that it is not clear whether we should understand Rousseau's point in factual or conceptual terms. Is it that no sane person would accept any payment that could conceivably be made in exchange for certain things, and these are the objects of inalienable rights? Or is it that there are things which are not commensurable with any conceivable payment, and these are the objects of inalienable rights? Rousseau himself vacillates between these two perspectives.⁵

This quandary is basically the same as the one we encountered in Hobbes's and Brown's account of inalienable rights. We do not know whether to gather statistics on what bargains apparently reasonable people are prepared to make or to devise a hierarchy of goods with a pinnacle populated by items for which no equivalent good could be found. The difficulty in distinguishing psychological from conceptual elements in the concept of compensation can be avoided by approaching the problem of

⁴The Social Contract, bk. I, preface.

⁵Ibid., chap. 4.

characterizing the objects of inalienable rights in a slightly different manner.

The idea that a right cannot be renounced because of the surpassing value of its object can be captured more satisfactorily in terms of the concept of supererogation. Altruistic self-sacrifice exceeding the requirements of duty is the heart of supererogation. Doing a supererogatory action involves a person's sacrificing something to which he is entitled and upon which he places a high value for someone else's benefit. Anything to which a person has a right could in principle be sacrificed supererogatorily; however, it is possible to grade the objects of a person's rights with respect to their potential as supererogatory sacrifices.

Faced with the question as to why no one can become obligated to allow violations of inalienable rights, an obvious response is that these rights have objects which it is always supererogatory to sacrifice altruistically. Allowing someone to act in a way that would have violated a right if the right had not been renounced is tantamount to sacrificing--temporarily or permanently--the object of the right. Consequently, any right with an object that cannot be sacrificed for the benefit of others except supererogatorily will bar generation of an obligation to submit to violations of the right and therefore bar renunciation of the right. We will now sketch some relations

between supererogation and rights that can be renounced in preparation for considering why it is impossible to renounce certain other rights.

Some of our rights entitle us to goods that it would rarely be supererogatory to relinquish, e.g., a right to a penny or a right to a rubber band. Because these things are so easily acquired and because we generally place such a low value on them, only extraordinary circumstances--ones in which a person has an urgent and immediate need for his penny or rubber band--could elevate his contributing them to someone else's cause to the class of supererogatory actions. Other rights entitle us to goods that we are ordinarily not obligated to relinquish on behalf of other people but nevertheless may be obligated to relinquish for their sake. Though a person justifiably places a high value on something to which he is entitled, circumstances may yet determine whether or not his sacrifice of it is supererogatory or morally required. For example, it would ordinarily be supererogatory for a person to offer hospitality to homeless strangers, but it would not be supererogatory for him to provide shelter for strangers stranded by a blizzard in a desolate area. Although a person is entitled to the privacy of his home, the desperate need of another person for shelter may take precedence over the former's right. Thus a beneficiary's urgent need can reduce to an obligation an action that would usually be supererogatory. Finally, there are

actions which involve sacrifices that are invariably supererogatory.

We have seen that supererogation is commonly relative to circumstances. Circumstances can augment the value a thing has for the person who is entitled to it, and circumstances can create needs in other people that are sufficiently pressing to supercede a person's entitlement. Thus, whether an altruistic sacrifice is obligatory or supererogatory will frequently depend on the context in which the action is taken. Still, there remains a problem about limiting cases of supererogation. One end of the spectrum is sealed off by the lower limit on the class of things that can be made the objects of rights. The concept of a right precludes the possibility of rights which entitle persons to things which could not conceivably be sacrificed supererogatorily. A right that gave a person discretion over something for which he could never develop an urgent need would be pointless and consequently too feeble to impose any obligation on others to respect it. It makes nonsense of the concept of a right to say there can be rights which no one is ever obligated to respect. The other end of the spectrum is much more interesting. It raises the question of what could render an entitlement impervious to circumstances, that is, not amenable to obligatory sacrifice.

An altruistic sacrifice that is always supererogatory would occupy an odd position in the moral universe. Such a sacrifice would be permissible but never required, and it would evoke praise but not emulation. We must ask what feature actions could have that would force moral systems to adopt this circumspect view of them. Our inquiry will be simplified if we first ask what would compel a moral system to condemn a certain type of action.

The paradigm of a wrong action is one that typically harms other people without bringing about any redeeming good consequences. For example, setting off enough nuclear explosions to destroy life on this planet could never be the right thing to do because it epitomizes destructive conduct and cannot be justified by any good consequences it can be expected to produce. Any moral system that could generate an obligation to obliterate all known moral agents would be self-defeating, and any self-defeating moral system would only be acceptable as a guide to conduct under conditions that do not combine with the moral system to produce self-defeating obligations. As H. L. A. Hart puts it, ". . . our concern is with social arrangements for continued existence, not with those of a

suicide club."⁶ Any moral system that is capable of requiring its own demise is incompatible with this assumption because a moral system can only be destroyed through the destruction of all the individuals who uphold it. Thus, an adequate moral system must be incapable of yielding self-defeating obligations.

There are two types of obligations that are self-defeating from the standpoint of moral systems. The kind we have been considering is an obligation to destroy others. The other kind which is an obligation to destroy oneself explains the peculiar moral status of certain forms of altruistic self-sacrifice. Some forms of self-sacrifice are never obligatory because these obligations would also yield a self-defeating moral system. For example, if one person could be obligated to commit suicide for another person's benefit, then circumstances could be so constellated that every person would be obligated to kill himself

⁶The Concept of Law, p. 188. In this connection, notice that it is not always wrong to harm another person. Though it is not permissible to sacrifice an innocent person in order to improve the already satisfactory circumstances of others, it is permissible, but not obligatory, to sacrifice such a person in order to save others from catastrophe. If a moral system is to mute accusations of self-defeatism, it must allow moral agents to defend themselves without generating obligations to destroy other moral agents. This is the chief function of the neutral idea of a permissible action.

for someone else's benefit.⁷ The general conflagration produced by universal conformity to the dictates of morality would put an end to morality. Thus, it is clear that a moral system cannot obligate moral agents to do self-sacrificial actions that negate their ability to uphold a moral code for the same reason that no moral system can obligate one person to kill everyone.

Now the question arises as to why these acts of self-sacrifice that cannot be obligatory are not simply wrong. If moral systems must avoid requiring these altruistic self-sacrifices for the same reason they must avoid requiring sacrifices of others, why are the former permissible and moreover praiseworthy while the latter are at best permissible and never praiseworthy? The explanation of this difference in the moral status of these two types of action lies in the difference between them with respect to what motivates a person to do them. When one person resolves to harm another innocent person or to allow such a person to be harmed and his conduct counts as permissible, it is because his infliction of harm on this person or his failure to prevent harm to this person is

⁷The objection that one person must be left to be the beneficiary of all these sacrifices is negligible since his eventual death will complete the process of destruction. Stipulating that the ultimate beneficiary of suicidal self-sacrifice must be a very young woman pregnant with at least one male child or twins of the opposite sex seems both too farfetched and too risky to defeat our line of criticism.

necessary to ward off some substantially greater harm either to himself alone or to himself and others. When the proposed injury to another person is grave, more than one person must stand to benefit significantly from its infliction in order for the gains to outweigh the losses.⁸

Nevertheless, the motivation for inflicting such permissible injuries remains selfish despite the fact that others may reap the benefits along with the agent.

Moral systems are concerned with ordering social intercourse in patterns of mutual accommodation and cooperation. Since self-interest is the main obstacle to harmonious interaction, moral systems are designed to curb rather than to promote self-interested conduct. The idea of an obligation to undertake a self-interested self-sacrifice, like submitting to an extremely painful medical treatment in order to have a disease cured or an injury healed, is doubly superfluous since people can be expected to look out for their own best interests without moral encouragement and since a person's decision not to make such a sacrifice does not necessarily pose a hindrance to

⁸ John Taurek has recently defended the view that the number of persons who will lose or gain as a result of a proposed course of action is ordinarily morally irrelevant. ("Should the Numbers Count?" Philosophy and Public Affairs 6 (1977): 293-316) It is unfortunate that we cannot take up the details of his position here since we would argue that numbers are relevant in a somewhat broader range of situations than he would allow. Still, it is worth pointing out that Taurek does concede that there are legitimate ways of introducing numerical superiority into our system of duties. (pp. 310-316)

social accommodation and cooperation.⁹ Likewise, human willingness to secure personal interests at the expense of other persons is a persistent and apparently ineradicable cause of social conflict and is, therefore, the primary target of moral constraint. A moral system's efficacy in achieving its overarching purpose would only be undermined if the moral system were to confer praise on a select group of selfish actions while condemning all others. Furthermore, this praise would be misplaced since it would condone permissible selfish actions though it is equally permissible to refrain from doing them.

When circumstances oblige a person to choose between a permissible sacrifice of someone else's interests and a permissible self-sacrifice, we have seen that morality cannot exact either choice. But it can commend the action that stems from a motive consonant with the overall purpose of morality. Because supererogatory self-sacrifices represent extensions of ordinary kindness and generosity, praise for this sort of conduct is compatible with a viable network of social relations. Yet, because universal adherence to supererogatory practices would destroy this network, no moral system can advocate engaging in this form of behavior as a regular practice.

⁹ Notice that if a person is obligated to agree to some form of self-sacrifice for his own betterment, it will be because the person has outstanding obligations to others. In that case, his obligation is not founded on self-interest though he will incidentally benefit from carrying it out.

Returning to our original problem of specifying what goods can be the objects of inalienable rights, we can extract a key point from our discussion of supererogation. A minimal condition for the adequacy of a moral system is a guarantee that the moral system will not prove self-defeating. In other words, no acceptable moral system can generate obligations to destroy the capabilities of individuals to function as moral agents since these obligations, if universalized in practice, would foil the moral system's functioning as a guide to conduct.¹⁰ Thus, it cannot be obligatory for a person to sacrifice anything

¹⁰ It is worth noting in this connection that protecting individuals insofar as they are capable of moral agency must be a primary desideratum of moral systems. The two most widely advocated alternatives are guarantees of individual survival and protection for the individual's pursuit of personal well-being. Though it is undeniable that providing maximal protection for the individual's pursuit of personal well-being would be an effective device for insuring consistent implementation of a moral system, it would not necessarily be the case that a moral system that lacked provisions specifically aimed at enabling individuals to seek personal happiness would be disqualified as an adequate guide for conduct. Conceivably, a moral system could promote the well-being of its adherents exclusively through their selfless participation in communal enterprises. As for guarantees of survival, this appears to be a necessary condition for an adequate moral system because we suppose that survival is a necessary condition for moral agency. However, if there were a system of reincarnation and the moral community encompassed the various forms an individual might assume, there would be no reason to insist that moral systems protect individuals from these transformations. Insofar as personal well-being and survival are necessary for moral agency, it will be incumbent on moral systems to provide appropriate guarantees in order to elude charges of self-defeatism. Nevertheless, it is important to recognize that these requirements are derived from a more basic requirement that moral agency be sustained.

that he needs in order to function as a moral agent, and, if he were to sacrifice any of these things altruistically, his act would be supererogatory. One consequence of this result is that no right with an object that is necessary for moral agency could be renounced; for no one could obligate himself to allow violations of the right. Inalienable rights must, then, be rights that provide for a core of security which individuals who have the capacity for moral agency require in order to realize this capacity and function as moral agents.¹¹

Before proceeding to consider which rights qualify as inalienable rights, we should note a final point in regard to renouncing these rights. We have denied that the right to x (where x is the object of the right) can be renounced if x is something that can only be sacrificed supererogatorily. Whenever x meets this condition, it will be impossible for the individual who possesses the right to assume the obligation to sacrifice x which would be necessary for effective renunciation. Still, we might ask

¹¹An argument made by Alan Gewirth provides additional support for this conclusion. Gewirth defends the claim that individuals who propose to frustrate the moral agency of others are inconsistent on the grounds that the former are taking advantage of the rule that "agents or persons who are going to act have the right to decide, in the light of purposes that seem to them appropriate, what are the specific rules on which they will act and which they will hence apply to their recipients" while refusing to universalize this rule. ("Categorical Consistency in Ethics," The Philosophical Quarterly 17 (1967): 290-291)

whether a person who possesses an inalienable right has any leeway with respect to his exercise of the right.

We have argued that it cannot be right though it can be permissible for one person to violate another's inalienable rights. If a visiting delegation of Martians were to announce that they would explode the planet unless we turned over Jimmy Carter for a permanent zoo exhibit on Mars, it would be permissible for us to agree to their plan, though it would also be permissible for us to hide him and risk Martian retaliation. This situation would allow Carter two options: either he could demand that his rights be respected despite the cost, or he could submit to this imprisonment. A person who possesses an inalienable right can supererogatorily refrain from resisting a violation of it, thereby supererogatorily sacrificing x. Though a person's declining to stand on his inalienable rights could not convert a permissible violation into a morally obligatory one, it could have the effect of forgiving the violation. In this way, individuals who possess inalienable rights are allotted a measure of power over the exercise of these rights.

3. Four Inalienable Rights

The preceding account of inalienable rights suggests a two-pronged test of inalienability: (1) is it always supererogatory to sacrifice the object of the right, and

(2) is the right needed for moral agency? Initially, we can check the claim that it is always supererogatory to sacrifice the object of the proposed right altruistically against our intuitions about cases that challenge this claim. In support of these results, we can proceed to ascertain whether or not enjoyment of the right in question is necessary for a person to function as a moral agent. For this purpose, we will take a moral agent to be an individual who is capable of choosing and living by constraints on action that take into consideration the requirements of social existence and who is capable of taking responsibility for his choice of a code of conduct and for whatever actions ensue.¹² Any right with an object that persons need in order to satisfy this minimal conception of moral agency will count as an inalienable right.

There seem to be four inalienable rights:

1. the right to life, i.e., the right not to be killed
2. the right to liberty, i.e., the right not to be forced to execute another person's dictates

¹²It is worth noting that our conception of a moral agent is less comprehensive than Rawls's conception of a moral person. A moral person has a conception of his own good and is capable of a sense of justice; he is entitled to equal justice. (See A Theory of Justice, p. 505.) We are concerned with a more limited question, namely, who possesses inalienable rights. Consequently, our conception of a moral agent does not and need not contain sufficient substance to explain what social justice is and who should receive it.

3. the right to benign treatment, i.e., the right not to suffer gratuitous acute pain
4. the right to satisfaction of basic needs, i.e., the right to adequate food, liquid, shelter, clothing, and medical treatment for survival

One preliminary question that this list provokes concerns the status of these rights with regard to permissible violations. We have not formulated these rights so as to allow specified types of killing, enforcing, hurting, and depriving while disallowing others despite the obvious objection that these rights oughtn't always to be respected. As we indicated earlier, there are good reasons to state moral rights in their strongest form because this approach exacts justifications for violations on a case by case basis.¹³ Accordingly, we will acknowledge that these rights can be violated justifiably by construing them as prima facie rights; however, we will not foreclose justification by introducing widely accepted exceptions into the formulations of the rights.

In the next two sections, we will apply the tests described above to our selection of inalienable rights. While defending these rights, we will also clarify what protection each of them affords. We will consider the rights to life and liberty together because of their immediate bearing on moral agency, and then we will discuss

¹³See chap. IV, Sec. 7 above.

the indirect but critical impact of the rights to benign treatment and satisfaction of basic needs on moral agency.

4. The Right to Life and the Right to Liberty

The right to life prohibits other persons from killing the person who possesses the right and allows this person to defend himself if he is attacked. It is obvious that a person cannot be a moral agent unless he is alive (at least, not within the moral sphere in which we presently find ourselves), and so it is also obvious that this right protects something essential to moral agency. But it is doubtful that it is always supererogatory for a person to sacrifice his life for the benefit of others. Two kinds of case can be adduced to call this claim into question: (1) a soldier has a duty to follow orders to participate in battles if his army is involved in a just war, and (2) a citizen may have a duty to join his country's army in wartime.

These proposed counter-examples can be dispensed with quite easily. A soldier is obligated to fight in battles or to care for wounded combatants in the midst of battles because he has agreed to do so in voluntarily signing up. Without this contract, there is no obligation to participate in a war for the benefit of persons other than the soldier. As for civilians who are obligated to volunteer for military service in a time of war, they are only obligated to join the army and risk their lives if the war

is defensive. In other words, it is only when a person would be fighting to protect his own interests as well as others' that he is obligated to join his country's army. A person is not obligated to help further a ruler's aggressive aspirations, nor is a person governed by a tyrant obligated to help resist liberating forces. Evidently, persons are not obligated to endanger their lives for altruistic reasons unless they have entered into agreements that commit them to conduct that would otherwise be supererogatory.

Before we proceed to the other inalienable rights, we should emphasize the difference between a person's risking his life and his sacrificing his life. On the one hand, a soldier can enter a battle with the understanding that there is a considerable risk of his being killed but without any intention of sacrificing his life. On the other hand, a soldier can pounce on a live hand grenade in order to absorb the explosion and save the other nearby members of his platoon with the understanding that there is no chance of his surviving. Somewhere between these cases the distinction between a risk and a sacrifice blurs, for it is not possible to say precisely how grave a risk must be before it becomes a sacrifice and it is not always possible to find out how grave a risk is. Nevertheless, this distinction is sufficiently firm to be useful, and it enables us to observe that prior agreements cannot commit

a person to sacrificing his life. Some military commanders acknowledge this principle by asking for volunteers when a mission thought to be suicidal is planned. Because a person cannot be obligated to sacrifice the object of an inalienable right though he can be obligated to risk its loss, altruistic sacrifices of the objects of inalienable rights are invariably supererogatory, whereas taking a risk with the same thing may not be.

We have defined the right to liberty as the right not to be forced to execute another person's dictates. This right, too, bears on moral agency in a direct and obvious way. For we absolve persons of responsibility for their behavior when they have been compelled to act by others. Still, it is somewhat difficult to see how the concept of supererogation pertains to this right. Clearly, it is not necessarily supererogatory for a person to act on another's behalf and exclusively for the other's benefit. Such conduct may involve no sacrifice on the part of the agent. (We assume that it is an unacceptable extension of the concept of a sacrifice to say that any moment not devoted to pursuing personal gain counts as a sacrificed opportunity.) But we are overlooking a crucial point in making these observations. The right to liberty entitles a person not to be forced to carry out another person's orders. Consequently, supererogation involving a sacrifice

of the object of this right must consist of submitting to force for someone else's benefit.

An example will bring out the difference between sacrificing liberty and acting as another person's agent. Suppose that a war is in progress and that two scientists have been collaborating on and have nearly completed plans for a new weapon that is expected to overpower the enemy quickly and humanely. Enemy agents kidnap one of the scientists in order to extract the plans for the weapon from him. The other scientist knows that his colleague will be tortured, will almost certainly give in, and will probably torment himself with reproaches for the rest of his life. In order to save him from this misery, the other scientist arranges for his colleague's release by agreeing to take his place. Naturally, he realizes that his captors will try to force him to divulge the weapon plans and that he may comply, but he is determined to spare his associate. Once we clarify what would be involved in relinquishing liberty, it becomes evident that no one could be obligated to sacrifice the object of this right for altruistic reasons.

Our presentation of the right to liberty raises numerous problems. One is that the concept of force seems to be relative to the individual to whom force is being applied; what will force one person to do a given act will not force someone else to do the same act. This seems to

imply that what will count as respect for the right to liberty will vary with the strength of will of the person who possesses the right. The problem comes to this. Two bank tellers might differ with respect to their resolve to resist holdups. Whereas one would unhesitantly turn over his cash supply if a robber pointed a gun at him, the other would refuse to comply under the same circumstances. Does this entail that a bank robber who happens upon the second teller would not violate his right to liberty although he would have violated the first teller's right to liberty if he had chosen the first teller's window?

Whether an action is a violation of a person's right to liberty cannot depend on his tolerance for stress any more than whether an action is a violation of someone's right to life can depend on whether or not the victim wears a bulletproof vest. A person is being forced to execute someone else's dictates when a command is accompanied by a threat of harm or a sample infliction of harm of a degree of fearfulness such that we would expect an ordinary person to submit and his refraining from submitting, if he does refuse to comply, would require that he utilize greater volitional stamina than most people have at their disposal.¹⁴ No form of persuasion that does not include a threat or a preliminary infliction of harm can count as a violation of

¹⁴The force required for a violation of the right to liberty could be defined simply as a threatened violation of one of the other inalienable rights.

the right to liberty, and uncommon impressionability does not subject a person to more violations of his right to liberty than a less easily influenced person may suffer.

