

# FROM THE STANFORD ARCHIVES

## CONTEMPORARY THEORIES OF RIGHTS

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### PREFACE

We often experience disappointment upon reaching the conclusion of a treatise on political philosophy. Too frequently the vigorous, forthright style and logic which an author employs during the first chapters in criticizing the “fatal errors” of preceding doctrines on his subject give way in the conclusion of the book to exactly the same type of errors when he attempts to build, however eclectically, a theory of his own. If the author has honestly attempted to meet his problem, we may well find that his approach, in attempting to be fair and to accord with common sense as well as logic, loses its vigor and becomes mincing and apologetic. On the other hand, if the author has made no attempt to carry over his ideas into the realm of actualities, we may feel that a tenable approach to the problems of morals and politics has been sacrificed to a

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Chief Justice William H. Rehnquist’s 1948 master’s thesis is being published for the first time in this Symposium Issue of the *Stanford Law Review* with permission from the Rehnquist family and the Stanford University Library and Archives. The text and footnotes are presented unedited, and original pagination is indicated in brackets.

The influence of this thesis on Chief Justice Rehnquist’s subsequent jurisprudence is explored elsewhere in this Symposium Issue. See Douglas W. Kmiec, *Young Mr. Rehnquist’s Theory of Moral Rights—Mostly Observed*, 58 STAN. L. REV. 1827 (2006).

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too rigid exercise in logic.

It is between this Scylla and Charybdis that even such an elementary study as the present one must steer. It is apparent upon a cursory examination of the history of philosophy that in order to set forth any startlingly new doctrine, we must risk shipwreck on one or the other; we must resort either to a logical *tour de force* or to a formless theory which can be all things to all men. For the great middle channel, which avoids both of these extremes, has been thoroughly explored by the great minds which have addressed themselves to the [\*ii] subject. The reconciliation of liberty with authority, which is the most vital problem in political theory, and its corollary questions of the purpose of the state and the nature of political obligation, admit of but few practical solutions which avoid both extremes. It can be truthfully said that the great answers to these questions have differed in degree of shading rather than in fundamentally opposed precepts.

Viewing these problems in historical retrospect, one cannot but ask himself if any solution is possible, or even if lasting progress has been made since men first perplexed themselves with the political phase of their existence. There are few ideas in political theory or in philosophy as a whole which cannot be traced back in some form to Plato, Aristotle, and their amazingly fertile period of Greek speculative thought. Indeed, there are those who think that the philosophical efforts of the ancient Greeks rank far above contemporary works on the subject. At any rate, when one considers the enduring quality of ancient political thought, lasting in spite of the entirely different concrete political situation with which they dealt, one must look askance at those who proclaim that the only thing permanent is change. History and psychology demonstrate that though political systems and political institutions rise and fall, the qualities in man which make him a social animal and constantly spur him on in his search for peace, liberty, and security remain relatively constant.

The inherent demand of the mind for unity and [\*iii] relatedness among the various branches of knowledge and thought cautions us that a series of logical propositions may entirely fail to relate the questions of political theory to the totality of human experience under which they must be subsumed. Underlying any system of politics, morals, or social values there must be a theory of human nature; in this regard it must be conceded that there is some validity to Bergson's anti-rational contention that this basic principle, this inner reality of human nature must be intuited as a living entity rather than dissected with words. Even if we are unwilling to follow Bergson all the way, no one would deny that it is political theory which must adapt itself to human nature and not *vice versa*. Testimony to the truth of this proposition is the enduring quality of the famous apothegms of poets and philosophers, which live in the world of action as well as that of ideas because they reached in and grasped, if only momentarily, the essence of the problems with which they were dealing. As examples, we might cite Plato's famous phrase, that cities will never have rest from their evils "until philosophers are kings, or the kings and princes of this

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world have the spirit and power of philosophy,” or Alexander Pope’s couplet, “Let fools for forms of government contest, whate’er is best administered is best.” These are household expressions, whereas many much longer and more elaborately reasoned attempts have “fallen dead-born from the press.”

When we compare the emotional dynamism of the vast [\*iv] written literature on the subjects of philosophy and politics with that of the great tragedies in the field of drama, with the masterworks of art, and with the finest efforts of the great musical composers, we may well have misgivings as to whether the logical treatise method which has characterized almost all of philosophy since its inception can ever sufficiently grasp the human reality which is the nexus of the problems which it seeks to solve. It may well be replied that the purpose of political philosophy is not the same as that of art or even literature, and that it cannot be measured by the same standards. Political philosophy need not, nay, should not have an emotional content.

There is undoubtedly substance to this contention, but in my opinion it is to a certain degree superficial. Admittedly philosophical treatises are not intended to have the same emotional appeal as dramatic tragedy or great music. But nevertheless, I believe that insofar as political philosophy neglects the emotional side of human nature in deference to academic standards of tempered rationality, it loses one of the principal forces which project it from the library into the market place. If we write only for the edification of academicians like ourselves, this will not concern us; but anyone who hopes that someday his words will become the thoughts of others in a search for some more suitable form of political society cannot overlook it.

With these considerations in mind, we are less [\*v] surprised that definitive solutions to the questions posed by political theory have not yet been reached. Even the efforts of those who were the greatest thinkers of their day have been discarded by succeeding generations insofar as they claimed to be unified answers to the basic questions, though frequently their observations on certain issues, the truths of a fundamental nature which they pointed out, have remained to give immortality to their names.

To undertake an unpretentious study such as the present one with any hope of making a lasting contribution in the field would be sheer folly. The most that can be hoped for is that the author has succeeded in organizing the material in some such slightly different way that the reader may find it easier to formulate for himself the answers to the questions which the subject has always presented.

My obvious indebtedness to the many authors upon whose ideas I have drawn, both consciously and unconsciously, can only be recorded here; the magnitude of the obligation will become apparent in the succeeding pages. To Dr. Frederick Anderson of the Romanic Languages Department at Stanford University I am indebted for his generous help on the question of the development of natural law and natural rights from the thought of the Stoics. I wish to thank also Dr. Kurt Reinhardt of the Germanic Languages Department

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at Stanford University for his help in the treatment of St. Thomas Aquinas. [\*vi]

Above all, I wish to express my gratitude to Dr. Arnaud B. Leavelle, of the Political Science Department at Stanford University, whose supervision of this work at every stage passed beyond the realm of academic duty into that of personal friendship.

William H. Rehnquist  
Stanford University  
July, 1948 [\*1]

#### CHAPTER I. THE GENERAL CONCEPT OF RIGHTS

The problem of rights cannot be considered independently of its relationship to the structure of political theory as a whole. While it would be clearly undesirable to broaden the scope of this paper by treating other questions at great length, it is nevertheless incumbent upon us to refer cursorily to our reasons for examining this particular problem, and to its relationship to the central questions of political theory—the reconciliation of liberty with authority, and the determination of the ends of the state.

To do otherwise would be to adopt an unnecessarily dogmatic attitude. We cannot arbitrarily set forth a theory of natural rights or a theory of functional rights until we know to what kind of a state we are referring, and the ends that it is to achieve.

When it is declared that the state *ought* to recognize certain rights, the natural retort is, “Why should it?” The contract school of political philosophers said that the state should recognize certain rights because such recognition was the object which people desired to attain by entering into the contract which established the government. Even though it is very probable that these thinkers did not mean to imply that states actually were formed by members gathering on a great plain to sign the contractual document, the fact that Maine and [\*2] others have cogently refuted the historical accuracy of the contract, and the fact that German idealism has caused many thinkers to reject even the “fiction” of the contract, would seem to urge upon us an alternative basis for considering a doctrine of rights.

This basis can be found in the idea of political obligation as such. Without referring to the violation of any “original contract” we may nevertheless reasonably ask ourselves, “Do I have any obligation to obey a state which fails to recognize certain claims on it by its citizens?” What claims, if any, should a state recognize in order that its citizens should have an obligation to obey it? Thus we are able to circumvent the “fiction” of the contract and nevertheless give our problem a very real meaning in its present day context.

Again, we may proceed to lay out an elaborate theory of rights without any attempt to examine the ends of the state. This, however, is very much of a “take

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it or leave it" attitude which leaves many questions unanswered, and must remain anything but convincing to those who did not think exactly the way we did in the beginning. Certainly a stronger case could be made for the recognition by the state of certain claims by individuals in a state which exists primarily for the benefit of the individuals who compose it than in a state which is built on the organic theory and by definition absorbs the individual in its totality. [\*3]

These considerations must be borne in mind throughout this study; and when we come to the exposition of what we consider a satisfactory basis of rights, we shall preface this treatment with an assumption as to the kind of state with which we are dealing.