The preceding explication of what constitutes force where the right to liberty is at stake suggests that our account of this right provides for a much more limited form of protection than some other accounts of this right. Our version of the right to liberty specifies a type of harm that others may not inflict on the bearer of the right in order to obtain his submission, but it does not delineate anything that this person is free to do. Basic liberties of the type enumerated by John Rawls are conspicuously absent from our list of inalienable rights.¹⁵ We have concentrated on barring forced obedience rather than on affirming areas of discretion because the former has an immediate impact on moral agency while the latter is only derivatively pertinent to moral agency. The question of what liberties a person ought to have concerns the purview of moral agency, but the question of whether a person's right to liberty ought to be respected concerns moral agency itself.

A person's freedom to express himself or to act can be circumscribed, and yet he may remain a moral agent.

¹⁵ Rawls includes the right to vote and to be eligible for political office, freedom of speech and assembly, liberty of conscience, freedom of thought, freedom of the press, the right to hold personal property, and freedom from arbitrary arrest and seizure. (A Theory of Justice, p. 61)

In fact, unjust restrictions can be imposed on his liberty without neutralizing his ability to function as a moral agent. For example, a person who is not allowed under any circumstances to make any statement criticizing the government of his country suffers from an unjust limitation of his liberty but does not therefore cease to function as a moral agent. Still, someone might object that the same results can be laboriously achieved through detailed and thoroughgoing restrictions on liberty as can be achieved through orders backed by force.

An unusually tenacious and patient censor might disallow every statement a person proposes to make by a process of elimination until only one conceivable statement on the subject at hand is left. The objection is that this progressive narrowing of the prospective speaker's options would have the same effect as the ruler's simply telling the speaker what he must say to avert punishment. But this claim will not survive close scrutiny. The censor's restrictions on what the speaker may say always leave the speaker the option of remaining silent without incurring any penalty; however, the ruler's ordering the speaker to make a particular assertion and threatening to injure him if he refuses closes off all alternatives. Thus, restrictions on liberty, regardless of how rigidly they confine a person's range of options, never become equivalent to coerced action.

Only an enforced denial of liberty can usurp moral agency because an enforced denial of liberty is indistinguishable from coerced inaction. A person whose liberty to speak is effectively denied is not permitted to assert anything just as a person who is intimidated into silence is prevented from saying anything. If a person were denied all freedom to act, he would be immobilized unless violations of his right not to be forced to execute another person's dictates enlivened him in the guise of someone else's puppet. From this, we can see that some freedom to act is necessary for moral agency; however, we must recognize that no single liberty or combination of liberties can be identified as necessary for moral agency.

By ruling out both coerced inaction and coerced action, the right to liberty we have put forward also rules out a total denial of freedom to act. Nevertheless, our position stops short of advocating a set of liberties. We have not addressed the questions of what kinds of liberties people should enjoy or how extensive those liberties should be. Apart from pointing out that liberties must be constrained by respect for the inalienable rights of others, we leave decisions regarding these issues to a theory of justice. Since these are not questions concerning necessary conditions for moral agency, they do not fall within the competency of a theory of inalienable rights. What is important for us to appreciate here is

that restricting the range of options available to an agent may be justifiable, but the right to liberty disallows paralyzing agency through the imposition of a choice.

Another problem connected with our construal of the right to liberty is that it seems to be incompatible with any law that prohibits a specified type of conduct, e.g., murder, or requires a specified type of conduct, e.g., paying income tax, and enforces its dictates through sanctions. In other words, is it possible to curb freedom to act using the law as a tool of enforcement without violating the right to liberty? Consider the plight of a person who is contemplating murdering a friend who he believes has betrayed him. Needless to say, he ought to refrain from killing his friend, but we must ask how the law might enter into his deliberations. There are three possibilities: (1) he realizes that the murder would be wrong regardless of what the law says and decides against it; (2) he wants to murder his treacherous friend, but the law deters him; and (3) he decides to murder his friend and defies the law. The law's influence in a person's life differs from the influence of a robber's pointed pistol over a bank teller's conduct in two respects. First, the law may not come up as a factor in a person's deliberations despite the fact that he is contemplating an illegal act and is familiar with the law since he may conclude on independent grounds that the act would be wrong. Second, in

deciding to defy the law he is taking a gamble that he will not be caught and punished. For the bank teller the threat is immediate and inescapable, and the likelihood of suffering injury for failing to comply with the robber's demands is high.

Though law cannot be adequately analyzed in terms of commands backed by threats, a law that prohibits an action that a person is considering doing certainly can assume that visage.¹⁶ However, the command and the threat are both more distant from the person to whom these are addressed than is ordinarily the case when commands are issued and threats are hurled. Indeed, it would be misleading to say that a person who never seriously contemplates committing murder is submitting to a legal order not to kill anyone in order to avoid being punished. It is only when a person actually considers violating the law that he may encounter the threatening aspect of the law. Accordingly, it is better to think of certain laws as permanent, or at least stable, possibilities of threats rather than as blades constantly poised above every citizen's neck. An individual must engage the law by proposing to commit a crime in order for the law's deterrent function to be triggered.

¹⁶H. L. A. Hart criticizes the account of law as commands backed by threats in The Concept of Law (chaps. 2-4). His discussion of obligation in chap. 5 is also relevant to the problem we are considering.

In adopting the above view of legal deterrence, we reconcile the rule of law with the right to liberty. A law does not force a person to act in one way rather than another unless he takes steps to violate it, and even then the law may not intervene. Thus, it is only under extraordinary circumstances that a law can be said to violate a person's right to liberty. This transforms our problem from one concerning the compatibility of law and the right to liberty into one concerning the justifiability of a given legal sanction that may violate a person's right to liberty. Obviously, it is possible for laws to be enacted that are capable of violating a person's right to liberty unjustifiably. Laws forbidding harmless sexual practices between consenting adults fall within this category. Nevertheless, the gravity of some crimes is sufficient to justify deterrent violations of would-be criminals' rights to liberty. Where this is the case, a law may violate a person's right to liberty but do so justifiably.¹⁷ It is permissible for laws to reinforce moral obligations by constraining freedom to act when failure to fulfill the

¹⁷ We have assiduously avoided explaining away legal interference in individuals' lives by appealing to the influence suffrage gives citizens over legislation in a democracy; for the will of the majority as it is embodied in the legislative process may conflict or coincide with the will of any given individual. Though it is desirable to have some input in this process, it is a mistake to conflate the impact of a vote with personal decision-making.

obligation ordinarily poses a serious threat to other persons or to a just social order.

5. The Right to Benign Treatment and the Right
to Satisfaction of Basic Needs

The right to benign treatment and the right to satisfaction of basic needs are a step removed from moral agency as compared with the right to life and the right to liberty. A successful violation of a person's right to life destroys the person and along with him his ability to function as a moral agent. A successful violation of a person's right to liberty constitutes a temporary or permanent usurpation of his moral agency. In contrast to this, violations of the right to benign treatment or the right to satisfaction of basic needs can be used as a means of destroying or usurping moral agency. By subjecting a person to acute pain or depriving him of basic necessities, another person can kill or control him. Thus, one reason for including these rights on our list of inalienable rights is their instrumental relation to the two we have already established.¹⁸ In addition, the rights to benign treatment and satisfaction of basic needs provide a form of

¹⁸ Respect for the rights to benign treatment and satisfaction of basic needs does not guarantee respect for the rights to life and liberty. Modern medicine raises possibilities of painless killings and seizures of moral agency achieved without violating any right other than the right to liberty. Nevertheless, it is important to recognize the secondary shield the rights to benign treatment and satisfaction of basic needs provide for the objects of the rights to life and liberty.

protection for moral agency that is independent of survival and autonomy. Violations of these rights can disrupt or impair moral agency without infringing the victim's right to life or liberty. Thus, it is necessary to accord the rights to benign treatment and satisfaction of basic needs full status as separate inalienable rights.

Before we examine the relation between supererogation and the rights to benign treatment and satisfaction of basic needs, we need to specify what these rights entitle a person who possesses them to demand. We have said that the right to benign treatment is equivalent to the right not to suffer acute gratuitous pain. Although it is ordinarily wrong to inflict mild pain on a person gratuitously, this proscription does not derive from any inalienable right since mild pain does not undermine moral agency. A person's possession of the right to benign treatment bars torturing him or assaulting him, but it also bars withholding analgesics when relief from acute pain can be managed or a cure for the cause of the pain when one is available.

The right to satisfaction of basic needs complements the right to benign treatment. It provides for adequate food, water, shelter, clothing, and medical treatment for survival and thereby protects persons who possess this right from certain types of deprivation.¹⁹

¹⁹The right to medical treatment warrants several comments. First, this right spans the right to benign

The right to satisfaction of basic needs can be viewed as an umbrella right covering an assortment of subsidiary rights, but it should be stressed that the subsidiary rights must meet three criteria. First, the rights must be constructed so as to prevent forms of deprivation that

treatment and the right to satisfaction of basic needs. Some medical treatment seems to be aimed mainly at alleviating the patient's pain or ridding him of the cause of it, whereas other types of medical treatment seem to be aimed mainly at preventing the patient's condition from deteriorating. Since this right can be divided between the right to benign treatment and the right to satisfaction of basic needs, it is best not to consolidate it into a single separate right because this would only serve to obfuscate the reasons for acknowledging the right. For example, if a person has an inalienable right to medication for relief of pain, it is because of the probable effects of prolonged, acute pain on his ability to function as a moral agent. Second, the professionalization of medicine is no obstacle to a right to medical treatment. Although many city dwellers lack the skills to produce (as opposed to purchasing) food, clothing, or shelter for a needy person, we do not consider the specialization that has evolved with respect to these commodities a barrier to acknowledging rights to them. Insofar as moral agents could learn the skills necessary for directly honoring an obligation to supply minimally adequate food, clothing, or shelter for another person, it is also possible for moral agents to master the rudiments of medical care. Finally, variations in medical knowledge over the course of history and in different places do not rule out a right to medical treatment. It might be that there are key words through which we can gain control over others and violate their rights to liberty. Let us suppose that 'abacadabra' is such a word, but nobody knows it. A person P_1 joking with another person P_2 utters what he believes to be the nonsense syllables 'abacadabra' and then proposes that P_2 take him to dinner. Although P_1 does not know it, his amusing sequence of sounds has forced P_2 to comply with his suggestion. P_2 's right to liberty, has been violated, but P_1 does not realize that the violation has occurred and does not know how he could have avoided infringing P_2 's right to liberty. Uncontrollable circumstances can limit our ability to respect rights in numerous ways--ignorance is one of them. Gradual progress in the medical sciences improves our ability to respect the right to medical treatment; it does not demonstrate that there is no such right.

cause acute pain or ultimately the death of the victim; basic needs are critical. Second, they must secure things that all people need occasionally though the intervals at which the need arises may not be regular; basic needs are universal. Third, the objects of the rights must be goods that people ordinarily provide for themselves but sometimes cannot; basic needs are personal. Our conception of a basic need has been developed by attending exclusively to the individual as a potentially self-sufficient system. It ignores needs generated by his social context because frustration of these induced needs does not jeopardize moral agency. In sum, a person's possession of the right to satisfaction of basic needs entitles him to a social and economic environment that secures him against starvation, exposure to the elements, and the ravages of tractable disease, but it does not entitle him to just political or economic institutions or to a comfortable existence.

Many of the most widely known examples of supererogation involve acute pain. To submit to torture so that someone else will not be tortured, to make oneself the target of an attack in order to deflect it from someone else, to give someone else pain killers when one desperately needs them oneself, or to allow someone else to be cured of a painful disease rather than oneself are all supererogatory acts. The only plausible objection to

this claim presents the case of a parent attracting an attacker to himself in order to protect his young child.

In situations in which this or similar conduct seems to be obligatory, two features stand out. First, by virtue of the parent-child relationship the parent has a more stringent and more extensive obligation to aid the child than people ordinarily have with respect to one another. Conduct that does not count as supererogatory when parents act in relation to their young children, like allowing their children to live in their homes, would count as supererogatory if a person acted in a similar way on behalf of total strangers under ordinary circumstances. Second, whereas the child is helpless, the parent has some ability to defend himself and consequently may suffer less serious injury. Thus, the parent's conduct represents a gamble that the pain caused by the attacker can be minimized through his intervention.

In a situation in which a parent is forced to choose between submitting to excruciating pain and allowing his child to be subjected to the same treatment and there is no possibility of resistance, we would hesitate to say that a parent's agreeing to endure the pain instead of his child would not be supererogatory.²⁰ A parent's

²⁰ To avoid confusion, it is worth noting a situation in which a parent's interests can coincide with his child's although benign treatment is at issue. If a parent must undergo an extremely painful treatment in order to

self-sacrificial conduct is unquestionably more comprehensible than that of a complete stranger would be since the parent's love for his child helps to explain his ability to act selflessly. Nevertheless, the comparative ease with which we can understand parental self-sacrifice should not seduce us into relegating such conduct to the status of mere obligation fulfillment. Thus, a special relationship can generate an obligation to suffer greater pain on behalf of another person than would ordinarily be required and to take greater risks of suffering pain than would ordinarily be required; however, the obligation is limited by the degree and certainty of the pain.

It is more difficult to exhibit the supererogatory quality of action pertaining to the right to satisfaction of basic needs. To some extent this is because of the complexity of the system through which our basic needs are satisfied. We do not periodically line up to receive minimally adequate allotments of food, liquid, medical treatment, clothing, and shelter; monetary and property

recover from a potentially fatal illness, his own interest in self-preservation may move him to agree to the treatment, and coincidentally his recovery will eventually enable him to resume his parental duties. In this case, the parent's conduct cannot be considered supererogatory. However, if he genuinely would prefer to die rather than undergoing the treatment but chooses to submit to it purely out of a sense of responsibility for his child, his conduct would be supererogatory. Of course, the difficulty in separating altruistic from self-interested motives in a case like this would justify us in doubting anyone's claim that his submission to medical treatment was in fact an act of supererogation.

systems are interposed between individuals and the things they need. Consequently, it is difficult to pinpoint which transfers of money or property constitute indirect sacrifices of food, liquid, medical treatment, clothing, or shelter needed for survival. Moreover, many of us live so far above subsistence level that it is difficult to conceive of what it would be like to be on the brink of starvation for lack of nourishment, dehydration for lack of water, expiring for lack of medical treatment, or freezing for lack of clothing or shelter. Still, we can enhance our empathic powers by artificially simplifying matters.

We will imagine a society consisting of ten people living in isolation on almost barren land. Because their land is virtually unarable and they have no alternative source of supplies, they live on the verge of starvation. Each day they search for food and then gather to prepare and eat a single poor meal. They take turns serving the meal and always line up in the same order except that each day a different person is at the head of the line. Sometimes there is not enough food for everyone to receive a minimally adequate portion. When this happens, the members of the group have agreed that minimally adequate portions should be dispensed to as many people in the line as can be served before the food runs out. They hold that it is better for some of them to eat enough than for all of them to eat too little because experience has shown that the ones

who have eaten adequately will be more successful in finding food the next day than all ten of them would be in an undernourished condition. One day the ninth person in line receives the last helping of food leaving nothing for the server. Surely, the ninth person could not be obligated to relinquish his meal to the tenth or to share it with him.²¹ Though it could be argued that persons have an obligation to share a surplus with others who are less fortunate, there does not seem to be any basis for arguing that persons are ever obligated to give up commodities or services without which they will eventually die.

Despite the practical difficulties that could arise in connection with distinguishing intense hunger from malnutrition, severe thirst from dehydration, and extreme vulnerability from exposure or medical neglect, it seems to be clear that people cannot be obligated to subject themselves to starvation, dehydration, or exposure for the sake of their fellows. These conditions inflict such misery on people and bring them so close to death that the moral strictures we found associated with the rights to life and benign treatment carry over to the right to satisfaction of basic needs. A person must enjoy an excess of an

²¹ Later, we will inquire into the moral position of a person whose inalienable rights have been violated for compelling reasons of social exigency. His position differs from that of a person whose inalienable rights are systematically denied. See Chap. VIII, Sec. 3 below.

essential commodity before he can be obligated to distribute any of his allotment to others; lacking such an excess, his foregoing any part of his portion for the benefit of others would be supererogatory.

At this point, someone might interject that a person who has obtained a surplus of essential commodities cannot be obligated (though he may be inclined) to help sustain others who have less than they need. Charity, on this view, cannot be obligatory because this obligation would conflict with property rights, and property rights are necessary to secure satisfaction of basic needs. The problem of delineating circumstances under which charity ceases to be supererogatory reaches beyond the scope of our present concerns; however, we need to consider whether the right to satisfaction of basic needs masks inalienable property rights.

One way to put this problem is to ask whether the nine members of our impoverished society who receive food on a day when there is not enough for ten are in the same position with respect to their portions as we are with respect to a particular meal in which we have a property right. On the one hand, the nine people who have been served portions do seem to have rudimentary property rights in the food they have received. Each member of the group, including the person who receives no food, is obligated to allow the others to consume the food they have

been given. The daily distribution of rations sets up a system of possessions backed by obligatory mutual restraint.

Still, the persons who receive food are only free to use it for the purpose for which it was intended. Each has a right to satisfaction of his need for nourishment. Therefore each is entitled to eat the food he is given, but none is entitled to waste his portion or to feed it to a pet. Of course, property rights are usually limited. A person who has a property right in a particular meal may not use the meal to kill another person by adding poison to it and serving it to his intended victim. Nevertheless, property rights do not usually impose an obligation to use the property in a prescribed way. Although a person cannot use his meal to murder or injure someone else, he is not required to use it to nourish himself. In contradistinction to this, the rights of the nine members of our straitened society to their portions are contingent upon their using their portions to satisfy a basic need.

The right to satisfaction of basic needs could blend into a property right. If our society of ten were to allow its members to use their portions as they please within the constraints imposed by the rights of others, they would create a conditional property right. The portion each person received would become his property provided that there was enough for everyone. However, this society could, instead, require that anyone who did not

want to eat his share return it to the communal pot from which it would be dispensed to the others in order to improve their diet a bit. This alternative suggests a way of differentiating the right to satisfaction of basic needs from property rights.

The right to satisfaction of basic needs does not predetermine how issues concerning the distribution of essential commodities should be settled once a society meets the basic needs of its members. If the recipients of excess essential commodities forfeit their allotments upon refusing to use them to satisfy a basic need, they cannot be said to have a property right in these commodities. Alternatively, if they are allowed to use an allotment that exceeds their requirements for some unrelated purpose, we can say that their right to satisfaction of basic needs is transformed into a property right. Nevertheless, we must recognize that neither of these arrangements is a logical consequence of the right to satisfaction of basic needs. Because this right confers commodities and services on persons and prohibits interference with their use of these allotments, it is reasonable to construe the right to satisfaction of basic needs as a precursor of property rights. But because the protection afforded by this right terminates after each individual's basic needs have been satisfied, it is not defensible to claim that the right to

satisfaction of basic needs is really a camouflaged property right.

A slightly different way to understand the relation between the right to satisfaction of basic needs and property rights is to reflect on how the former could be implemented. In order to insure clarity, we have confined our discussion to the simplest conceivable method of guaranteeing this right--persons line up and receive provisions that they have gathered earlier that day. But this arrangement is neither practicable nor desirable in modern societies. Manufacturing and farming on a gigantic scale have replaced our daily subsistence harvest, and complex systems of private and state ownership, taxation, and welfare have replaced our simple communal dole. Although detailed proposals for implementing the right to satisfaction of basic needs are beyond the scope of this inquiry, it is worth noting some basic points in regard to this matter.

The choice between private and collective ownership of the means of production is not settled by advocacy of the right to satisfaction of basic needs. Since both capitalist and socialist forms of ownership of the means of production are in principle capable of generating sufficient wealth to implement the right to satisfaction of basic needs, this right does not dictate a decision between alternate economic systems except if conditions are such

that under one, but not the other, system this right could not be secured for all who qualify. Nevertheless, it is incontrovertible that a system of personal property involving both money and goods provides the most efficient mechanism for supplying individuals with what they need to survive. Furthermore, introducing a monetary system to mediate between officials, individual recipients, and essential commodities reduces an official's ability to use his dispensations to violate a recipient's right to liberty. Although the institution of personal property is not a necessary consequence of the right to satisfaction of basic needs, it is only under exceptionally desperate or primitive circumstances that other arrangements appear attractive or viable.

6. The Broader Context of Inalienable Rights

We have found four rights that provide crucial support for moral agency. Three of the rights we have designated as inalienable rights protect the individual agent--his life and two primary components of his well-being. The fourth, the right to liberty, directly protects his ability to exercise moral agency. Each inalienable right sustains the individual's ability to function as a moral agent by helping to secure a minimal level of psychological equilibrium.

A person may have chosen a code of conduct which accommodates the interests of other persons, but we would not expect him to measure up to the standards he has set for himself if he were subjected to certain types of affliction. If someone were to attempt to kill him, to subjugate him, to torture him, or to expose him to insufferable conditions, he probably could not resist defending himself outright or, at any rate, feigning submission in order to revolt against his treatment at a more auspicious time. And we would excuse, if not countenance, whatever he might do. For it is common knowledge that previously humane and sensible individuals can be driven to desperate acts of defiance, even self-defeating ones, by attacks on their lives or infliction of extreme misery.

From what we have said, it is clear that violations of inalienable rights are destructive of moral agency. They reduce the individual to his suffering and his desire to be released from it and thereby suppress the restraints that would ordinarily temper his conduct. It is not surprising, then, that we concomitantly discovered that persons are never obligated to sacrifice the objects of these rights for altruistic reasons. Though they may voluntarily assume positions that obligate them to take considerable risks with the objects of these rights under appropriate circumstances, these obligations do not extend to out-and-out sacrifices. This entails that a person

cannot be obligated to renounce any of these rights. For if a person were to renounce one of these rights, he would create an obligation in himself to permit any violation of his erstwhile right. But it is impossible for him to be obligated to submit to such violations since it is always supererogatory for him to sacrifice the object of an inalienable right altruistically.

The account we have given of inalienable rights is highly suggestive both with respect to the concept of moral agency and also with respect to the concept of a moral community. Our treatment of the relation between inalienable rights and moral agency is as yet incomplete. We have sketched how violations of inalienable rights incapacitate moral agents, but it remains for us to explore the effects of a denial, as differentiated from a violation, of a person's inalienable rights on his ability to function as a moral agent. Furthermore, we need to specify precisely what response violations and denials of inalienable rights entitle the victim to make. Since we cannot address this issue without establishing some conclusions about the bases of moral interaction, our inquiry will ultimately lead us to consider the role of inalienable rights in the constitution of the moral community. These concerns will occupy us in the next chapter.

CHAPTER VII

INALIENABLE RIGHTS AND THE FOUNDATIONS OF MORAL INTERACTION

We have argued in the preceding chapter that there are at least four rights that cannot be renounced because it is impossible to incur an obligation to allow violations of them and that this incapacity is ultimately a consequence of the crucial support these rights provide for moral agency. But so far our approach has been to inquire into the subversive effects on moral agency of relinquishing the objects of these rights. Now, the question arises as to why rights to these goods must be acknowledged. We have already seen that a moral code that excludes these rights thereby concedes the possibility of its generating self-defeating practical guidance. In what follows, we will develop this point by considering how inalienable rights contribute to the foundational structure of moral communities. Our inquiry will proceed in four stages. First, we will ask what could prevent a moral community from being established. Second, we will ask how denying inalienable rights could create conditions resembling those that would preclude moral interaction. Third, we will ask how respect for inalienable rights overcomes these obstacles to moral

relations. Lastly, we will ask why there can be no substitute for acknowledgement of inalienable rights.

1. Impenetrable Systemic Deceit

Before we consider what would prevent individuals from forming a moral community, we need to state what we take a moral community to be. A moral community is a network of relationships in which mutual forbearance and assistance are evidenced by responsible individuals. Although mutual forbearance is sufficient for a state of peaceful coexistence among the occupants of a given region, it does not suffice to show that these individuals are members of a community. Mutual assistance is what transforms a group of isolated individuals who do not aggress against one another into a community. The assistance need not take the form of individuals deliberately undertaking to help one another; it may occur automatically as a result of institutional structures. Nevertheless, this element makes the difference between a group of people who are not enemies and a group of people who constitute a community. In accordance with this account of a moral community, we can say that a moral agent must be capable of responsibly conducting himself so as to display both respect and concern for his fellows. Thus, the question of what would prevent a moral community from being established can be construed as the question of what would prevent

individuals who are capable of functioning as moral agents from satisfying this definition. We will argue that impetrable systemic deceit would thwart moral agency.

Many philosophers have observed that the distinction between honesty and dishonesty can only be maintained in practice against a background of normally honest conduct. Kant claims that it would become impossible to make a promise if everyone were to adopt a policy of pretending to make a promise without any intention of fulfilling it whenever that strategy seemed convenient.¹ And A. I. Melden remarks, ". . . without the telling of the truth there can be no lying."² In one sense, this is all perfectly obvious. If we knew that promisors typically broke their promises, we would discount any promise we might receive. Also, if lying were as common as truth-telling, we would not believe anything we heard until we could obtain independent confirmation. Scepticism is undoubtedly the most rational attitude with which to meet an uncertain world. However, this thesis about how it would be reasonable to respond to

¹Foundations of the Metaphysics of Morals, trans. Lewis White Beck (New York: The Bobbs-Merrill Company, Inc., 1959), pp. 403 and 422. Marcus Singer also makes this point. (Generalization in Ethics, p. 231)

²"Action," in Essays in Philosophical Psychology, ed. Donald F. Gustafson (New York: Doubleday and Co., Inc., 1964), p. 68.

widespread dishonesty is considerably weaker than the one which will be defended in the following discussion.

Unless people are obligated to represent themselves honestly in their dealings with others and, for the most part, act in accordance with this obligation, human action becomes unintelligible. This is to say that a context of non-deceitful relations makes it possible for us to discern what action is being (or was) done and who is doing (or did) it. Without this context, our methods of classifying actions and attributing them to agents would break down. In particular, it would be impossible to distinguish instances of respect for other persons from instances of crass and self-serving manipulation or to distinguish gestures of concern for other persons from ones of contemptuous indifference. Moreover, it would be impossible to assign responsibility for anything that might occur. Our concept of moral agency would collapse.

Deceit can take two forms: (1) a person can represent himself as believing in principles which he surreptitiously ignores in practice, or (2) a person can, through his statements or conduct, disclaim responsibility for his actions or foist responsibility for his actions onto someone else. Where hypocrisy, false protestations of innocence, and frame-ups are the rule, deception ceases to be distinguishable from sincerity. In saying this, we are not merely asserting that the obstacles to finding out

which action was done by which person would prove insurmountable. Beyond this, we are claiming that individual agents would be unable to identify and characterize their own actions.

A world in which there were no moral or legal barriers against deceit would answer the following description. Deceit could be systematic or sporadic; it could be undertaken purposively or on a whim; the perpetrator's motives could be malicious, benevolent, or simply self-interested. Deceitful acts could themselves become the objects of additional deceitful tactics in order to prevent detection. An initial deception could breed an endless concatenation of deceptions, each aimed at concealing the previous one, and other persons could be drawn into the web of deception by the need to protect themselves. In such an environment, people would shed their tendency to become flustered when found out; they would invent and master techniques for dismissing such discoveries or diverting their accusers. Since neither shame nor guilt would occur in connection with deceit, the signs we rely on to reveal deception would never give anyone away. There would be no chink in the smooth surface of deceit, and, even if there were, its discovery would only instigate further deceit.

The world described above is probably sufficiently distressing to send anyone gladly to the refuge of sincerity and forthrightness, but we have not yet presented

the most serious implications of a deceit ridden world. So far we have assumed that each perpetrator of deceit would know that he was deceiving others and each honest person would know that he was purveying the truth. Also, we have assumed that each individual would remain able to identify his own acts. In what follows, we will argue that these assumptions cannot be sustained once we scrutinize the position of a person attempting to function in such a context.

In a world of ongoing, unpredictable, and undetectable deceit, a person's experience of his relations with other people would resemble watching a bank of television sets, each of which carries an acquaintance's professed version of reality. Lies are told; misleading schemes are executed; but elements of the truth occasionally surface in the narratives, too. Sometimes essentially the same account would run on more than one monitor; however, concurrence among the narratives could be evidence of a conspiracy rather than a proof of reality. If the viewer's acquaintances are clever, each of their broadcasts will be coherent though the broadcasts may constantly contradict one another. In order to participate in these relationships, the viewer would feed his actions into the video system through electrodes which would pick up his decisions and project them. Naturally, he is only allowed one action at any given time. He could not be allowed to respond differently

to each narrative line because his video set-up is designed to simulate the situation of a person who is getting different stories from different people but despite this conflict must decide what to do. This model enables us to comprehend the dissociation that would develop between the individual and his conduct under these conditions.

The first question we may raise concerns the viewer's ability to characterize his own conduct accurately. We know that he is never sure who is deceiving him or how he is being deceived. But does he know whether his own actions are deceitful or forthright? Suppose that the viewer is a doctor making her rounds at a hospital. On one screen the viewer's former husband has just rushed up and in anguished tones asked whether his brother, who he has been informed is critically ill, is still alive. Simultaneously, on another screen a co-worker has politely inquired how things are going. The viewer believes that the second screen is carrying an instance of her co-worker's sincere interest in her well-being and that the first screen is depicting part of the plot she is convinced her former husband is executing to evoke her pity and ensnare her in another marriage. She casually says, "Everything's fine," and walks toward the elevator.

Unbeknownst to the viewer, her former spouse's beloved brother is in the hospital and is at that very moment being brutally murdered in his bed. Her former

husband who has taken her statement as reassurance suffers a severe shock upon entering his brother's room and finding him dead. As a result of this ghastly and unanticipated discovery, it becomes necessary to hospitalize him for extended psychiatric treatment. Actually, the co-worker's small talk was a subterfuge to distract the viewer long enough for an accomplice to kill the viewer's former brother-in-law. The viewer's reply to her co-worker has in fact led her former husband to expect that his brother will be alive when he arrives, thus precipitating his psychological collapse, and, in addition, she has unintentionally helped to advance her co-worker's plot which is directed against her former husband as well as against his brother. Subsequently, all of these events are successfully hidden from the viewer.

Our omniscience enables us to see that the viewer's statement has grievously misled her former spouse while aiding a vicious criminal plot. The viewer does not even suspect that her remark may have had serious repercussions. As far as she is concerned, she has uttered an inconsequential commonplace. Thanks to the machinations of others, she will never discover that she has made a cruelly deceitful statement. The viewer simply does not know and cannot find out what she has done.

Someone might object that we have neglected to consider the viewer's intentions. But our reply would be

that they are irrelevant. Provided that the world is arranged so that good intentions are normally correlated with right conduct and bad intentions with wrong conduct and this is known to the participants, a person's intentions can legitimately enter into his judgments about his own conduct. He can praise or blame himself for both his intentions and his act; he can condemn his bad intentions while exulting in the unexpectedly good results of his action; or he can congratulate himself for his good intentions while regretting his act. However, when the world is constituted so that good intentions are as likely, if not more likely, to yield disastrous results rather than desirable ones and bad intentions are likely to produce contrary effects and it is impossible to ascertain the objective import of one's own action, good or bad intentions make no difference. Because it is impossible for our viewer to discover who is deceiving her and who is sincere and therefore impossible for her to ascertain the real consequences of any of her actions, she cannot revert to an appraisal of her intentions.

Indeed, it is not clear that we could draw a distinction between good intentions and bad ones in a world like the one we have been describing. If kind impulses randomly result in deprivations and benefits for persons toward whom this feeling is directed, the intention to secure or promote another person's interests cannot be

considered either good or bad. Similarly, if malevolent impulses randomly result in benefits and deprivations for the persons toward whom this feeling is directed, we have no basis for labeling the intention to harm another person as good or bad. The impenetrable system of deception we have posited thwarts any attempt to predict the probable consequences of action. Consequently, we are obliged to assume that intentions of whatever sort produce randomly good and bad results. Thus, the fact that our viewer merely intends to satisfy what she takes to be her co-worker's idle curiosity about the state of her life and to ignore what she believes to be her former husband's underhanded importunity cannot justify us in exculpating her or in censuring her. Accordingly, she also has no grounds for reaching a favorable or adverse judgment of her own intentions and conduct.

Another possible objection to the conclusions we have drawn from our video model is that events like the ones we have described could transpire in the world to which we are accustomed, but we would not then conclude that it makes no difference whether a person's intentions are good or bad or that good and bad intentions are indistinguishable. To this we can answer that the crucial difference between the world we live in and our imaginary video world is that the possibility of reliable correction of misunderstandings exists in our world but not in the other. This is to say

that, although a sophisticated, long-term, deceptive scheme could be implemented, the chances of its ultimately succeeding are not good.

This state of affairs contrasts with our model inasmuch as it is reasonable to suppose that the very prevalence of deception in the world we have constructed would tend to protect individual acts of deception from being uncovered. Furthermore, whereas in our accustomed world we would be able to investigate any charge of deceit by collecting evidence which could be tested for trustworthiness to support or refute that charge, in our construct no one can ever be confident that the evidence he obtains is not itself delusory. Of course, it is possible that grandiose deceitful plots are sometimes brought off and never discovered. But it is just because these are the exception rather than the rule or, in other words, because they impinge upon an otherwise coherent pattern of events that it is conceivable that we might isolate and unravel them.³

A world penetrated by deceit reduces what can be said about human action to a parody of positivistic protocol

³Needless to say, it is possible that our apparently reliable world is contained within an all-inclusive system of deceit constructed so that we can never discover the nature of our delusion. Descartes' Evil Genius may be in control though we do not suspect it. Still, within the world to which we do have access deceit occurs against a background of honesty and regularity. Consequently, we are able to decipher our own actions as well as the actions of others.

sentences: "Here, now, ordered sequence of words, 'everything's fine,' spoken by me," or "Here, now, walk toward elevator, executed by me." Characterizations of actions are confined to accounts of physical motions or lists of words uttered. Neither the point of the action, the meaning the words convey, nor the rightness or wrongness of the conduct can be discerned. An agent may know what he intends to accomplish by his action or statement, but he can never be assured that his intentions are realized in fact and therefore cannot evaluate either his intentions or his actions. Furthermore, it is questionable whether an individual could keep track of his own behavior in this context. Perhaps the expression of agency in our protocols, namely, 'by me,' is unproblematic given that these propositions are asserted as the behavior is occurring, but the attribution of agency becomes problematic once the behavior is past.

Conditions of impenetrable systemic deception prevent individuals from competently identifying their own behavior in retrospect. Undoubtedly, a viewer's monitors could produce an assortment of narratives that would block his ability to identify his own behavior as it was occurring; however, this problem would not necessarily be chronic. Also, if we were to add a feedback device to our video model which would connect the viewer's projected behavior with his consciousness in a way more nearly

approximating our usual awareness of our physical positions and movements, the difficulties involved in identifying present behavior would be alleviated. Still, for our purposes a person's ability to identify his own behavior after it has taken place is crucial. A person cannot be said to take responsibility for an act that he is only prepared to acknowledge at the moment he is doing it because responsibility encompasses consequences of action that may not occur until after the action is completed. Consequently, a person must be able to identify past as well as present acts as his own if he is to count as a responsible individual. Our video model helps to clarify the problem confronted by a person seeking to identify his past behavior in a world of deceit.

Consider another viewer facing his bank of television sets. He does not know which, if any, of them is accurately representing real events. Suppose that he is the father of two children, and a crisis has erupted in his family because his ten year old child has discovered the family's pet dog lying dead and mutilated beside the baby's crib. One screen portrays an account of the previous evening's proceedings in which he and his wife drunkenly decide to distract the crying baby by torturing the dog to death. Another screen represents him entertaining the baby by cavorting clownishly near the crib. Did either of these episodes occur? Both? Neither? He cannot be sure

which of the monitors is carrying his memory of the events as opposed to the fantasized account he has contrived. By hypothesis his wife's testimony is worthless despite the fact that she might tell the truth. In addition, the dead dog in the baby's room may not be the family's pet but instead an indistinguishable substitute planted there to confuse and disturb him. The viewer has no way of justifying a claim to responsibility or a denial of responsibility for either of the acts recounted on his monitors.

Now someone might object that our viewer's dilemma is caused by the conflict between the events depicted on the two monitors. What if, our objector might ask, the viewer had simply remembered the previous evening's events in one way, and no other version had been projected from any other source? We concede that this could be the viewer's situation, but we deny that the absence of alternative projected versions of events justifies the viewer in assuming responsibility for the behavior that is projected.

It is well-known that memory is faulty and that distorted memories have no internal feature to set them apart from accurate memories. We rely on the coherence of our memories and the confirmation we occasionally seek from others to assure us that our recollection of prior events correctly represents them. Contrary to this, our viewer may have both coherent and confirmed memories and

yet be justified in doubting their accuracy. His memories may be coherent because he has been following only one monitor and ignoring the rest. But since that monitor may not be carrying real events, the coherence of the viewer's memories does not provide evidence for their accuracy. Another possibility is that the viewer may have contrived a unified explanation encompassing all of the events he has witnessed on his bank of monitors, thus producing a coherent set of memories. Unfortunately, his inability to ascertain which of the events he has incorporated into his system of recollections are real vitiates any claim to accuracy that might be made on behalf of his memory. Moreover, the viewer cannot turn to anyone else for corroboration because he cannot know whether their testimony will be deceitful or honest.⁴ In light of the fact that the viewer has no reliable way of checking the accuracy of his memory, he cannot be justified in acknowledging any past behavior as his own or in repudiating any behavior alleged to have been his.

In the world we have explicated in terms of our

⁴Notice that since the viewer's acquaintances would also be experiencing life through a video system, they would not know whether their testimony proved to be deceptive or helpful. Thus, their testimony would be doubly worthless: it could be given sincerely but in fact mislead the inquirer; it could be given deceitfully and in fact mislead the inquirer; it could be given sincerely and in fact validate accurate memories; or it could be given deceitfully and in fact validate accurate memories. The viewer who requests this testimony has no way of knowing what kind of response he is getting.

video model the ideas of moral choice and responsibility cancel out. Both of these concepts are lost because they only have application in a world in which intentions are realized in action. But the radical and irremediable ignorance of the consequences of action that prevails in the world we have described reduces intentions to decisions to move or refrain from moving in a particular way and accordingly reduces action to behavior. In this context, it is impossible to distinguish good and bad intentions or to recognize right and wrong conduct. Consequently, the idea of a moral choice, one that takes into consideration the exigencies of social existence, has no place. Taking this point a bit further, it becomes evident that the idea of responsibility is also eliminated because it makes no sense to take responsibility for mere behavior. The concept of responsibility depends on our ability to know and control what we are doing. In addition, the concept of responsibility requires that we be able to identify the actions we have done after we have finished doing them, and we have found that a world of deceit would preclude competent retrospective identification.

Impenetrable systemic deceit would prevent individuals from assuming the role of moral agents. Their respective patterns of behavior might coincidentally coalesce so as to produce a network of cooperative relations, but it is more probable that the result would be a

state of unremitting belligerency and insecurity. Lacking the opportunity to realize the capacity for moral agency, any individuals who might be subjected to the conditions we have described could not act so as to display respect and concern for others though their behavior could accidentally simulate deference and assistance. Thus, regardless of whether or not our imaginary environment proved to be conducive to survival and personal prospering, the populace could not constitute a moral community.

2. Inalienable Rights and the Capacity for Moral Agency

The fundamental difference between the universe we constructed in the preceding section and the one with which we are familiar is inalienable rights. In order to see that this is so, we will ask under what conditions human relations might degenerate to such an extent that deceit would become an acceptable practice. Then we will explain how inalienable rights would rectify this state of affairs.

In order to highlight our views about justifiable deceit, let us imagine a society in which there are masters and slaves. We will assume that no slave has a right not to be killed although slave owners have rights not to have their property destroyed. Thus, the owner of a slave has a right to kill the slave, and the prohibition on others'

killing the slave represents an obligation to the owner not an obligation to the slave. Needless to say, slaves are legally required to submit to their masters' wishes. Slave owners have a right to obedience from their slaves. Therefore, no slave has a right not to be forced to execute another's dictates. Finally, although prudent masters minimize the pain they inflict on their slaves and provide for their slaves' basic needs, the slaves do not have a right to such care, nor do they have a right to protect themselves or to provide basic necessities for themselves through entrepreneurial undertakings. Slaves are completely at the mercy of their masters.