By this approach I do not mean to totally abandon Cicero's majestic expression that "the law will not lay down one rule in Athens and another rule in Rome." But for Cicero's exposition to be valid we must assume a community of purpose underlying all states, so that the governments of both Athens and Rome have the same objectives; thus we return by another route to the basic question of the purpose of the state. The weight of present day legal and philosophical opinion has turned its back on Cicero and natural law; and to base an investigation on an assumption which is flatly rejected by many is neither good scholarship nor good salesmanship. This is not to say that rights themselves are not fundamental, but rather that a theory of rights considered in a political vacuum is misleading to the point of being meaningless.

What is the role of rights in political theory? Naturally, different writers have given radically different answers. Before attempting to review them, it is essential to differentiate between legal rights, which have the status of law, and moral rights, whose validity rests outside the legal structure of the state. E. F. Carritt, the British moral and political philosopher, has treated the subject thoroughly in [\*4] his work, *Morals and Politics*. Though he nowhere specifically defines the concept of rights, it is quite clear that he means by a legal right any claim, of an individual or group upon other individuals, groups, or upon the state itself for a certain kind of treatment, which is recognized by the state. By a moral right he would mean a claim of this nature which the state *ought* to recognize.

The contents of this basically adequate definition of the abstract term itself can be made richer by briefly reviewing the manner in which some of the classical political theorists have treated the subject. As with most other political ideas, we must go back to Greek idealism to find its roots. The Greek political thinkers regarded the state as "natural" and man as a "social" animal. Indeed, Aristotle declares in Book I of his *Politics* that "he who first founded civil society was the cause of the greatest good; for as by the completion of it man is the most excellent of all living beings, so without law and justice he would be the worst of all."<sup>1</sup> Thus the Greeks were not faced with the problem of rights in

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1. Aristotle, *Politics*, p. 5.

any "state of nature" anterior to civil society, since this society itself was natural.

However, the position of the Greeks must be differentiated from that of the modern idealists in the matter of rights. As is pointed out below, Hegel and his followers held not only that there could no question of individual rights [\*5] which were not recognized by the state, but that the state itself was the source of all justice and moral rectitude. In the *Politics*, on the other hand, we find Aristotle remarking *a propos* a right which the law gives that "that which is legal is in some respects just,"<sup>2</sup> implying the converse that in some respects it may be unjust. In Book VI of the *Politics* we also find reference to liberty and equality as the basis of what Aristotle styles a democracy.

Though the Greeks did not idealize the actual state in the Hegelian sense, it is nevertheless true that they were not concerned with rights as we know them today. Though both Plato and Aristotle admit that particular states may be bad or unjust, their idea of the state as natural results in a preoccupation with justice, virtue, and good as they are found in the state, rather than a concern with rights which could be claims of individuals against the state or outside the state.

The transition from Greek to Roman political thought reflects the difference in outlook of the two eras. The development of the Roman law reveals the institutionalization of the claims of one individual upon another into legal rights; but insofar as it was indigenous, the Roman law was pure legalism devoid of moral content. It remained for a philosophy emerging from Hellenistic Greece to provide the ethical basis for Roman jurisprudence and legal philosophy. Stoicism supplemented Roman legality with moral force. [\*6]

For the Stoics it was Nature, as the concrete expression of God Himself, that gave men the knowledge of their rights and duties. The peculiar universality of the Stoic theory of natural law has endured, and has powerfully influenced the concepts of natural rights in the juristic sense. Under the law of Right Reason, said the Stoics, men are equal in that they all ought to have those rights essential to human dignity. Justice demands that states as well as individuals recognize those rights. The passage from Cicero's exposition of natural rights exemplifies this point of view.

To invalidate this law by human legislation is never morally right, nor is it permissible to even restrict its operation. Neither the Senate nor the people can absolve us from our obligation to obey this law, and it requires no Sextus Aelius to expound and interpret it. It will not lay down one rule in Rome and another at Athens, nor will it be one rule today and another tomorrow. But there will be one law, eternal and unchangeable, binding at all times upon all peoples; and there will be, as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter and its sponsor.<sup>3</sup>

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2. *Ibid*, p. 10.

3. Cicero, *Republic*, Book III, p. 22.

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Though Cicero does not specifically mention natural rights, it is apparent that they are closely connected with his idea of natural law. Here we have explicitly stated a concept of law (and implicitly a concept of rights) which, whether embodied in written law or not, is binding upon both the governed and the governors. Thus is clearly revealed the possibility of a disparity between legal rights and moral rights.

The Stoic idea of natural law was partially taken over by the Medieval Christian writers, who added to it a [\*7] distinctively other-worldly flavor. In St. Thomas Aquinas' synthesis of faith and reason we find the idea of an ordered whole governed by a rational hierarchy of values. In his *Summa Theologica* he delineates the four types of law as Eternal, Natural, Divine, and Human, respectively. Eternal law, which is a direct embodiment of the reason of God, transcends the physical universe and is entirely beyond human comprehension. Natural Law is also a reflection of Divine reason, but less direct because it inheres in the created objects of the physical world. Divine Law is revelation in the usual sense of the word, while Human Law, divided into the categories of *ius gentium* and *ius civile*, is the product of the entire community acting for the common good. St. Thomas says little of individual rights; in one of the few places in the *Summa Theologica* where he treats the subject, he implicitly denies the right of revolt against lawful authority.

Less known medieval thinkers, however, treated rights at greater length. Otto Gierke, in his famous work *Political Theories of the Middle Age*, devotes considerable attention to this aspect of medieval thought.

Absolute protection against positive law was due to those rights which were directly conferred by pure Natural Law without the intermediation of any entitling act (e.g. the right of life) . . . . In this sense Medieval Doctrine was already filled with the thought of the inborn and indestructible rights of the Individual. The formulation and classification of such rights belonged to a later stage in the growth of the theory of Natural Law. Still, as a matter of principle, a recognition of their existence may be found already to the medieval Philosophy of Right when it attributes an absolute and [\*8] objective validity to the highest maxims of Natural and Devine Law. Moreover, a fugitive glance at Medieval Doctrine suffices to perceive how throughout it all, in sharp contrast to the theories of Antiquity, runs the thought of the absolute and imperishable value of Individual; a thought revealed by Christianity and grasped in all its profundity by the Germanic spirit.<sup>4</sup>

In present day Roman Catholic philosophy, Jacques Maritain has combined the Thomistic idea with certain principles of Stoicism. In *The Rights of Man and Natural Law*, he declares that,

The true philosophy of the rights off the human person is based upon the idea of natural law. The same natural law which lays down our most fundamental duties, and by virtue of which every law is binding, is the very law which assigns to us our fundamental rights . . . . Every right possessed by

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4. Gierke, Otto, *Political Theories of the Middle Age*, p. 83.

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man is possessed only by virtue of the right possessed by God, which is pure justice, to see the order of his wisdom in being respected, obeyed, and loved by every intelligence.<sup>5</sup>

Thus far we have examined ideas growing out of ancient and medieval cultures. Though we find an increasing emphasis on the concept of rights in the thought of the Stoics and some medieval writers, we cannot escape the conclusion that these thinkers were not primarily concerned with the individual; that they were so convinced of the organic nature of society and the harmony of the social order that to many of them it seemed ridiculous to speak of the individual apart from the state or society of which he was a member. It is only with the advent of the Renaissance and the Reformation that we find political theory profoundly influenced by what Auguste Comte described as “that perennial western malady, the revolt of the individual against the species.” [\*9]

In the philosophy of what, for the want of a better generalization, we may call the contract school, we witness a tremendous change from the attitude of previous thinkers. Crotius, Hobbes, Spinoza, Locke, and Pufendorf, though they reached differing conclusions as to the nature of rights, all treated their subject with greatly increased emphasis upon the individual *qua* individual. Indeed, the contract school ushers in a revolutionary inversion of the relationship of man and the state, the effects of which have persisted to this day.

Hobbes and Spinoza both treated “natural rights” at some length, but it seems clear that they conceived the term to be almost synonymous with the words “power” or “capability.” With them it was in no sense a claim which the individual had upon others independently of his power to enforce it; rather it was a prerogative which the individual exercised in the state of nature independently of, and it would seem in defiance of, his fellow men. Man’s two rights in the state of nature are, according to Hobbes, to use all of his bodily power to defend himself and to seek peace with other man as best he can. Even the fearsome Leviathan to which man submits in order to end the “*bellum omnium contra omnes*” cannot deprive him of the basic right of self-preservation.