It is easy to imagine situations in which we would consider deceitful conduct on the part of a slave permissible. A slave who contrives to make his thwarting his owner's attempt to kill him appear to be something other than an act of defiance cannot be faulted. A slave who is being punished for some petty offense by starvation is justified in stealing food if he has the opportunity to do so without getting caught. A slave who pretends to love and respect his master while harboring hatred and plans for escape or revolt engages in justifiable deceit. Indeed, it is hard to think of a form of deceit that a slave definitely could not justify practicing against his master under the conditions we have assumed.

Even within the slave class, the obligation to engage in non-deceitful relations would be seriously undermined. The slaves might respect one another's basic rights insofar as orders from their masters did not force them to do otherwise, and yet the broader social context would probably compel them to distrust each other and accordingly to behave duplicitously. The main justification for deceit within the slave class would be the presence of unknown informers within the group and the possibility that another slave would divulge an unguarded confidence in order to gain favor with the master. Considering the wretched position imposed on the slaves, we cannot condemn those who, encouraged by their masters, would succumb to the temptation to try to improve their lot through treachery. At the same time, it is clear that this element within the slave class would initiate a syndrome of deceit that could ultimately prevent (although it would not necessarily prevent) the slaves from maintaining a moral community among themselves.

Despite what we have said about the moral position of the slaves, there is no reason to suppose that any similar moral breakdown would occur within the master class. Of course, a master surrounded by justifiably deceitful slaves might be disposed to conceive paranoiac beliefs doubting the sincerity of his fellow slave owners, but such crises of trust would not be sufficiently frequent

or widespread to destroy the foundations of the moral community. The slave owners would secure for themselves what they would deny to their slaves, namely, the rights that would enable them to fulfill their obligations to engage in non-deceitful relations.⁵ These are the rights that enable them to realize the capacity for moral agency and to maintain a moral community.

In our sketch of a society in which slavery is customary, we have indicated that slaves would ordinarily be justified in deceiving their owners and possibly one another as well while slave owners would be obligated to conduct themselves honestly. We suggested that this disparity is a consequence of the fact that the slaves' inalienable rights are denied, whereas the masters' inalienable rights are respected. As we have seen, a slave must always be alert for assailants of various kinds, and he cannot hope ever to achieve a degree of security sufficient

⁵ Notice that this claim differs from the doctrine of the moral correlativity of rights and duties. (Joel Feinberg, Social Philosophy, pp. 61-62) The basic tenet of this doctrine is that those whose rights are respected have a duty to respect the rights of others. We do not dispute this claim; however, we arrive at it in a more complex manner. Our position is that the fact that a person's inalienable rights are respected enables him to fulfill a fundamental obligation, namely, the obligation to engage in non-deceitful interpersonal relations. When a group of persons generally do act in accordance with this obligation, a moral community is established. In order to sustain such a community, the members must be obligated to respect one another's inalienable rights. At this point, our position connects with the doctrine of the moral correlativity of rights and duties. Nevertheless, our position should not be conflated with this other view.

to relax his guard. It is permissible for him to meet others' villainy and dissembling with similar tactics, but he must convincingly maintain a docile persona if he is to outwit his enemies and survive. We will now argue that a slave is in a position similar to that of a person attempting to function in a world of impenetrable and systemic deceit. In other words, his being deprived of his inalienable rights is debilitating in respects parallel to the ones we examined in connection with our world permeated by deceit. In particular, we will show how denial of these rights imperils a person's ability to function as a moral agent.

In the preceding section, we observed that our concept of moral agency presupposes both that individuals can know what they are doing and thus have the ability to characterize their actions accurately and also that individuals are able to identify their actions and the consequences of their actions after the actions are done. If a person cannot meet these conditions, he cannot qualify as a moral agent. Though he may choose a code of conduct, he cannot live by it except accidentally; though he may intend to be considerate of others, he lacks the information he needs to realize his intentions in action; and though he may not seek to evade responsibility, the inaccessibility of his actions prevents him from assuming it. A barrier is raised between the agent and his action,

and the separation renders the concept of moral agency inapplicable. Whereas in our imaginary world these results were achieved through an unabated isolation of the individual brought about by the unintelligibility of the conduct of other persons, essentially the same results can be achieved through a reduction of the individual to dependence and subservience. Such a reduction can be effected by depriving a person of his inalienable rights.

In talking about depriving persons of their rights, it is important to distinguish between a denial of a right and a violation of a right. When a person qualifies for a right but others refuse to recognize his right, his right is being denied. This involves a refusal on the part of individuals who could be called on to respect the right to admit that the person is entitled to whatever the right provides, and it implicitly carries a threat of violations. Nevertheless, a person can deny that another possesses a right for which the latter is in fact qualified without ever acting so as to violate the right. His denial of the right serves notice that he would not consider himself to be obligated to honor any claim made against him on the basis of the right, but it does not entail that he will ever violate the right. It is possible that no occasion will ever arise for him to violate the right or that he will find independent reasons for refraining from acting so as to violate the right.

A person whose right is denied is exposed to violations of his right but is not necessarily victimized by violations of his right. Still, his objective position is that of an individual who is obliged to rely on his ability to defend and promote his most fundamental interests rather than his entitlement to a core of security. The slaves in the society we described above are victims of their masters' institutionalized violations of their rights to liberty; however, their rights to life, benign treatment, and satisfaction of basic needs may never be violated though they are certainly denied.

We will now consider the position of a person who is a member of a group that has been designated as the slave class but who has not been enslaved. His inalienable rights are denied, but it may be that none is being violated. How does his status affect his ability to function as a moral agent? Presumably, he shares the same basic purposes, capacities, and vulnerabilities as the members of the master class. Otherwise, he would not qualify for the rights, and there would be no point in conferring them on him. Consequently, we must assume that like them he values his life, wishes to control the direction it takes, suffers from pain, and requires sustenance and protection from unpropitious environmental conditions for survival. Moreover, because he is capable of moral agency and because inalienable rights would shield him from harms that

impair moral agency, he needs the protection afforded by these rights for the same reason as members of the master class. Yet, a person whose inalienable rights are denied may not actually be enduring any violation of his rights. Consequently, his position cannot be explained by reference to insupportable afflictions and uncontrollable urges to eliminate them. Instead, we must consider the interconnected questions of how he can expect to be treated by others and how he can interpret others' conduct with respect to him.

A person whose inalienable rights are denied is isolated from other people by two features of his situation. First, he lives in fear of what other people may do to him. Because they refuse to admit that he is entitled to minimal respect and concern on their part, it is reasonable for him to assume that they would not hesitate to injure, degrade or, for that matter, kill him. Thus, he is obliged to anticipate the worst from others in his deliberations about his own conduct. Second, he cannot discern the meaning of other persons' actions with respect to him. Not only are other persons unpredictable, they are also opaque. Given that their refraining from violating his inalienable rights cannot justifiably be interpreted as evidence of their respect and concern for him, he is left with the unanswerable question of what this conduct does mean.

Obviously, he can surmise that his present tenuous safety is due to the fact that those who might violate his rights have neither a reason nor an inclination to afflict him. He can speculate as to what they would accept as a sufficient reason to violate his rights or what might provoke one of them to do this, but these calculations are bound to remain inconclusive. Since his rights are denied, he must assume that whatever treatment he receives at the hands of the master class is independent of what he is and how he behaves toward others. That is, he cannot take their failure to violate his rights as an acknowledgement that he meets the qualifications for the rights, and he cannot take their violations of his rights, when they occur, as punishments for his transgressions against them. For he has been excluded from the realm of mutual respect and responsibility constituted by inalienable rights.

At the foundation of the master class's position with respect to the slave class is their obstinate refusal to appreciate the similarities between the members of the slave class and themselves. The fact that the master class denies the inalienable rights of the members of the slave class testifies to their unwillingness or inability to invoke only morally relevant distinctions in support of their practices. Consequently, a member of the slave class cannot suppose that additional morally irrelevant distinctions will not be introduced. Though the members of the

master class may consistently regulate their conduct in accordance with some set of principles (and these principles may be public knowledge), their conduct will nonetheless remain morally unintelligible because the principles on which it is based depend on self-serving or arbitrary patterns of discrimination that systematically humiliate others. To the extent that the conduct of the members of the master class manifests their objectification of the members of the slave class, the members of the slave class are obliged to view themselves as the objects of others' behavior rather than as recipients of any form of moral consideration.

The members of the slave class confront the members of the master class in roughly the same way as we may suppose Californians unable to move away confront the San Andreas fault. This geological time bomb is indifferent to the humanity of the residents of California (though it makes no pretense of a false superiority) and poses a constant threat of an earthquake. Similarly, the members of the master class deny the humanity of the members of the slave class and thereby compel them to live in dread of violations of their inalienable rights. For the members of the slave class, violations of their inalienable rights by the members of the master class are like natural disasters.

As a result, the members of the slave class are justified in adopting the same defensive stance toward the master class as Californians might appropriately adopt with respect to the San Andreas fault. Certainly, every effort is made to understand this geological phenomenon in order to learn to predict slippages and thus minimize damage in the event of an earthquake, and presumably everyone would embrace a safe way to engineer the immobility of the fault if one could be found. Likewise, it is appropriate for the members of the slave class to seek regularities in the conduct of the master class in order to anticipate aggression, and it is appropriate for them to manipulate the members of the master class in order to prevent aggression. For the members of the slave class cannot afford to be daunted by their adversaries' humanity any more than Californians can afford to anthropomorphize the San Andreas fault.

The primary consideration for a member of the slave class in choosing principles of action must be self-defense. Because he lacks moral protection for his vulnerabilities, he is exposed to injuries that can destroy or temporarily disrupt his ability to function as a moral agent. He is in a doubly dangerous predicament. On the one hand, he--more than anyone else--needs to be in command of his faculties in order to protect himself; while on the other hand, he--more than anyone else--is subject to losing

control over his conduct as a result of the incursions of others. Thus, the only rational policy for him to adopt in his dealings with the members of the master class is the following egoistic one: I ought to do whatever in my judgment is most likely to prevent violations of my inalienable rights, and, if preventive tactics fail, I ought to do whatever in my judgment will shorten the duration of the violation and minimize the harm I suffer.⁶ Circumstances may be such that a person adhering to this principle will do exactly the same things as a person who guides his conduct by a more conventional principle, such as the golden rule. However, if we view what they do in the broader moral context of intentions and accountability, we will discover important differences in their conduct.

In the preceding section, we found that moral agency would be incapacitated in two respects under conditions of impenetrable and systemic deceit: individuals would be unable to characterize their actions accurately and would be unable to assume responsibility for their actions. Comparable, though admittedly less severe, problems would develop for the members of the slave class whose rights are denied. While the members of the master

⁶Depending on circumstances, this may also be the most rational policy for him to adopt with respect to other members of the slave class. See p. 238 above. For a discussion of the possibility of implementing this principle within a framework of class solidarity aimed at reform, see Chap. VIII, Sec. 3, pp. 324-326 below.

class would be able to act for various reasons and to manifest an assortment of virtues in their conduct, the scope of the conduct of the members of the slave class would be narrowed to a single reason--self-protection--and a single motive--self-interest. Furthermore, the exigencies of a potential slave's circumstances would oblige him to disclaim responsibility for his conduct whenever possible in order to avoid reprisals for aggravating a member of the master class. In contradistinction to this, a member of the master class has no compelling reason to disavow his actions unless he commits a crime.

Because their inalienable rights are denied, the members of the slave class are forced to homogenize and internalize their conduct. Every action represents an attempt to compensate for the protection recognized inalienable rights would have afforded, and responsibility for these actions is best kept private for fear of unpredictable recriminations. Thus, a member of the slave class must focus his intentions on a single objective and isolate himself morally in order to contend with the uncertainties generated by the denial of his inalienable rights. The precariousness of his position will not allow him to divert his attention from self-defense to self-realization or social contribution. If someone objects that a person with such limited horizons would have little reason to persist in his efforts to protect himself, we can only reply that his

determination must reflect his hope that his inalienable rights will eventually be acknowledged.

A person whose inalienable rights are denied may retain the status of a moral agent though his agency is confined to the perspective of expediency.⁷ But his position leads us to wonder what the consequences for moral agency would be in a society that denies everyone's inalienable rights. If everyone were obliged to adopt the egoistic principle we have recommended for members of the slave class in the society we have been considering, would moral agency survive? In order to answer this question, we must

⁷It is sometimes argued that egoism does not count as a moral code though it is obviously a possible code of conduct; and it could be argued that an egoist cannot count as a moral agent though he is certainly an agent. (For discussion of the incompatibility of egoism and morality, see Brian Medlin, "Ultimate Principles and Ethical Egoism," in Morality and Rational Self-interest, ed. David P. Gauthier (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1970), pp. 56-63 and W. K. Frankena, Ethics, pp. 17-20.) We cannot take on these complicated issues here, but a few comments are in order. It is important to note that the members of the slave class would not be obliged to embrace the form of egoism we have advocated for them if their inalienable rights were acknowledged, and it would be rather foolish, if not pathological, for them to limit themselves to self-defense if self-fulfillment were possible. Thus, a member of the slave class is to be distinguished from other types of egoist in two respects. First, he is compelled by the conduct of others to adopt an egoistic principle of action, and second, his egoism takes a highly restricted form. Unlike other egoists, a member of the slave class is a provisional egoist. Accordingly, there is no reason to suppose that a member of the slave class views his egoism as anything more than a necessary pragmatic posture which he would gladly relinquish if others would cooperate. If this is so, there is no more reason to deny such a person the status of moral agency than there is to deny this status to a soldier in combat.

envision the social world that would be created by universal adherence to our egoistic principle. Each individual would know that every other individual would always be maneuvering so as to ward off violations of his inalienable rights. The ultimate outcome of this scheming would be either the total isolation of every individual from every other or chaos.

Since isolation could not occur as a result of mutual forbearance inasmuch as this would imply mutual respect for rights, extreme underpopulation would be required for this outcome. In other words, it would be necessary for people to be separated by such great distances that interaction would be a virtual impossibility. Of course, the idea of moral agency would be inapplicable to individuals living under these conditions since there would be no occasion for displaying either respect or concern for others or for balancing personal interests against those of others.

The alternative outcome does not hold out better prospects for moral agency. If people remained in contact with one another but single-mindedly pursued the unattainable goal of personal security, the result would be a bewildering labyrinth of concealed motives, diversionary tactics, cross-purposes, misalliances, and outright antagonisms. The general obfuscation effected by this state of affairs would stymie moral agency just as it did in our model of a world of impenetrable and systemic deceit.

Individuals would be thwarted in their attempts to characterize their actions accurately, and they would be unable to assume responsibility for their conduct. In the next section, we will provide an explanation of this deterioration by considering the relation between inalienable rights and the obligation to engage in non-deceitful interpersonal relations.

3. Inalienable Rights and the Obligation to Engage in Non-deceitful Interpersonal Relations

We have urged that a modified egoism is the most rational policy for a person whose inalienable rights have been denied to adopt. But someone might object that in presenting our case we have neglected an important alternative. Instead of struggling to prevent violations of his rights, a person whose inalienable rights have been denied might submit to this deprivation and refrain from resisting violations. It could be argued that this acquiescent posture would not necessarily entail any admission of the legitimacy of the denial of this person's rights. It would only constitute an admission of the futility of resistance. A person might consider it more dignified openly to endure degradation and injury at the hands of despots than to maneuver covertly to forestall violations of his rights. Moreover, the public spectacle that could be made of this martyrdom might hasten the downfall of these brutal practices.

The position sketched above is unquestionably more noble than the egoistic position we have recommended, but this exalted nobility is precisely what places this position beyond the reach of most human beings. Later we will examine the position of the martyr in detail.⁸ For our present purposes, it is sufficient to note that there probably are persons who could go about living without taking evasive precautionary measures against violations of their inalienable rights despite their appreciation of the seriousness of these violations should they occur and, in addition, who could withstand the temptation to seek release from whatever violations do occur. However, it is clear that this conduct presupposes uncommon reserves of both self-esteem and self-effacement.

Conceivably, child-rearing methods could be altered so as to foster these qualities and thereby increase the population of individuals capable of responding to the threat of inalienable rights violations in a less abject manner than we would ordinarily expect. However, a social group that adjusts its nurture practices to meet such morally unacceptable conditions will produce a generation that is ill-equipped to live under conditions of normalized social intercourse. Once the martyrs have succeeded in bringing about the demise of their oppressors and instituting acknowledgement of the inalienable rights of all who

⁸See Chap. VIII, Sec. 3 below.

qualify for them, extraordinary reserves of self-esteem and self-effacement are likely to become obstacles to mutual accommodation and cooperation.⁹ Ultimately, it appears to be morally suspect for a generation of parents to conspire to create a generation of liberators who will probably become the victims of the social usefulness that has been imbued in them. Thus, we cannot condemn the ordinary human being for his limited ability to cope with assaults on his fundamental security, and we cannot require that he display a form of dignity in the face of such attacks that would be counterproductive in a morally normal context.

The egoistic principle that would govern a person's conduct if his inalienable rights were denied can best be understood in terms of the obligation to engage in non-deceitful interpersonal relations and the constitutive role of inalienable rights with respect to that obligation. The obligation to engage in non-deceitful relations is basically an obligation to contribute to the network of trust upon which moral communities depend.¹⁰ Not only does

⁹This, of course, does not entail that societies cannot tolerate persons who possess these qualities but only that a society composed predominantly of such individuals would face unusual and severe problems.

¹⁰To avoid confusion, it is necessary to point out that the obligation to engage in non-deceitful interpersonal relations is a prima facie obligation; that is, it ought to be honored unless it is superceded by overriding considerations.

it forbid lying and other related methods of misleading others, it also derivatively proscribes conduct that would instigate deception aimed at concealing either the fact that the action occurred or the fact that such and such a person did it.¹¹ Moral communities rely on widespread acceptance of this obligation for survival. For unless the members of a moral community generally honor it, the community will disintegrate in a chaos of colliding interests and deceit, or it will be transformed into an authoritarian society in which surveillance and fear of harsh sanctions are substituted for mutual responsibility and trust.

¹¹The obligation to engage in non-deceitful relations raises two kinds of issues. First, there are questions about what counts as deceit. For example, it is clear that deliberate restraint in expressing our feelings or in proclaiming our motives may, but need not, count as deceit. A person who has just suffered a grave disappointment and who chooses to conceal his unhappiness from the strangers who are riding the subway with him cannot be accused of deceit, but if this person tries to conceal his feelings from his wife, this behavior would normally count as deceit. What constitutes deceit is relative to the intimacy of relationships and to the standards of openness imposed by circumstances. The second kind of issue raised by the obligation to engage in non-deceitful relations concerns enforcement. Obviously, there are some types of deceit which ought to be legally prohibited, e.g., misrepresentation of real estate to potential buyers; however, there are many types of deceit with which the law should not interfere, e.g., false excuses for not attending parties. Within the latter class, there are types of deceit that ought to be discouraged through social pressure, e.g., pretended forgetfulness of loans among friends, and others that do not warrant any concerted effort at prevention, e.g., the use of personal telephone answering machines when the owner is home. Whether a given form of deceit should be minimized through sanctions and what form these sanctions should take depends on the seriousness and the extent of the probable consequences of the form of deceit in question.

Whereas general conformity to the obligation to engage in non-deceitful relations enables social intercourse to proceed in a free but orderly fashion, recognition of the inalienable rights of the members of the community enables these individuals to honor this obligation without undue risk to themselves. When a person's inalienable rights are denied, the obligation to engage in non-deceitful relations becomes a hindrance to elemental self-protection. Indeed, honoring this obligation may become a hazardous gesture on behalf of community stability.

If the protection afforded by recognized inalienable rights is denied to some members of the community, deception and honesty are converted into weapons in the defensive arsenal of the dispossessed. Their refusal to adhere to the obligation to engage in non-deceitful relations except insofar as it would serve their private purposes to do so is permissible because the objects of inalienable rights are such that whenever a person voluntarily sacrifices any one of them for the benefit of others his action is supererogatory. Consequently, it would be supererogatory (and therefore not obligatory) for a person to conform to the obligation to engage in non-deceitful relations when his inalienable rights are denied; for the obligatory conduct would be likely to lead to unjustifiable

violations of the person's inalienable rights and it might require submission to such violations.

Our views regarding self-incrimination in criminal proceedings lend support to the connection we have drawn between inalienable rights and the obligation to engage in non-deceitful relations. Once a person has been accused of a crime, his inalienable rights are in jeopardy. If he is convicted of the crime, his punishment will be a controlled and presumably commensurate violation of one of his inalienable rights. Capital punishment violates his right to life; imprisonment violates his right to liberty in varying degrees depending on the type of facility and for varying durations depending on the crime; flogging violates his right to benign treatment; and fines may undermine his ability to satisfy his basic needs.¹²

¹²If we had contended that the right to property should count as an inalienable right, fines would be direct violations of this right. But since we have substituted the right to satisfaction of basic needs for the right to property, fines need not actually violate this right though they may force a person to rely on others for satisfaction of his basic needs. Still, it is possible for a fine to violate a person's right to satisfaction of basic needs. If a person cannot find employment as a result of a sensational trial, has no friends or family to take care of him, cannot find a benefactor, and lives in a state that only recognizes the right to acquire property as a means of securing the right to satisfaction of basic needs, a fine that consumes his savings and investments would violate his right to satisfaction of basic needs. (If we suppose that he is the first resident who has proved unable to satisfy his basic needs by exercising his right to property, we cannot condemn the state for failing to have established a welfare system.)

Since punishment for a crime is not equivalent to an outright denial of a criminal's inalienable rights, we refuse to allow defendants a right to obstruct justice by contriving to conceal crimes or foisting the blame for crimes onto innocent parties. Still, our recognition of the right not to incriminate oneself embodies our conviction that a person cannot be obligated to cooperate in the infliction of a violation of his own inalienable rights. If a defendant is knowingly forthcoming with self-incriminatory evidence when a violation of his inalienable rights is at stake, his conduct must be viewed as a supererogatory contribution to social stability and order. Thus, we make a limited exception to the obligation to engage in non-deceitful relations for persons accused of crimes because we do not believe people can be required to honor this obligation to the extent of attracting punitive violations of their inalienable rights. In the absence of these contravening circumstances, we consider persons obligated to confine their deceptive conduct to altruistic purposes if they engage in deceptive conduct that might be considered morally objectionable at all.

From the conceptual vantage point we have attained, the role of inalienable rights in the constitution of the moral community is clearly illuminated. We have already seen that the objects of inalienable rights are things without which a person's ability to function as a moral

agent would be destroyed, curtailed, or impaired. Inalienable rights protect moral agency and thereby establish a population capable of participating in a moral community. Beyond this, these rights define a core of security that obligates persons to engage in non-deceitful interpersonal relations. Because these rights assure persons that their conformity to this obligation will not prove suicidal (from the standpoint of their survival as moral agents), persons who enjoy these rights cannot excuse their self-interested deceptions by pleading that they dreaded the consequences of honesty. Adherence to the obligation to engage in non-deceitful relations may not always maximize the advantages of a person, but it cannot be supererogatory to fulfill this obligation once a person's fundamental interests are secured.

4. The Irreplaceability of Inalienable Rights

A potentially crushing objection could be raised to the theory of inalienable rights we have developed. What if none of the rights we have identified as inalienable rights were acknowledged by the members of a community, but all of the correlative obligations were? Would inalienable rights, then, be superfluous? These are questions that have troubled surprisingly few natural rights philosophers. But Joel Feinberg, H. L. A. Hart, and Richard Wasserstrom are noteworthy exceptions to the

predominant philosophical indifference to these problems. Each of them has attempted to show that rights make a contribution to the moral universe that would necessarily be missing if we were to rely exclusively on obligations to explain moral relations.

Feinberg invites us to imagine a place he calls Nowheresville where people have a conception of what is morally mandatory, that is, a conception of a duty, but lack the conception of a right.¹³ According to Feinberg, there would be "no duties subject to acts of claiming" in Nowheresville.¹⁴ Feinberg's point echoes Wasserstrom's poignant portrayal of American racism: "If the white Southerner fails to do his duty, that is simply a matter between him and his conscience."¹⁵ Again, Feinberg and Wasserstrom concur in thinking that rights give voice to the idea of human equality. Feinberg puts it thusly: "Having rights enables us to 'stand up like men,' to look others in the eye, and to feel in some fundamental way the

¹³"The Nature and Value of Rights," The Journal of Value Inquiry 4 (1970): 243-249.

¹⁴Ibid., p. 250.

¹⁵"Rights, Human Rights, and Racial Discrimination," p. 123. Ronald Dworkin shares Feinberg's and Wasserstrom's perception of theories dominated by duties as agent-centered and theories founded on rights as attending primarily to the potential victim. (See his Taking Rights Seriously (Cambridge, Mass.: Harvard University Press, 1977), p. 172.)

equal of anyone."¹⁶ And Wasserstrom objects to denying some persons' natural rights on the following grounds: "It is to read certain persons, all of whom are most certainly human beings, out of the human race."¹⁷ For Feinberg and Wasserstrom, the addition of rights to a universe that had only contained duties enables those who possess rights to object to injuries inflicted on them, and this standing established by rights places all who possess them on a single moral plane.

If we adopt a realistic view of human fallibility and prejudice, it is hard to fault Feinberg's and Wasserstrom's position. Since people cannot always be trusted to carry out their obligations, it is important that those who might be harmed by others' laxity or cruelty be in a position to protest. In a commentary published along with Feinberg's article, Jan Narveson argues that rights may be an unavoidable feature of our moral universe but that rights are not necessarily such a desirable feature of our moral universe.¹⁸ Narveson holds that introducing some duties into the moral universe inescapably drags rights in, too. If, he queries, it can be proper for the beneficiary of a duty to call the duty to the attention of the

¹⁶"The Nature and Value of Rights," p. 252.

¹⁷"Rights, Human Rights, and Racial Discrimination," p. 124.

¹⁸"Comments on 'The Nature and Value of Rights,'" pp. 258-260.

person who has the duty, it is hard to see how reminding a person of his duty can be distinguished from asserting a right. Feinberg might reply that, unlike assertion of a right, reminding someone of his duty forces a person into an obsequious, pleading posture. Since this response assumes that the person who has the duty has failed to do it out of contempt for the person to whom it is owed rather than as a result of an oversight or a more stringent, incompatible duty, it violates Feinberg's assumption that obligations are taken seriously in Nowheresville. As Narveson points out, a world in which moral performance is "as high, and as reliable, as we profess it should be" would be preferable to a world in which people are obliged to clamor for their rights and to press claims.

Narveson overlooks two crucial and related points in criticizing Feinberg's position. One is that obligations can have various origins, and the other is that an obligation need not implicitly acknowledge the equal status of the beings it concerns. An agent might derive his obligations from any of an assortment of ultimate principles, including such diverse ones as Mill's principle of utility, Kant's categorical imperative, and Ayn Rand's rational selfishness. In practice, these principles might over an extended period of time create pockets of security coinciding with the protection afforded by inalienable rights for the same individuals who would possess inalienable rights if these rights were to be introduced into the

moral universe. Since the beneficiaries of these obligations would enjoy the same area of security that inalienable rights define, they would be able to function as moral agents and would be obligated to engage in non-deceitful relations. This suggests that it is the security that we have formulated in terms of inalienable rights, not the inalienable rights themselves, that is essential to moral agency. But before we can draw any definitive conclusions, we must examine the analogue of a violation of an inalienable right.

Circumstances may be constellated in such a way that it is permissible or obligatory to violate a person's inalienable rights. Similarly, any criterion for ascertaining duties would occasionally allow or dictate an invasion of someone's pocket of security. How would this situation differ from a violation of an inalienable right? The most prominent difference is that no wrong occurs when there is an obligation to invade someone's de facto pocket of security and there is no contravening right. The pocket of security is merely a happy coincidence; it has no status independent of the obligations that shape its contours. If the obligations change radically in response to new conditions, the pocket may contract or vanish altogether. With the disappearance of the pocket of security would go the obligation to engage in non-deceitful relations, leaving the victim in the same position as a person whose

inalienable rights are denied. The situation is quite different when a fundamental measure of security is provided by inalienable rights. Should it become necessary to violate them, the victim nevertheless retains them and may therefore be in a position to demand compensation. At least, the victim of a rights violation has the satisfaction of being recognized as a victim.

When a pocket of security is constituted by obligations without any foundations in rights, the distinction between a denial of a right and a violation of a right collapses. Consequently, obligations do not establish any fixed hierarchy among the various entities that may be affected by action. It would be no worse for a person to put shackles on another human being than it would be for him to put a leash on his pet dog as long as duty required it. In contradistinction to this, inalienable rights endow those who possess them with an irrevocable membership in the moral community. A society that acknowledges the inalienable rights of all who qualify for them recognizes a fundamental and inexpugible form of equality.

Obligations do not provide as secure a form of protection for individuals as rights provide because obligations reflect the standards from which they are derived while rights reflect the qualifications of the individuals who possess them. Still, this evaluation of the relative merits of rights and obligations as moral armor

for individuals has proceeded on the assumption that rights will be respected and that obligations will be honored although in practice rights may be denied and obligations may be ignored. In his critique of Feinberg's views, Narveson hints that the enforceability of rights may be crucial to the explanation of what makes rights valuable. If it is true that rights can be enforced more satisfactorily than obligations, rights will afford the individual greater protection than obligations under conditions of wavering morality as well as providing a rigidly defined area of protection when morality is firmly entrenched.

Hart contends that rights mark out the sector of morality in which enforcement is justifiable:

It is not merely that as a matter of fact men speak of their moral rights mainly when advocating their incorporation in a legal system, but that the concept of a right belongs to that branch of morality that is specifically concerned to determine when one person's freedom may be limited by another's and so to determine what actions may appropriately be made the subject of coercive legal rules.¹⁹

Moreover, Hart holds that the legitimacy of legal enforcement of rights is a consequence of the function of rights, namely, maintenance of a "certain distribution of human freedom."²⁰ Although his claim that all rights carry with

¹⁹"Are There Any Natural Rights?" p. 177.

²⁰Ibid., p. 178.

them a permission to coerce respect is highly controversial, Hart directs his argumentation solely to the question of whether or not all rights secure an equitable distribution of freedom. Perhaps he supposes that since his right to freedom does not permit coercive or injurious conduct it is self-evident that coercion may be used to enforce respect for this right. But surely we cannot infer that force may be used to secure a right from the fact that the formulation of the right imposes constraints on its exercise. Hart comes closest to defending his position when he claims that persons who submit to restrictive rules in order to participate in a mutually beneficial enterprise acquire a right to similar submission on the part of those who have benefited from the arrangement.²¹ But even if he is correct about this source of rights, it does not follow that those who have voluntarily restricted their liberty would be justified in forcing the others to restrict theirs.

It is the idea of an equal right that links coercion with the concept of a right. Although Hart does not explicitly affirm this position, it certainly hovers in the background of his paper. There are recurrent mentions of justice, fairness, and equality throughout the article, and these references typically occur when the

²¹ Ibid., p. 185.

question of the propriety of coercion comes to the fore. In the remainder of this section, we will explicate the relation between rights and coercion and adjust Hart's position to accommodate this account.

As we have seen, Hart's statement on the justifiability of legal coercion to back up rights is irredeemably categorical. Evidently, he holds that any moral consideration that deserves to be called a right also warrants legal enforcement. This position stands in sharp contrast to ordinary usage. Indeed, as Frankena points out, Hart himself "talks as if making a promise always conveys a right."²² But Hart would undoubtedly concede that not every promise ought to be legally enforced. A person who repeatedly promises to meet a friend for lunch and repeatedly breaks this promise without any excuse may properly be shunned socially but surely oughtn't to be thrown into jail or fined. We propose to understand the concept of a right in such a way that there may be moral rights that the law ought to ignore. Amending Hart's account, we will say that any right that must be acknowledged as an equal right in order to be intelligible as a right justifies social enforcement.

It may be desirable to wield public force in support of some rights that are generated by transactions

²²W. K. Frankena, "Natural and Inalienable Rights," p. 215.

or conferred along with social or economic positions, but the reasons for providing social support for such rights, e.g., social stability or efficiency, are independent of the rights. The kind of right we have been considering is predicated upon the enduring properties of individuals--their capacities and their vulnerabilities--and these rights define a margin of security (in the case of inalienable rights, an indispensable margin of security) for the individual. Rights of this type acknowledge, as we have argued above, the equality insofar as they are members of the moral community of all of the individuals who possess them.

Yet, despite the fact that these individuals are indeed equal with respect to their ability to satisfy the qualification for a particular right, they differ in innumerable other respects, and these distinctive qualities may have a beneficial or a detrimental impact on their ability to exercise the right. As a result, the egalitarian idea underlying these rights is inevitably sabotaged by the differences between people. In order for inalienable rights to survive as moral considerations apart from any criterion of obligation, the equal status guaranteed by these rights must be maintained, and this tendency to inequality must be thwarted. The concept of an equal right sustained by social sanctions, which may be legal or customary whichever suffices, circumvents the imbalances perpetrated by the diversity of human beings.

The idea of an equal right cuts across the distinction between treating a person as an equal and giving a person equal treatment. An equal right provides for equal treatment relative to the purpose of the right on the assumption that all of the persons who possess the right share this purpose to the same degree. Thus, if we suppose that the purpose of the right to vote is to provide an opportunity for individual citizens to register their views about their representatives and about referendum issues, an equal right to vote will reflect the principle that each person should have one vote on each question before the electorate.

This can be clarified by considering what an unequal right to vote would be. One person P_1 has an inferior right to vote in comparison with P_2 's right to vote if P_1 's vote counts as 1 while P_2 's counts as 2 in the tally. Another way in which P_1 's right to vote may be inferior to P_2 's is if P_2 is given ballots for all contested offices while P_1 is only given ballots for some of the offices that are at stake. One person's right can be inferior to another person's right by virtue of a disparity in the efficacy of their respective rights relative to the purpose of the right or by virtue of differences in the extent of applicability of their respective rights. A right is an equal right provided that everyone who possesses it can accomplish the same things

in the same range of situations and with the same degree of effectiveness by asserting it.

Commonplace differences between people would render the right to life unequal if coercive measures were not instituted to counteract them. A puny stupid person's right to life would probably be less efficacious than a strong, clever person's right to life in the absence of laws against murder backed up by police protection since the puny, stupid person would be less able, though equally entitled, to defend himself. Also, a well-liked person's right to life might prove more extensive than that of a pariah in the absence of legally regulated assignments of enforcement resources since more people would be willing to help protect the well-liked person from a threatened attack than would be willing to help protect the pariah. Unless the right to life and the other inalienable rights we have discussed are socially enforced, the protection they afford will vary with the irrelevant strengths and weaknesses of the persons who possess them.

We can understand what is wrong with unequal inalienable rights from either of two perspectives. On the one hand, the purpose of these rights is protecting moral agency, and people qualify for them because they are

capable of functioning as moral agents.²³ A person's possession of an inalienable right does not depend on his merit as a moral agent but simply on his capacity to be one. Bad agents can be punished and good ones can be rewarded within the framework of the moral community, but before any such action can be taken it is necessary to secure the moral agency of those whose conduct will be appraised. (It is not, for example, fair to condemn a person for his actions when they have been products of coercion.) Inalienable rights perform this preliminary function and therefore cannot be distributed in accordance with judgments that could only be made after inalienable rights have been acknowledged. Still, someone might admit that everyone who qualifies for inalienable rights qualifies for the same reason and is therefore equally entitled to these rights, but this objector could nonetheless deny that this entails that these rights must be implemented as equal rights.

In order to see what is wrong with unequal enforcement of inalienable rights, we need to consider how this practice would affect moral agency. Substantial differences in the enforcement of inalienable rights are equivalent to partial denials of the rights. Recalling the example we

²³For a somewhat different but related view of this matter, see Gregory Vlastos' "Justice and Equality," in Human Rights, ed. A. I. Melden (Belmont, Calif.: Wadsworth Publishing Company, Inc., 1970), pp. 84-95.

gave above, if the well-liked person's and the pariah's lives are equally endangered but most of the community's resources are committed to protecting the well-liked person, the pariah can only surmise that the community considers a threat against his life more acceptable than one made against the life of the well-liked person. A person whose right to life is denied lives in fear because his right may be violated with impunity, and a person whose right to life is recognized but only as an inferior right is obligated to contend with the fact that there would be little resistance to a threatened violation of his right. Obviously, the latter's situation is not as desperate as the former's. Nevertheless, it is clear that he would be justified in considering himself released from the obligation to engage in non-deceitful relations to the extent that honoring this obligation would interfere with his ability to make up for the inferiority of his recognized right. To allow inequalities with respect to the inalienable rights we have advocated would be to undermine the foundations of the moral community.

We have argued that incidental personal characteristics should not influence the distribution or the implementation of inalienable rights by showing that these rights could not serve certain purposes if they were not recognized as equal rights. Because the purposes to which we have appealed are ones through which the rights become

intelligible, the discovery that unequal inalienable rights would be incompatible with the realization of these purposes justifies social enforcement of these rights. If the population of individuals who qualify for inalienable rights were homogeneous with respect to characteristics that can enhance or diminish the efficacy or extent of these rights, it would not be necessary to equalize inalienable rights by coercive means. However, the diversity of the people who qualify for inalienable rights makes legal enforcement of these rights unavoidable, except within small and tightknit communities where peer pressure may be adequate. Thus, we can say that inalienable rights provide a more reliable form of security for individuals than a system of obligations could because inalienable rights carry with them a compelling justification for social enforcement.

Still, someone might ask why a system of obligations owed equally to everyone would not also provide the requisite security and justify social enforcement. The plausibility of this proposal stems from the fact that the concept of an obligation owed equally to everyone is the concept of an obligation derived from a right; otherwise, it is incoherent. The concept of an obligation owed equally to everyone immediately raises two questions. First, to whom does 'everyone' refer? And second, what is 'equal owing'? This latter question poses no serious

problem. If a person P_1 borrows \$1.00 from P_2 and \$1.00 from P_3 , he owes both of them the same amount, and barring special arrangements it is as incumbent on him to pay P_2 as it is to pay P_3 . Thus, a person has an obligation that he owes equally to all the members of a group if it requires him to behave in the same way with respect to all of them and the requirement is no less binding with respect to some of them than it is with respect to the others. The difficulty in conceiving of an obligation owed equally to everyone without covertly introducing the idea of a right lies in stating who the beneficiaries of the obligation are.

Consider the obligation not to kill anyone formulated as 'Thou shalt not kill.' This imperative is widely interpreted as a prohibition on killing other human beings, but it is reasonable to ask why such a small group of living things should be singled out for protection. One theological tradition has it that we are not allowed to kill other human beings because this would amount to destroying the property of the god who created us but that we are allowed to kill other living creatures because this same god created them for our use. In other words, killing human beings is a sort of cosmic violation of a god's property rights.²⁴ Consequently, this theological

²⁴It is a curious consequence of this theological position that if this god were to repudiate one of his human creations, others would cease to be obligated not to kill him.

account holds that the obligation not to kill is not owed to other human beings at all, but rather it is owed to a god.²⁵ In order to obtain an account of this obligation as one that is owed to everyone, we must repair to a secular standpoint. But this move deprives us of divine distinctions between living things that ought not to be killed and living things that may be killed. Either we must conclude that it is not permissible to kill any living thing, or we must find some basis for differentiating the set of beings that are protected by this prohibition from the rest of the class of living things.

An obligation not to kill any living thing that is held to be equally binding with respect to the killing of all forms of living things is indefensible. Since no one believes that killing a cockroach is as serious an offense as parricide, we will not digress to argue this point. We are left with the problem of marking the boundary between permissible and forbidden killings. This

²⁵ Many philosophers have pointed out that religious accounts of obligations separate the person towards whom the obligatory conduct is directed from the transcendent entity to whom the obligation is owed. Joel Feinberg makes this point in his comments on the paper by Richard Wasserstrom cited above, and he uses this idea in his description of Nowheresville. (See "Wasserstrom on Human Rights," The Journal of Philosophy 61 (1964): 641-642 and "The Nature and Value of Rights," pp. 247-249.) H. L. A. Hart, too, distinguishes between obligations owed to a divine being and ones owed to persons. (See "Are There Any Natural Rights?" p. 182.) What we have said would also apply to a theory of obligation based on political authority.

cannot be accomplished without appealing to some characteristic (or set of characteristics) of the things that ought not to be killed that justifies forbearing or appealing to some characteristic (or set of characteristics) of the things that may be killed that justifies declining to forbear. If we adopt the first of these two strategies, we are simply furnishing a qualification (or set of qualifications) for the right to life. If we adopt the second of these strategies, we furnish such a qualification by implication since living things that lack the property that renders killing other living things permissible will have a right to life.²⁶

Once we abandon the idea of explaining our obligations by reference to a religious or political authority or by reference to some ideal of self-perfection, we must find some feature of the creatures to whom we owe these obligations that accounts for our moral ties to them. By declaring that we are equally obligated to conduct ourselves in a specified way with respect to all of the members of the class delineated by the presence of a given property, we declare that the members of this class have a

²⁶ Notice that the possibility that we might be obligated to kill some type of living thing does not create a problem for this claim. If we are obligated to kill anything, it must be permissible to kill it. Consequently, it must have the property that identifies the kind of things that may be killed and some additional property that identifies the kind of things that ought to be killed.

right that requires us to treat them in the indicated manner. Since we cannot extricate our account of an obligation owed equally to everyone from the idea of a right, the suggestion that we substitute a system of obligations owed equally to everyone for our set of inalienable rights cannot constitute a genuine alternative.

We have defended inalienable rights against a double-edged challenge. First, it was proposed that a system of obligations might protect the same core of individual security that inalienable rights were designed to protect. Then it was suggested that obligations might perform this function just as effectively as inalienable rights could. In short, the objection is that inalienable rights are not needed to understand the foundations of moral interaction because they could be replaced by a set of obligations. We have fended off this attack by showing that any set of obligations that is independent of rights will define an area of moral protection that, like a balloon, expands and contracts with circumstances and will not warrant coercive enforcement. In contradistinction to this, inalienable rights define a rigid area of security for individuals that can only be legitimately penetrated when exceptionally powerful considerations can be invoked to justify the infringement. Furthermore, inalienable rights constitute a more reliable form of protection since the justification for insuring their recognition with

coercive measures is built into their internal conceptual structure. Thus, we conclude that inalienable rights alone make it possible for individuals who meet the qualifications for possessing them to function as moral agents and to found moral communities.

CHAPTER VIII

THE DISPOSSESSED

We devoted the preceding chapter to mapping out the relations between inalienable rights and the constitution of a moral community. As a result of this focus, our discussion concentrated on what it means for a person to have inalienable rights which are respected or to be denied inalienable rights for which he is qualified. This orientation excluded detailed consideration of several other positions that individuals might occupy vis-à-vis inalienable rights. We will take them up now because each yields additional insight into the workings of these rights. We will discuss three categories of individuals: (1) nonhuman animals, (2) humans who do not qualify for inalienable rights, and (3) persons whose inalienable rights are violated.

1. Animals

One objection that a reader of Chapter VII may be harboring is that the capacity for moral agency is too restrictive a qualification for inalienable rights. The observation informing this objection is that there are countless creatures who cannot meet this qualification but

who are vulnerable to the types of maltreatment from which inalienable rights protect individuals. And the intuition that completes the objection is that those who could benefit from the protection afforded by these rights ought to possess them. This point gains credibility from the fact that we often consider ourselves obligated to treat these creatures in the same ways we would treat them if they had inalienable rights. We do not, for example, feel free to torture animals gratuitously or to starve our pets wantonly. Thus, the moral relevance of the capacity for moral agency to possession of inalienable rights can be called into question.

In order to respond to this line of criticism, we need to review the process through which we selected the inalienable rights we have defended. We began with the following question: how can we tell which rights are inalienable? Initially, we said that inalienable rights are distinguished by the reciprocity that holds between an individual's enjoying these rights and his realization of a capacity which qualifies him for these rights. We then proposed that an individual qualifies for inalienable rights by virtue of his capacity for moral agency and that these rights protect the individual in ways that are necessary for him to function as a moral agent without engaging in supererogatory self-sacrifice. This led us to look for vulnerabilities for which persons need a moral

shield in order to secure their status as moral agents. Our reasoning can be distilled into two questions. First, by what standard are we to recognize the vulnerabilities inalienable rights protect? Second, which rights would adequately protect these vulnerabilities? Anyone who wishes to extend the protection of inalienable rights to creatures other than humans who have the capacity for moral agency must provide alternative answers to these questions.

It is not our contention that it is impossible to give answers to these questions other than the ones we have supplied but rather that other conceivable answers that would enlarge the class of possessors of inalienable rights have unacceptable consequences. We have already given cursory consideration to one of the possible alternatives.¹ It might be claimed that being alive is all that is required for an individual to possess inalienable rights and that inalienable rights protect individuals in ways that insure their survival. On this view, our list of inalienable rights would be shortened to two items, namely, the right to life and the right to satisfaction of basic needs. The right to liberty and the right to benign treatment would be eliminated since they have no immediate impact on survival.

The only way to prevent this contraction of the

¹See Chap. VIII, Sec. 4 above.

list of inalienable rights would be to retain the rights to liberty and to benign treatment as derivative inalienable rights on the grounds that violations of these rights may pose an indirect threat to survival; however, this tactic seems inadvisable because it opens the class of inalienable rights to any right that might somehow under some set of circumstances protect an individual's life. For example, during the early stages of the Vietnam war, the right to marry enabled many young men to avoid induction into the army and therefore helped to insure their survival. It would be easy to concoct additional examples.

If we allow rights that may indirectly guarantee survival to count as inalienable rights, this class of rights will expand indefinitely unless we establish some secondary criterion to distinguish inalienable rights that may contribute to an individual's survival from alienable rights that may have a similar bearing on survival. However, this enterprise would be doomed to artificiality because all of these rights are intermittently inalienable from the standpoint of the original criterion. Although a frequency rating could be assigned to each right representing the likelihood that it will guarantee the survival of anyone who possesses it and these ratings could be used to rank the rights, there would not be any reasonable place to fix the division of these rights into inalienable and alienable categories. Moreover, the idea

that there is a distinctive relation between inalienable rights and the qualifications for them would vanish with this maneuvering.

There are several other problems associated with enlarging the class of possessors of inalienable rights by regarding life as a sufficient condition for possessing them. One is that at least one right that we deem essential for people would be utterly inappropriate for some animals. Though we are reluctant to eliminate the right to liberty from the list of inalienable rights attributable to persons, it would be positively cruel to grant it to certain domesticated animals. Cows, for example, would face a dismal future if they were to be liberated from farmers and the pastures they provide for their animals. This, in turn, raises a problem about the right to satisfaction of basic needs. Although this right is obviously directly pertinent to survival, attempting to respect it if it were granted to animals would be a Sisyphean task. Another difficulty arises in connection with the right to benign treatment. The fact that this right would be excluded from the list of inalienable rights conflicts with the idea that the distribution of this type of right ought to reproduce the distribution of the capacity to benefit from possession of the right and also with the idea that our obligations to animals are correlated with their rights. This multiplication of difficulties

attendant upon attempting to furnish a single qualification for inalienable rights that nonhuman animals as well as humans can meet suggests that we need a more complex approach.

We could attach a different qualification to each of the inalienable rights. Mortal life could be the qualification for the right to life; the capacity for self-sufficiency could be the qualification for the right to liberty; sentience could be the qualification for the right to benign treatment; and the capacity for moral agency could be the qualification for the right to satisfaction of basic needs. Each of our inalienable rights would be universal within a suitable domain as delimited by the respective qualifications for these rights. The main problem with this arrangement concerns the stringency of these rights. If we say that humans and animals are equally qualified for some of these rights, we will be obliged to acknowledge that humans do not possess more stringent versions of these rights than those possessed by animals. The only alternative is to supply a justification for considering rights possessed by humans more compelling than those possessed by animals.

Part of the motivation for attributing inalienable rights to animals seems to originate in the indifference many people exhibit toward suffering inflicted on animals. If these unconcerned people, the reasoning goes, could be

convinced that animals have many of the same fundamental rights that people have, they would realize that their negligent attitudes towards animals are blameworthy and would presumably take their obligations with respect to animals more seriously in the future. Appropriation of the concept of an inalienable right for purposes of encouraging improved awareness of the ways in which animals are affected by our conduct along with greater concern with the treatment of animals should not be confused with the view that animals have inalienable rights because they deserve the same respect as humans. Nevertheless, it is not clear how these positions can be separated once it is claimed that humans and animals qualify for these rights by virtue of the same properties.

Even the most imperturbable and steadfast animal sympathizers ought to be prepared to concede that humans have more stringent inalienable rights than animals. Robert Nozick argues forcefully on behalf of animals, but he checks his argument before it reaches the point of advocating rights parity between people and animals. He contends:

Once they exist, animals too may have claims to certain treatment. These claims may well carry less weight than those of people. But the fact that some animals were brought into existence only because someone wanted to do something that would violate one of

these claims does not show that the claim does not exist at all.²

Eventually Nozick speculates that whatever differences in stringency there may be between the rights of people and animals reflect the monopoly people have on meaningful lives.³ In the end, it is not clear whether Nozick's final view is that animals qualify for the same rights in the same way as people but to a lesser degree than people do, that the rights animals have are different from the ones people have since they are less stringent, or that the welfare of animals ought to be given substantial weight in our deliberations about what we should do.

On one interpretation, the first two of the above options are spurious alternatives. Both assert that animals have rights but cannot satisfy the qualifications for these rights as fully as people can and so their rights are less stringent than those that people have. It makes no difference whether we say that one creature possesses a less stringent version of a right than another because he only fulfills the qualifications for the right partially or that there are variously weighted rights corresponding to levels of fulfillment of the qualifications. Still, the former formulation is preferable because it does not misleadingly suggest that the degrees to which

²Anarchy, State, and Utopia, p. 39.

³Ibid., p. 50.

the qualifications may be fulfilled are discontinuous and therefore can be used to mark discrete levels of fulfillment.

For example, if we say that sentience qualifies an individual for the right to benign treatment, we may discover that some creatures experience pleasure and pain more intensely than others. Nevertheless, we would not expect to find bands of sentience bounded by degrees of sentience that no creature possesses. Instead, we would expect to find a continuum over which sentient individuals are ranged. We could deal with this variation by adopting the rule that the more sensitive an individual is, the more stringent is his right to benign treatment. If animals are generally less sensitive than people, their rights to benign treatment will carry less weight.

The problems generated by this position are insurmountable. A preliminary point to notice is that there is no reason to suppose that distinct degrees of susceptibility to pleasure and pain are characteristic of species. Species will undoubtedly overlap in this regard, and stray individuals may prove uncommonly sensitive or insensitive. Thus, we cannot legitimately invoke distinctions between species to divide up the continuum of sentience. This state of affairs presents us with two options. Either we must accept a thoroughgoing relativization of the

stringency of inalienable rights, or we must accept an across-the-board egalitarianism in this regard.

The trouble with embracing this type of egalitarianism is that it trivializes the rights in question. Common-place pest control practices would engender serious moral quandaries. It would be incumbent on us to show why annoying buzzing or the likelihood of insect bites justifies violating an inalienable right or else to show why we should restrain ourselves and endure this irritation. Acknowledging equal inalienable rights for all creatures that can meet minimal qualifications for them would quickly enmire us in convoluted explanations of why these rights are compatible with at least some of our customary behavior with respect to mosquitoes or in proposals for radically restructuring our personal and institutional policies in order to accord them their rights. In other words, we face a choice between fool's errands: we can contrive sophistic justifications of our present practices, or we can devote ourselves to futile efforts to enforce this sentimental humanism. The upshot of both of these positions would be an erosion of respect for the inalienable rights of people.

The alternative to this untenable egalitarianism is an equally untenable relativism. This form of relativism holds that the stringency of each individual's rights should mirror the degree to which he satisfies the

qualifications for them. On this view, it is conceivable that no two individuals would satisfy the qualification for a right to precisely the same degree and therefore that no two individuals would have equally stringent rights. Though it might not turn out that every individual's right would be associated with a unique degree of stringency, it is clear that this relativization of stringency to degrees of qualification would minutely partition the class of recipients of moral concern. This result is unacceptable from both a practical and a conceptual standpoint.

When two innocent individuals possess unequally stringent rights and circumstances require that one but not both of their rights be violated, the injury should be inflicted on the individual whose right is less stringent. Ordinarily, conflicts between unequally stringent rights involve conflicts between different rights, such as the right to life and property rights. Our proposed relativization of the stringency of a right to the degree to which the individual qualifies for it creates a possibility of conflicts between unequally stringent versions of the same inalienable right.

Disparities in the stringencies of rights may be explicitly incorporated into agreements. A person may borrow from another person with the understanding that the lender's right to compensation is weakened by someone

else's prior claim on the borrower's resources. As long as such disparities are not concealed, they cause no practical or theoretical problems. However, in the case of an inalienable right like the right to benign treatment, the inaccessibility of the information needed to evaluate the relative stringencies of different individuals' rights would force us to adopt egalitarianism as a rule of thumb or to guide our decisions by mere guesses or rough estimates.

The difficulty of obtaining exact measurements for appraising the relative stringencies of rights would often nullify the practicability of choosing conduct on this basis. Furthermore, varying degrees of responsiveness to different kinds of adverse stimuli would complicate the problem of assigning stringencies to rights and compound the difficulty of making rational and fair choices. Ultimately, we are driven to admit that persons would be unable to ascertain whether their conduct was in conformity or conflict with the rights of the affected parties. Our mania for precision would paradoxically generate a system of rights that could not be reliably respected.⁴ Rampant

⁴ A difficulty that is the reverse of this one could also arise. If the qualification for a right is such that it rarely or never admits of degrees, its stringency could not enter into our deliberations at all. For example, we suggested earlier that mortal life might be advanced as a minimal sufficient condition for possession of the right to life. Since African violets meet this qualification as fully as humans do, we would be obligated to give these

and irremediable moral incompetence would be an inevitable consequence of this construal of inalienable rights. Accordingly, these rights could provide no security for individuals independent of that provided by obligations contingent on standards other than rights.

Associating inalienable rights with minimal qualifications and adjusting the stringency of the right to reflect the degree to which an individual meets the qualification is clearly not a workable arrangement; however, an alternative might be to distinguish between levels of qualification for a right and therefore levels of stringency by introducing serial qualifications for the right. This proposal could be schematized as follows:

An individual possesses R^1 if and only if he satisfies Q_1 ;

An individual possesses R^2 if and only if he satisfies Q_1 and Q_2 ;

An individual possesses R^3 if and only if he satisfies Q_1 , Q_2 , and Q_3 ; etc.

('R' represents a right, and its exponents indicate the stringency of the right; Q_1 , Q_2 , and Q_3 are serial qualifications for the right.)²

Taking the right to benign treatment, we could distinguish three levels of stringency by distinguishing three qualifications. The qualifications could be the capacity to respond reflexively to stimuli, the capacity for awareness

plants' rights as much attention as we give our own. Such unrelenting anti-elitism generates its own brand of moral incompetence brought on by a system of moral obligations that is too vast and unwieldy to be honored.

of pleasure and pain, and the capacity to respond morally to sentient experience. Satisfactorily demarcating the boundaries between these levels of qualification might prove to be an impossible undertaking, but we will assume the contrary in order to concentrate on the question of whether it would be worthwhile to pursue this course.

Placing the construction we sketched above on inalienable rights seems to be recommended by two advantages. It enables us to avoid an unmanageable and deleterious form of egalitarianism while incorporating the moral standing of nonhuman creatures into our system of fundamental rights. But before we can accept this modification, we need to determine how it would affect our account of inalienable rights. In particular, we need to ask how the relations between animals, their qualifications, and inalienable rights would differ from the relations between people, their qualifications, and inalienable rights.

It is sometimes suggested that the view that animals can have rights rests on a mistaken conception of rights as establishing static, invisible shields around the individuals who possess them. The correct image, it may be argued, is of a right as a mobile shield that must be deployed by its possessor before it can protect him. The idea is that rights are essentially defensive weapons but they can only do their job in the hands of a trained

soldier.⁵ This line of argument depends on the assumption that rights only function when they are challenged. But it becomes evident that this is incorrect if we consider that many challenges are never executed because the persons who might otherwise have undertaken them acknowledge that their proposed victims have rights which impose an obligation on others not to mount such attacks. Notice, here, that the right does not function as a deterrent by virtue of a superior aggressive capability, which might take the form of entitling the victim to demand compensation, but rather it functions within a purely moral framework of entitlements based on qualifications, which the person who possesses the right may not realize he has met. Thus, it is not necessary for a right to be asserted for it to protect an individual. Still, actively exercising the right does become crucial once someone initiates a violation of it. But despite the urgency of asserting the right under these circumstances, the individual who possesses the right need not be capable of exercising it himself, though this is certainly an asset, since someone else may make suitable claims on his behalf.

Construing our problem about whether animals can have inalienable rights as a question about whether they

⁵This seems to be the crux of H. J. McCloskey's position. (See "The Right to Life," Mind 84 (1975): 411-415.)

can exercise agency with respect to these rights reduces the problem to a verbal quibble; should we say that creatures who cannot exercise rights can nevertheless possess rights in the proper sense of the term, or should we say that these creatures can only possess rights in an extended sense? Though it is undeniable that a paradigmatic account of the concept of a right would exclude possession of rights by animals, this does not provide a decisive reason for concluding that animals cannot have rights in any sense that warrants the appellation.

We propose to approach this problem from the standpoint of the grounds for possessing rights rather than from the standpoint of the individual's ability to engage in distinctively rights-exercising behavior. We will concern ourselves exclusively with rights that individuals possess regardless of their prior conduct and relationships since inalienable rights are not generated by transactions or ongoing special relationships. We will ask whether the properties of nonhuman animals are by themselves capable of generating rights to the basic types of noninterference and care secured by inalienable rights.

The best place to start this inquiry is to remind ourselves of the basis for human possession of inalienable rights. We have argued that humans who are capable of functioning as moral agents qualify for inalienable rights and that these rights concern vulnerabilities that must be

protected for moral agency to be secured. As we developed our position, a remarkable integration of individualistic and social interests emerged. We found that inalienable rights guarantee a core of security for the individual, that this security enables the individual to acknowledge the obligation to engage in non-deceitful interpersonal relations and to function as a moral agent, and that the individual's assumption of this role and subsequent participation in the moral community is a source of others' security. The interests of the individual who possesses an inalienable right and the interests of individuals who might be required to respect this right coalesce in the concept of moral agency. It is important to recognize that while each individual has an interest in his personal security, no one would have an interest in anyone else's security (in the absence of special relations or transactions) if this security were not instrumental in the realization of moral agency. The unity of interests at the foundations of the moral community is located in the enabling, as opposed to the defensive, function of inalienable rights.

This unity of interests should not be viewed as a happy coincidence but rather as a necessary feature of inalienable rights. For it explains how it is possible for certain properties of individuals to generate rights without any form of supplementation. The rights we have

defended as inalienable rights are self-sustaining, and in recognition of this we might describe them as intrinsically valuable. But this is not to suggest that they have any mystical or indefinable property. On the contrary, they are intrinsically valuable for the most commonsensical of reasons. Respect for these rights in combination with the capacity for moral agency is constitutive of moral agency, and moral agency is something that every person who is capable of it wants for himself and also that every person wants for every other person who is capable of functioning in this way. Viewed from one perspective, it is not surprising that there should be a self-sustaining set of rights because justification cannot go on indefinitely; however, in light of the history of thought on this issue, it is surprising that the intrinsic value of rights should turn out to be analyzable in such mundane terms.

Having clarified the structure of justification behind the inalienable rights people possess, we are now in a position to ask whether a similar complex of rights, qualifications, and mutual interests obtains for animals. When we are confronted with qualifications like being alive, being capable of self-sufficiency, and being sentient, our initial response may be a sympathetic twinge, but this is not sufficient to justify an inalienable

right. If animals have inalienable rights, it cannot be because they resemble us to a certain extent.

We identify a selection of our own properties for protection by ascertaining what forms of protection we need to function as moral agents. But we cannot appeal to the concept of moral agency to justify similar forms of protection for animals because animals lack this capacity. If we are to justify inalienable rights for animals, we must find some comparable and appropriate standard on which to base them.⁶ An animal's ability to perform some function in the ecosystem presents itself as the only promising candidate. Perhaps, animals have whatever rights they need in order to contribute to the processes of the ecosystem, and these should be considered inalienable rights.

One objection to this proposal is easily overcome. How, someone might ask, could rights be necessary for an animal to carry out its ecological function since these

⁶This line of argument presents a challenge to Rawls's suggestion that the capacity for moral personality is a sufficient condition but may not be a necessary condition for possession of his basic liberties. Rawls holds that these rights "depend solely on certain natural attributes," namely, the capacity to form a conception of one's own good and the capacity for a sense of justice. (See A Theory of Justice, pp. 505-506.) But if some creatures that do not share these capacities nevertheless possess these rights, it must be because they have some other capacity from which these rights can be derived. It is not clear that Rawls's list of basic liberties can be inferred from his concept of the capacity for moral personality, and it is very unlikely that this list could be obtained from any less exalted qualification that might be proposed.

rights would not protect the animal from attacks by its fellow animals? This can be answered by noting that humans wield unprecedented and ever-increasing destructive power which can be employed to wipe out an entire species so rapidly that the ecosystem cannot evolve compensatory mechanisms. Thus, animals need rights against people in order to contribute to the ecosystem, but the ecosystem is adapted to handle natural relations between predators and prey. This defense successfully responds to the criticism we have raised, but it contains an admission that adumbrates the inadequacy of our suggested account of inalienable rights for animals. Notice that we have found it necessary to appeal to the human ability to destroy whole species, as opposed to individual animals, in order to justify rights for these animals.

The idea of an ecological niche is based on the idea of a species. Admittedly, individual animals carry out the functions that constitute a niche, but it is ultimately the characteristics of the species that yields an account of this type of role. The animals are interchangeable. As long as enough members of a species are extant to perform a given function, the loss of an individual is a matter of indifference from the standpoint of the ecosystem. In other words, if inalienable rights for animals are justified by the ecological functions they perform, animal species will gain rights, but

individual animals will not. Individual animals will only reap the benefits of their species' rights after the species is endangered. It is evident from this that no community of interests exists to sustain inalienable rights for animals. People are interested in insuring that an ecological role will be carried out, but animals are only interested (if the term applies) in self-preservation. Consequently, any rights that animals might have are relative to human purposes. A rapport may develop between human concerns for ecological balance and animal instincts, but this should not be confused with the unity of interests we found among people.

Our discussion of the way in which inalienable rights are justified shows that the inalienable rights possessed by persons cannot be understood as more stringent versions of the similar rights animals might have. If animals have rights to life, liberty, benign treatment, or satisfaction of basic needs, these rights are less stringent than the inalienable rights of people, and they are not inalienable rights. Although animals and humans suffer from similar vulnerabilities, we have seen that vulnerabilities alone do not give rise to inalienable rights. Indeed, by scrutinizing the schema we devised for differentiating levels of stringency in accordance with levels of qualifications we can discern this very point. In order to escape from the difficulties we found when we

tried to rely entirely on quantitative measures of sentience to distinguish levels of stringency, we were compelled to insinuate ideas of the different types of responses different creatures are capable of making to stimuli into our statements of the qualifications. There would be no rights if there were no vulnerabilities, but some indication of why moral security corresponding to a vulnerability should be provided is also required before a right can be established.

In the case of inalienable rights, this additional justification takes a distinctive form. Not only is the set of individuals who possess the rights the same as the set of individuals who are obligated to respect the rights, but also these individuals are united by shared interests both in having their own rights respected and in respecting the rights of others. This coalescence of purposes cannot be duplicated when animals are brought forward as candidates for possession of inalienable rights. Because animals do not have the same capabilities as humans, they cannot be integrated into the same community of interests; and because they are not endowed with the capacity for moral agency, they cannot found their own independent community of interests.

Although the concept of an ecosystem could be called upon to justify rights for animals, this justificatory strategy has the drawback of rendering animal rights

dependent on human purposes. This clearly reveals the futility of attempting to establish rights exclusively on the basis of the properties of animals. Since inalienable rights for animals cannot be generated by transactions or special relationships and therefore must be generated by the properties of the animals, this result implies that animal rights are necessarily derivative from human obligations or, in other words, that these obligations which are imposed by criteria independent of individual animals are primary. In contradistinction to the inalienable rights possessed by people, animal rights can be replaced by human obligations to animals without substantive loss.

2. Children and Incompetent Humans

Children require special consideration on our theory because they present us with an intermediary case. They do not have the capacity for moral agency (this is why we do not hold them responsible for their conduct), but they do have the potential for moral agency (this is why we teach them to act responsibly).⁷ They are not able to engage in reciprocal moral relations, but eventually most of them will be able to do so provided that their development is not stunted. In order for a child's moral

⁷For the distinction between a potentiality and a capacity see Chap. III, Sec. 4 above.

development to proceed apace, he must be treated as if he qualified for the rights to life and satisfaction of basic needs; violations of the right to benign treatment must be administered judiciously and in the service of moral training; and such enforced constraints as are forbidden by the right to liberty should be progressively removed as his judgment matures. This treatment can be summed up as a right to moral education.

This concept of the right to moral education should not be confused with the right to an education which often appears on lists of human rights. Obviously, these rights are related. It is necessary to teach a child the language that is spoken in his community and to give him guidance and practice in deliberating about conduct in order to respect his right to moral education. A right to moral education entails a right to training in certain linguistic and reasoning skills; however, it does not entail a right to be taught to read and write. While literacy is not irrelevant to moral agency since it enables persons to expand their moral purview, it is not necessary for a person to be literate in order to function as a moral agent. Some elements of the right to an education are incorporated into the right to moral education, but the right to an education is more inclusive in some respects than the right to moral education. Still, we should bear in mind that the right to moral education is

also broader than the right to an education inasmuch as we have adopted the former as shorthand for the treatment that ought to be accorded children where the objects of inalienable rights are concerned.

We will take it for granted that no one denies that children ought to receive the minimal care and concern we have proposed. But questions remain as to whether all adult human beings are obligated to treat all children in the prescribed manner and whether the source of this obligation is an inalienable right possessed by every child. These questions can be understood as opposite sides of the question of whether there is a community of interests to support inalienable rights for children. On the one hand, we will argue that the obligations we have described are independent of the parent-child relationship, i.e., that all adults have an interest in supporting the moral development of children. On the other hand, we will argue that these obligations are generated by the rights of children, i.e., that children share this interest in their own moral development.

It might be suggested that a parent has an interest not only in the moral development but also in the welfare of his own children but that others may evolve similar interests only through other types of special relations to a child or to the parent. It might be argued that the general obligation not to kill children

should be analyzed as an obligation to parents which must be acknowledged for the pragmatic reason that parents are notoriously volatile when the safety of their offspring is threatened. Aside from being rather brutal, this analysis fails to take into account the straightforward interests unrelated persons have in the moral development of the children who are born into their society.

An interest in the moral development of children need not spring from ties of affection to the parent or child or from fear of provoking parental wrath. Social existence creates a general need for the moral development of children. We can see this by considering what would happen if this need were not met. We can hold parents responsible for the conduct of their children, but children ordinarily outlive their parents. If the children have not received adequate moral educations before their parents die, we must choose between appointing guardians from the pool of available adults to restrain these morally immature people or suffering the consequences of allowing them to pursue whatever vagarious courses of action they may decide upon. Supplying guardians for orphans is not too onerous a burden in a society that generally insures that children receive adequate moral educations. However, a society that permits parents to opt for treating their children as perpetual wards could end up with too many morally incompetent individuals for the morally competent

portion of the population to handle. Since the resulting chaos would be contrary to everybody's interests, we can conclude that all morally competent adults have an interest in preventing this state of affairs by respecting the right to moral education.

Still, someone might object that we have packed too much into our account of the right to moral education. He might concede that everyone has an interest in the moral development of any children who will be allowed to live independent lives but qualify this admission by denying the claim that everyone has an interest in refraining from killing all children or in withdrawing control over the conduct of all children. This is to say that the interest in the moral development of children depends on the interest in the survival and self-sufficiency of children but that this latter interest is often spurious. Instead of bothering with moral education, we could kill or enslave children with whom we have no emotional involvement. One response to this suggestion might be an exasperated dismissal. A case could be made to the effect that anyone who can equanimously entertain the option of killing or enslaving children rather than educating them simply is not equipped with sufficient moral sensitivity to justify an attempt at refutation. Nevertheless, if pushed to this point, our position does provide a way of answering him.

There is a community of interest in moral agency that spans generations of people. In the earliest and frequently in the last years of a person's life, he is incapable of full self-sufficiency. It is common in underdeveloped nations for people to procreate and invest their piteous resources in caring for children as a form of insurance in anticipation of old age. These semi-mercenary familial relations are consequences of the fact that the right to satisfaction of basic needs is not respected in these societies except through private arrangements. The flaw in this system, of course, is that sterile persons and persons whose children die young are left without any means of support. A more satisfactory alternative is a moral community in which generations of members receive care from one another and provide care for one another in keeping with the usual stages of the human life cycle. In such a community, each individual has an interest in cultivating the young crop of moral agents because he will probably be obliged to depend on them to avert destitution in old age.⁸ To refuse to admit an interest in the survival and moral development of the children of one's community

⁸We assume that considerations of consistency apply here. Accordingly, a person who considers himself obligated to care for his own children but considers killing or enslaving the offspring of others an acceptable practice must also maintain that it is permissible for others to try to kill or enslave his children. Acknowledgement of this principle would preclude a person's establishing an adequate measure of personal security by founding a family

would ultimately be to consign oneself to a premature and perhaps unnecessarily wretched demise.

A moral community requires continuity over generations of moral agents. It will disintegrate despite the presence of the original members if provisions are not made for the moral education of new members. Thus, the individuals who would be obligated to respect the right to moral education have an interest in complying with this requirement, but this does not show that the recipients of this obligatory care necessarily share the interest in developing their potentiality for moral agency. It might be argued that this view interprets the role of children as a means to the ends of older people who have no right to subject helpless children to their self-serving purposes. In other words, the charge is that respecting a child's right to moral education for ulterior reasons would be like refraining from killing an animal in order that it will contribute to the maintenance of the ecosystem. Just as the animal does not share this purpose, children may not share the purposes of conniving adults.

The answer to this objection lies in a comparison of the relations between an animal, its interests, and ecological balance and a child, his interests, and moral agency. We might be led to believe that an animal's

while advocating or carrying out genocidal policies against youthful strangers to his own consanguineous knot. For others would be entitled to ravage his family, too.

performance of its ecological function is indistinguishable from the activities it carries out in order to provide for its own needs. For example, an animal's hunting for food prevents the population of its prey from increasing too much, and in this respect the animal's natural impulses coincide with its helping to stabilize the demographic profile of another animal species. Yet, it is not the case that an animal's pursuit of its ends must contribute to the maintenance of an ecological balance between species.

An animal could be frustrated in its performance of its usual ecological function and yet live a completely satisfying life. If we were to construct a huge dome (assume that it is too large for the animal to reach its circumference once it has been deposited in the middle) in which an animal's natural environment was carefully simulated and in which it could hunt, eat, sleep, roam about, etc. just as it would in the wild, the animal would not be frustrated although its opportunity to carry out certain ecological functions would have been eliminated. Since we might stock its artificial environment with prey raised on a nearby ranch, its hunting would not help to keep the population of these animals in check. If anything, the overall population of this species of prey would be increased because the animal would not be killing members of this species in the natural environment and meanwhile we would be raising additional animals to supply the

replicated environment. Despite this scheme to prevent the animal from carrying out an ecological function, there is no reason to consider the animal frustrated since he is not being hindered in the execution of any of his normal activities.

The development of a child's potential for moral agency cannot be separated from his accustomed activities in the way we have separated an animal's quotidian behavior from our understanding of this behavior as an ecological role. A child who is frustrated in the development of his ability to function as a moral agent cannot be provided with a substitute structure that will allow him to proceed normally except for the imperceptible omission of his assuming the status of a moral agent. After all, what would the requisite structure be like? Nozick's experience machine seems to be an apparatus comparable to the artificial environment we imagined constructing for an animal.⁹ The experience machine consists of a tank with electrodes programmed to stimulate the subject's brain so as to give him experiences like the ones usually produced by living. A person could elect to enter the tank, select a sequence of experiences, and proceed to undergo them effortlessly. For example, Nozick suggests that a person could choose to have the experience of writing a great novel. Our

⁹Anarchy, State, and Utopia, pp. 42-45.

question is: would a parent who decides to stick his baby in a tank with a lifetime of pre-programmed experiences instead of providing the child with a moral education frustrate his offspring in any morally condemnable way?

An initial objection, one anticipated by Nozick, might be that the child would not in fact do the things he would experience doing. He would have the experience of writing a great novel, but there would be no book to show for it. He would leave no mark on the world. To remedy this problem, Nozick prescribes the result machine which "produces in the world any result you would produce and injects your vector input into any joint activity."¹⁰ It would produce a book corresponding to the experience of writing it. However, Nozick is mistaken in thinking that joint accomplishments could be handled equally well by the result machine. In order for a cooperative enterprise to be carried off by the result machine, there must be other participants who must be out of tanks to take the other roles. Otherwise, the participatory process will be a delusion. Nozick mentions the experience of making a friend as one that the machines could produce. Since friendship is nothing more than the ongoing relationship between two people, there must be a friend if a tanked

¹⁰Ibid., p. 44.

person is to make a friend in addition to having the experience of making a friend. Nozick's ingenious solipsism has limits.

Now we need to compare Nozick's machines with the artificial environment we envisioned for an animal. We have seen that the animal could go about living in a satisfactory manner without fulfilling its ecological function. Could Nozick's machines similarly separate acting from functioning as a moral agent? Could a tank dweller have friends without exercising his capacity for moral agency? One way to see the problem is to notice that, whereas our animal has the experience of hunting because it hunts, a tank dweller would have the experience of friendship through the experience machine and would independently engage in friendly conduct through the result machine. The division of labor effected by life in the machines would dichotomize experience and action. There are two points worth noting about this arrangement: (1) a tank dweller's action occurs only to keep his experience from being fatuous, and (2) a tank dweller's action is not really his action.

The difference between our animal's experience and a tank dweller's experience is that the latter's is pure illusion. Although our animal performs no ecological function, it does not erroneously believe it is performing such a function; for no animal correctly believes it is

performing an ecological function. (No lion dozing on the plains of Kenya could espy a herd of antelope and think, 'I'm not hungry, but I've got to go perform my ecological function.') Animals hunt and have the experience of hunting in our dome. Since they do not also believe that they are helping to maintain an ecological balance, they cannot be deluded in this regard.

This is not so with people. When a person has the experience of writing a book, he believes that he is writing a book. And similarly, when a person experiences friendship, he believes himself to be contributing to a relationship between himself and another person.¹¹ But, as a matter of fact, the result machine would be carrying out the appropriate actions for the tank dweller. Thus, a tank dweller would believe himself to be functioning as a moral agent although the machines would have usurped his capacity to do so. A parent who places his baby in the custody of the tank would condemn the child to lifelong delusion in this regard.

¹¹Notice that the person the tank dweller's result machine befriends must also believe that he is involved in a real friendship. If the real-world friend did not believe this, the result machine would be merely faking the results. Just as the result machine cannot licitly substitute a sheaf of rave reviews for a great novel, it cannot hire an actor to play at friendship instead of making a friend on behalf of the tank dweller. The result machine would generate impenetrable systemic deceit in the world of otherwise capable moral agents while the experience machine would lock the tank dwellers into a different form of impenetrable systemic deceit.

Another problem presented by tank life concerns programming errors. Nozick dismisses the distress a person might feel between the time he decides to enter a tank and the time he is plugged in, but he considers this anxiety unwarranted because he fails to consider the possibility of programming errors. We will assume that parents are benevolent in their programming choices and that there are safeguards against keypunch errors. Nevertheless, we cannot rule out the possibility of mistakes. Perhaps, the electronically induced horrors to which the experience machine might subject a tank dweller are inconceivable to us because no stimulus for such misery occurs within the world with which we are familiar. Yet, we certainly can imagine an unrelenting stream of psychological and physical pain, and we must consider the position of the tank dweller should a catastrophic error occur. Of course, the tank dweller is helpless. He cannot make his misery known to anyone who could help, and he cannot take corrective action himself. Because he is not a moral agent, he may be compelled to suffer monstrous experiences, and he will have no power to mitigate or stop them.¹² Though a person

¹²This argument parallels parts of Herbert Morris's discussion of the evils of subjecting people to therapy to cure the alleged disorders that led them to commit crimes rather than punishing them for the crimes they have committed. (See "Persons and Punishment," pp. 120-124.)

might be prepared to embrace a life of deluded bliss, a life of incorrigible torture would be contrary to anyone's interests.

A child who is frustrated in the development of his potential for moral agency becomes a moral incompetent. Whether this state is produced by life in Nozick's machines or by inculcation of the belief that he is inferior and deserves to be neglected, his position does not differ from that of a retarded or deranged individual. He is not capable of assuming the obligation to engage in non-deceitful interpersonal relations, and he cannot be accepted as a member of the moral community.

Moral incompetence can be psychologically or physiologically caused, and it can be temporary or permanent. Though a person who lacks the capacity for functioning as a moral agent does not qualify for the rights to life, liberty, benign treatment, and satisfaction of basic needs, he does qualify for the right to moral education provided that he has the potential to become a moral agent. It is, however, notoriously difficult to distinguish between incompetent human beings who have this potential and ones who do not. Because diagnostic procedures are fallible and because denial of an individual's right to moral education is such a serious matter, we are obliged to adopt a conservative policy with regard to implementation of this right. Specifically, we must assume

that a person's moral incompetence is temporary and accord him the right to moral education in the absence of conclusive proof that his incapacity is permanent and irremediable.

The practical impact of our position is less penetrating than we might expect on the basis of our theoretical results. Although our account of inalienable rights requires that we distinguish between individuals who have the potential to become moral agents and individuals who do not, this theoretical distinction cannot be carried over into practice without incurring high risks of disastrous moral mistakes. Nevertheless, our theory does account for our intuition that scarce resources ought to be allocated to demonstrably normal children when circumstances prevent us from respecting the right to moral education of all individuals who may be qualified for it. Since this right is predicated upon a community of interest that encompasses moral agents and individuals who may become moral agents, the exclusion under circumstantial pressure of individuals who are incapable of becoming moral agents is explained.

Before we leave this topic, we will summarize our reasons for considering the right to moral education an inalienable right. One objection to this position might be that this right can never be claimed by anyone who possesses it since these people are morally immature. If

they were capable of functioning as moral agents and therefore capable of asserting their own rights, they would possess the four inalienable rights we designated in Chapter VI. In addition, it could be objected that the right to moral education is not on an equal footing with the rights to life, liberty, benign treatment, and satisfaction of basic needs. This point is based on the observation that we obtained the right to moral education in part by figuring out how our four original rights could be adjusted to suit the needs of children. Both of the complaints we have sketched capitalize on the dependent status of children: they cannot be held responsible for exercising their rights, and their rights are derivative. Clearly, we cannot deny either of these points; however, it is our view that these objections overlook a more fundamental similarity between our four original inalienable rights and the right to moral education.

Over the course of our discussion of inalienable rights, we have seen that the concept of inalienability can be viewed both from the perspective of the individual and from the perspective of the community. On the one hand, we have found that inalienable rights have objects that it is always supererogatory to sacrifice altruistically; on the other hand, we have argued that communities cannot refuse to respect these rights without undermining their own foundations. We cannot straightforwardly apply

our test of non-renounceability to children and their rights because the idea of a supererogatory self-sacrifice only pertains to the voluntary conduct of responsible individuals. Since we cannot assume that a child understands the probable consequences of relinquishing any component of his moral education and appreciates the gravity of these consequences, we would be obligated to overrule his decision to make such a sacrifice. This paternalistic obligation indicates that we consider the right to moral education just as crucial to the child's well-being as we consider the four inalienable rights to our own.

Moreover, we have seen that children must be recognized as fledgling members of the moral community if the community is to survive the frailties of its founding members. Thus, children share in the community of interest that sustains social interaction. We concede that the right to moral education is an inalienable right in an extended sense since it would be unintelligible without the context of a moral community in which our four original inalienable rights are acknowledged. Still, we classify the right to moral education as an inalienable right because it is founded on the same structure of justification as our other inalienable rights.

3. Persons Whose Inalienable Rights Are Violated

Violations of inalienable rights may be justifiable or unjustifiable, and the justifiable ones may be justified on the basis of the prior conduct of the person whose right is infringed or on the basis of independent circumstantial exigencies. These possibilities present us with an assortment of responses that could be made by persons in the face of violations of their inalienable rights. In this section, we will set out these options and consider their relation to self-interest in order to delve further into the problem of how moral interaction can be sustained.

According to Hobbes, a person whose right to liberty is going to be abridged as a punishment for a crime has a right to resist incarceration.¹³ This right seems to be predicated on Hobbes's belief that no one could restrain himself from attempting to prevent this punishment from being imposed.¹⁴ Although this contention is somewhat plausible when the punishment is execution since the prisoner has nothing to lose in this instance,

¹³Leviathan, pt. I, chap. 14.

¹⁴Michael Walzer makes this point in "The Obligation to Die for the State," in his Obligations: Essays on Disobedience, War, and Citizenship, p. 81.

this same position exaggerates the prisoner's predicament when the punishment is imprisonment for a specified period. In attempting to escape, a prisoner may provoke his pursuers to kill him and thus bring a fate worse than imprisonment upon himself. Indeed, Hobbes's advocacy of a right to try to escape imprisonment conflicts with his categorical rejection of any right to rebel against constituted authority. According to Hobbes, no one is ever entitled to try to overthrow the sovereign because success in this undertaking cannot be reliably predicted and because successful rebellion would encourage imitators.¹⁵ Since imprisonment is obviously not the only way a ruler can restrict the liberty of his subjects and inflict misery on them, Hobbes has no grounds for approving of individualistic rebellion against a penal sentence while repudiating mass rebellion against tyranny.

It is our view that imprisonment provides a mechanism which enables moral communities to contend with crimes without expelling the individuals who commit them and that convicted criminals have good reason to submit to judicially imposed prison terms. Imprisonment allows a criminal to acknowledge his responsibility for his crime and thus constitutes a form of respect for the criminal's status as a moral agent. Still, it is undeniable that the

¹⁵ Leviathan, pt. I, chap. 15, pars. 4-7.

respect for the criminal displayed by legal imprisonment may not elicit a corresponding sense of obligation in the prisoner to match that respect by acquiescing in his punishment. If this is so, only the convicted criminal's apprehension of self-interested reasons for submitting to punishment can stop him from attempting to escape.

Penal systems provide both negative and positive egoistically oriented inducements for compliance. On the one hand, tight security arrangements and the prospect of additional punishment for an attempted but unsuccessful escape aim to convince the prisoner of the futility of the endeavor. On the other hand, submission enables the prisoner to retain membership in the moral community, i.e., to continue to participate in the network of mutual accommodation and support generated by responsible individuals. We cannot expect people to turn themselves in to the police for their crimes, but neither can we view punishment as an unmitigated loss for the criminal. Through the enforcement of penal sanctions, moral communities can control serious infractions without excluding the individuals who perpetrate them.

Some cases of justifiable violations of inalienable rights consequent upon circumstantial exigencies resemble punishment in an important respect. We can see this by recalling the society we described in which the

members are barely able to subsist.¹⁶ We posited that the group sometimes fails to obtain enough food to provide minimally adequate portions for each member in which case adequate portions are served until the food runs out. Since the order in which they line up to receive their allotments rotates, no one is singled out for deprivation. Still, we need to ask how a person who does not get an allotment ought to deal with his plight.

The deprived individual must choose between respecting the rights of his fellows to the shares they have received and attempting to grab some food for himself. His situation differs from that of a convicted criminal inasmuch as there is no satisfactory answer to the question 'why me?' in his case. All that the other members of his society can do is to remind him of the scarcity of food and commiserate with him over his misfortune to be last in line on an unproductive day. No one is to blame for his suffering: the other members of his social group do not inflict it on him willingly, and he has done nothing to deserve it. Consequently, he cannot justify resistance by appealing to deliberate injustice, and he cannot urge himself to endure his deprivation as a way of shouldering responsibility for some previous offense. He can only calculate that he will be better off

¹⁶See Chap. VI, Sec. 5 above.

in the long run if he cooperates with the distribution system when it works against him as well as when it works to his advantage. Without egoistic incentives the members of a profoundly straitened society would not be able to maintain moral relations.

Just as self-interest can sustain a prisoner's determination to abide by his sentence, so self-interest can provide the glue needed to support moral relations in the face of unavoidable violations of inalienable rights. In both of these situations self-interest functions as a kind of motivational overdrive for morality after an individual's adherence to a moral code has been assailed by a violation of his inalienable rights. Such an individual finds himself on the fringe of the moral community. Since his conformity to the obligation to engage in non-deceitful interpersonal relations and his acknowledgement of his fellows' inalienable rights depends on self-interest rather than on respect and concern for others, his hold on morality is as tenuous as the circumstances that render dutiful conduct his best bet. Nevertheless, it is crucial for the survival of moral communities that they be able to utilize self-interest to uphold an individual's fragile integration in the community since violations of inalienable rights cannot always be avoided.

We have been considering violations of inalienable rights that temporarily hobble the victim's ability to

function as a moral agent, but there may also be justifiable violations that permanently incapacitate the victim morally. For example, we would be justified in allowing an invading force of Martians to kill John Doe if they are set to blow up the earth once we have refused to cooperate with their whim.¹⁷ But, does John Doe have any basis for going along with this scheme? It would plainly be supererogatory for him to present himself for the Martians to kill him. There is no question of mixed motives, for John Doe has nothing to gain by submitting and others have everything to gain by his sacrifice. Under these circumstances, self-interest cannot be activated in support of continued moral interaction.

Situations like the one sketched above must be viewed as ones which cannot be contained by moral communities. The compelling needs of the community conflict irreconcilably with the rights and interests of the individual. The violation inflicted on the individual disqualifies him for membership in the moral community, and the moral community cannot impose an obligation on him to make this sacrifice. This cataclysmic type of situation

¹⁷ Though we will not attempt to contend with this tangle of issues here, it is worth noting that it is not equally clear that an earthling chosen by the Martians would be justified in killing John Doe on their orders. This homicide could represent a heroic fall from grace in the style of Dostoevsky's Grand Inquisitor or a pitiful grasping at self-preservation whatever the moral price.

shatters, so far as the victim is concerned, the bonds of mutual accommodation and support upon which participation in the moral community is founded.

The position of persons whose inalienable rights are violated unjustifiably is an exacerbated version of the position we have just examined. Clearly, the victim of unjustifiable violations of his inalienable rights has no self-interested grounds for submitting apart from fear of provoking worse treatment, and he has no social ties with his tormenters that could spur him to supererogatory sacrifices on their behalf. When inalienable rights are violated unjustifiably but legally, it is usually a group that is singled out for oppression.¹⁸ The most familiar examples are cases of racial or religious persecution. When such discriminatory policies are in force, violations of inalienable rights are often sanctioned by official denials of these rights.

The range of responses available to members of such persecuted groups is curtailed by the exclusion of these people from the moral community. They can neither sacrifice themselves for the good of the dominant social group nor promote their private interests. When sacrifice is exacted from a person willy-nilly, his desiring to make the sacrifice becomes irrelevant and superfluous because

¹⁸Violations of the inalienable rights of random individuals are typically codified as crimes.

his autonomy in this regard has been negated. Furthermore, systematic denial of an individual's inalienable rights deprives him of the base of security on which he can construct improvements in the conditions of his life. There are only two kinds of self-interested conduct open to persecuted individuals: conduct aimed at preventing a worsening of their treatment and conduct aimed at removing the stigma attached to membership in the oppressed group.

A persecuted individual's pursuit of exclusively private interests is confined to maintaining an already wretched status quo. We have already discussed self-interested stasis maintenance under adverse conditions.¹⁹ We will not recapitulate our discussion of this matter here except to point out that this conservative policy offers greater safety to its adherents at the price of stifling all hope of ameliorated conditions. The only way for a persecuted individual to better himself is by contributing to the betterment of the group to which he belongs. Any gains he may win for himself alone must be viewed as inherently precarious since they can be taken from him with impunity. Thus, although persecution of the kind we have specified is designed to repress self-interested action on the part of the members of the persecuted group, it may unwittingly foster insurgent

¹⁹See Chap VII, Sec. 2 above.

solidarity among the members of the persecuted group because it arbitrarily closes off all other avenues of self-realization.

Members of a group whose inalienable rights are denied are not permitted to participate in the moral community's network of mutual respect and concern. One consequence of this exclusion is the peculiarly other-directed and collective form which self-interested conduct undertaken by members of the persecuted group may assume. Because persecuted individuals are blocked from directly advancing their own interests, they are obliged to unite with their fellow victims if they want to improve the conditions under which they live. Although cautious submission may prevent their circumstances from degenerating, rebellion against their oppressors provides the only, though an undeniably dangerous, outlet for ameliorative self-interested impulses. Whether rebellion is mounted as aggressive resistance or pacifist martyrdom, a paradoxical admixture of self-interest and altruistic devotion to the welfare of their fellow victims is characteristic of the individuals who pursue this course.

Persecution may have the effect of creating a subculture analogous to the straitened society we discussed above. For a member of such an impoverished society who is occasionally deprived of adequate food, we found that private advantage would in the long run

coincide with altruistic respect for the rights of others. Similarly, for a member of a persecuted group, his only opportunity to advance his own interests requires that he help to promote the interests of his fellow victims as well. The crucial difference between these two positions is that the former's is a consequence of unavoidable conditions and is shared by all the other members of his society while the latter's restricted prospects are unnecessary and are not shared by those members of his society who impose the restrictions. Whereas a straitened but fair society can call upon self-interest to sustain a semblance of moral interaction under extremely grave conditions, self-interest can transform a docile batch of morally isolated victims into an activist moral subcommunity antagonistic to the dominant moral community.²⁰

For Hobbes, self-interest can be civilized, but its uncompromising recidivist tendencies can never be fully eliminated. Hobbes considers self-interest to be an irreducibly anti-social force when the lone individual comes under attack, but he also contends that self-interest

²⁰It is worth noting that military conscription can be an equitably managed justifiable violation of the right to liberty consequent upon unavoidable historical circumstances, or it can be an unjustifiable violation of this right that creates a class of persecuted individuals. In either case, it is clear that this common practice threatens the moral bond among the members of a community by violating the inalienable rights of draft-age individuals.

dictates upholding established authority despite that authority's institutionalized transgressions against the individual qua member of a despised racial or religious group. Though it may be true as a matter of psychological fact that people find it easier to restrain their self-defensive inclinations when they see that others are similarly afflicted, this does not entail that there are not equally compelling reasons for resistance in both types of situation. Because Hobbes neglects questions about justification in these contexts, he overlooks the constructive possibilities of self-interested considerations.

By focusing on the ways in which respect for inalienable rights sustains moral interaction, we have been able to discern a pervasive and fundamental social role for self-interest. It is evident that in a given situation self-interest may urge an individual to undertake conduct destructive of the moral structure of restraint and trust. Yet, we have seen that self-interest also furnishes grounds for refraining from acting so as to provoke exclusion from the moral community or for seeking readmission into the moral community if necessary. Whether an individual's separation from the moral community is due to his own inadmissible conduct, to temporary circumstances which no one can change, or to arbitrary prejudices enforced by a more powerful social class,

self-interest can be marshalled in support of moral relations. The form that moral interaction will then take depends on the nature of the separation and is never unequivocally favorable to the renegade; however, the far-reaching advantages of integration in a moral community recommend acceptance of the terms of membership.²¹ Ultimately, it is because the reasons for submitting to the conditions set for membership in a moral community are so compelling that the boundaries of viable moral relations can be defined by reference to the point at which self-interest ceases to supply any considerations on the side of continued respect and concern for other persons.

4. The Universality of Inalienable Rights

Inalienable rights are not necessarily universal within the domain of human beings. Individuals who are capable of functioning as moral agents qualify for the rights to life, liberty, benign treatment, and satisfaction of basic needs, and individuals who have the potential to become moral agents qualify for the right to moral education. If there are human beings who meet neither of these qualifications, there are human beings who do not possess any inalienable right. Furthermore, possession of inalienable rights is not necessarily limited to the class

²¹For an extended discussion of the drawbacks attendant upon exclusion from the moral community, see Chap. VII, Sec. 2 above.

of human beings. If there are any nonhumans who meet either of these qualifications, they will possess the appropriate inalienable right (or rights). It is not the species to which an individual belongs but rather the individual's relation to the moral community that determines whether or not he possesses inalienable rights.

The four primary inalienable rights are universally actually possessed within the confines of the moral community proper, i.e., within the class of individuals who are capable of engaging in moral interaction. As we have seen, there are considerations that can justify violations of these rights, but these do not deprive the individual of his rights. The tension between the individual and the social unit of which he is a member could not emerge if the individual did not retain his rights despite conclusive reasons for violating them. Moreover, we have seen that qualified individuals have inalienable rights though their rights may be denied and may be violated unjustifiably. Their inalienable rights provide these victims with grounds for taking action to rectify their mistreatment and provide them with a basis for establishing moral relations among themselves. Thus, it could be argued that possession of inalienable rights accords an individual the status he deserves regardless of whether others are willing to respect his rights or conditions make it feasible to respect them.

Finally, it is important to recognize that a right must be inalienable with respect to the members of a given domain in order for the right to be necessarily universal within that domain. If a right can in principle be renounced, an individual who qualifies for the right may renounce it and thereby cease to possess it. Accordingly, it is merely accidental if all the individuals who qualify for an alienable right do at a given moment possess it. Even if we were to discover some alienable right that every legal system prohibits renouncing, the universality of this right would remain contingent since the law could be repealed by one or more of these states. Therefore, we conclude that a right must be inalienable to be a natural right since any alienable right could fail to meet the requirement that natural rights be universal.²² In our concluding chapter, we will present additional reasons for considering inalienable rights to be natural rights.

²²See Chap. III, Secs. 3-8 above.

CHAPTER IX

INALIENABLE RIGHTS AS NATURAL RIGHTS

We defined inalienable rights as rights to things which a person cannot be obligated to sacrifice altruistically. A person's altruistic sacrifice of the object of an inalienable right is always supererogatory. Consequently, no one can be obligated to make such a sacrifice, and this incapacity prevents persons from renouncing these rights. We then discovered a highly sensitive relation between enjoyment of these rights and a person's ability to function as a moral agent. The inextricable connection between inalienable rights and supererogation can be explained in terms of the enabling function of these rights with respect to moral agency. Inalienable rights protect those vulnerabilities which must be secured against various forms of attack in order for an individual to realize his capacity for moral agency. Ultimately, we concluded that moral communities must guarantee these rights for their members since inalienable rights delineate a core of security needed for an individual to assume the obligation to engage in non-deceitful interpersonal relations. Acknowledgement of this obligation provides

the background against which the system of mutual accommodation and support which is characteristic of moral communities can flourish.

The most conspicuous way in which our theory adheres to the natural rights tradition concerns the qualifications for inalienable rights. Natural rights are said to be rights that people have by virtue of human nature. This entails that these rights are independent of convention and that they are universal relative to human nature. We have seen that persons qualify for inalienable rights by virtue of their needs for basic forms of protection and either their potential or their capacity for moral agency. Accordingly, possession of these rights does not depend on social recognition to open the way for their universality. It proved necessary to develop a comparatively complex concept of universality suited to the context of rights; but, once we had obtained an appropriate account of universality, we found that inalienable rights satisfy this condition. Moreover, inalienable rights are possessed exclusively by humans. Though some nonhuman animals have the same fundamental needs as humans, there are no nonhuman animals capable of moral agency within the bounds of the explored universe. So far as we know, moral agency is a distinctively human capability. Finally, our position concurs with classic natural rights theories in viewing the distribution of

inalienable rights as delineating the boundaries of the moral community.

Looking beyond the problem of explicating the concept of a natural right, we can give some indication of the role these rights might play in political theory. Traditionally, natural rights are thought to be relevant to the concepts of political equality and social justice. Different theorists have accorded these rights varying degrees of prominence in regard to these matters, but we will not attempt to canvass the full range of these possibilities. Instead, we will confine our exposition to sketching the ways in which our account of inalienable rights contributes to our understanding of the problems of political equality and social justice.

Much of the controversy that currently surrounds the question of political equality concerns the impact of economic inequalities on formally equal rights. In connection with such diverse rights as the right to free speech and the right to a fair trial, it is frequently pointed out that a person's economic position can influence the form in which he is able to exercise his right. To a large extent, our inalienable rights evade this issue. Because the inalienable rights we have designated only provide for elemental forms of security, they allow virtually no leeway with respect to their implementation.

Either a person's life and liberty are adequately protected given the likelihood that he will be attacked or forced to submit to another person's dictates, or they are not. Similarly, respect for the rights to benign treatment and satisfaction of basic needs is not amenable to Spartan and luxurious modalities. Of course, a person might provide himself with more than adequate protection for his life and liberty, relief from mild as well as acute pain, and an extravagant home stocked with gourmet comestibles. Indeed, his community might supply him with these services and commodities. Nevertheless, their inalienable rights do not give the other members of the community grounds for objecting to this individual's privileges unless his advantages interfere with the community's ability to respect every member's inalienable rights.

Inalienable rights establish a base level of security for each of the members of a moral community. If a society does not have more wealth than is needed to secure the inalienable rights of its members, strict egalitarianism ought to prevail in that society. Once a society succeeds in producing wealth in excess of what is needed to fund inalienable rights, the problem of how this extra wealth ought to be distributed arises. Our theory of inalienable rights does not entail a distributive principle to handle this problem; however, it does contain a

negative criterion for identifying unsatisfactory distributive principles. Any distributive principle that could yield a distribution of goods that would obstruct the ability of a member of the community to function as a moral agent is unacceptable. In other words, if implementation of a distributive principle could subvert the function of recognized inalienable rights with respect to moral agency, it would be necessary to reject the principle. This is a very weak criterion. It will serve to eliminate the worst candidates, but it will not pick out the best proposal. In order to decide what distributive principle would be best, we must weigh considerations other than support for moral agency into our appraisals of the alternatives.

The relation we have been specifying between our account of inalienable rights and the notion of an adequate principle for regulating the distribution of a community's excess wealth might be summed up as asserting that respect for inalienable rights is not equivalent to securing social justice. This is not at all surprising in light of the small number of rights on our list and the ascetic quality of their provisions. Still, it might be argued that whatever people achieve or fail to achieve over and above the base of security described by inalienable rights is a private matter. In contradistinction to this, our view is that a society that can, but does not,

provide certain additional benefits for its members is not just. For example, the right to vote, the right to freedom of expression, and the right to a fair trial are not as fundamental as our inalienable rights, but we would condemn a society that refused to institute these rights while profering no reason for denying them. Although it is beyond the scope of our present inquiry to present conclusive arguments in support of these intuitions, it is important to note that our theory of inalienable rights in no way supplants further investigation of the concept of social justice.

In a more positive vein, we are in a position to insist that respect for inalienable rights is a necessary condition for social justice. A community that is unable to insure respect for the inalienable rights of its members may distribute the burdens of this privation fairly. And yet, we would not allow that this society has met the minimum conditions for social justice. Evidently, social justice requires that there be enough of certain goods to go around as well as requiring that these goods be distributed fairly.

An extremely impoverished society constantly totters on the brink of anarchical egoism. Since the society fails to guarantee the rights upon which the obligation to engage in non-deceitful interpersonal relations is founded, its members can only maintain the structure of

moral relations as a masquerade that promises the least awful consequences. If the community's arrangements for coping with its straitened circumstances qualified as socially just, the members of the community would be obligated to support them regardless of egoistic considerations to the contrary. But since violations of inalienable rights undercut moral agency itself, there can be no obligation to sustain a social system in which they will inevitably occur. Thus, social justice requires not only that communities commit themselves to respect for inalienable rights but also that communities succeed in implementing these rights. Effective recognition of inalienable rights is a minimal condition for social justice.

At the beginning of our inquiry into the problem of natural rights, we said that we would be looking for a way to identify foundational rights. Unlike the innumerable moral rights that a person might have as a result of any obligations that might be owed him or the miscellaneous rights put forward for legislative action by competing interest groups, natural rights belong at the foundations of political theory. No adequate political theory can exclude them or fail to register their impact. We have argued at length that inalienable rights are constitutive of moral communities, and we have shown how inalienable rights can be incorporated into theories of political equality and social justice. In light of the functional

and conceptual coincidence of inalienable rights and natural rights, we conclude that inalienable rights and natural rights are identical.

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