Spinoza makes even clearer than Hobbes the dearth of moral content in his definition of the term “natural right.” Because he originally identifies *jus naturale* with mere power in the state of nature, after the manner of Hobbes, he [\*10] consistently continues to regard *jus* in civil society as synonymous with the power to make it effective. In the state, the individual exercises only that *jus* (power) which the state allows him; if he is able to exercise more than the state allows him, he is to that extent outside of the state, and the state is imperfect. According to the *Tractatus Theologico-Politicus* the civil state can do no wrong except to divest itself of that power which is its only claim to the allegiance of its subjects.

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5. Maritain, Jacques, *The Rights of Man and Natural Law*, p. 117.



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With Locke, “rights” meant “natural rights” and natural rights meant those privileges or claims which inhered in man as man; they were derived not from any political or community sanction, but from the Creator himself. While this idea may seem on the surface to be similar to that embodied in the Stoic doctrine, there are significant differences. For Locke, the Creator endowed man with natural rights because he was man, and not because they were a means to universal world harmony. Locke treats the entire question from the viewpoint of the individual possessing the rights, whereas one feels that often the Stoics discussed the matter from the point of view of God Himself.

The basic rights which Locke set up were “life, liberty, and estate.”<sup>6</sup> These rights are carried over into civil society and become definite limitations upon the power [\*11] of the legislature.

The power of the society, or legislative constituted by them, can never be supposed to extend farther than the common good, but is obliged to secure everyone’s property [here it seems that Locke means property in the broad sense: life, liberty and estate] by providing against those defects . . . that made the state of nature so unsafe and uneasy.<sup>7</sup>

The formal apparatus of the social contract was carried over into the philosophy of the French Enlightenment, which culminated in the works of Rousseau. It should be noted that the word “culminate” here is meant in the chronological sense, for Rousseau broke sharply with that extreme rationalism which characterized the major portion of the development of the movement in France.

Though the famous expression, “Man is born free but everywhere he is in chains,” tends to glorify a Lockean state of nature, Rousseau nevertheless feels that it is the community and not God in a state of nature which is the source of morality. In the *Contrat Social* he expressly rejects the idea that the individual has rights against the state, or anterior to it. The very concepts of such natural rights are drawn from the communities in which we live, for the idea of a solitary individual outside of the community as a moral being is a fiction of the imagination. Paramount to any individual claim is the right of the community over all. [\*12]

Rousseau’s writings are so rich in shadings and nuances that it is impossible to make all parts of his political theory determinate. Nowhere is this more true than in his treatment of the *volonté générale*, the general will. Rousseau introduces the general will to solve what he considers to be the problem of government: “To find a form of association which protects with the whole common force the property of each associate, and in virtue of which everyone, while uniting himself to all, only obeys himself and remains as free as before.”<sup>8</sup> Obviously the general will had a Herculean task to perform, and

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6. Locke, John, *Second Treatise On Civil Government*, Section 87.

7. Locke, *op. cit.*, Section 131.

8. Rousseau, Jean Jacques, *Contrat Social*, Book I, Ch. VI.

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the strain shows in the ambiguities which have developed around the concept.

Each person, in entering into a community, puts himself under the supreme direction of the general will. He gives up the natural freedom of the state of nature for the civil freedom of organized society. The general will is more than a majority decision, according to Rousseau, or a sum of particular wills; it is more the consensus of the community. Here Rousseau and succeeding interpreters of his ideas become involved in difficulties. At one point Rousseau declares that the general will requires unanimous consent to bring it into existence; he frequently rules out the idea that the consensus of a group of particular wills, willing objects of interest to only certain sections of the community, can create a general will. Yet in Chapter VII of Book I he declares that the general [\*13] will can constrain a man against his own judgment, which is nothing but “forcing him to be free.”

The myriad implications of Rousseau’s writings have given him a Janus-like stature; one face toward the free, primitive, unbridled individual, the other face toward a society which is supreme over its members. In spite of this duality, it is clear that the general will as a source of rights favors a social interpretation of them, as opposed to the earlier thinkers of the contract school.

Rousseau and Hume were between them partially responsible for awakening Kant from his “dogmatic slumbers” and stimulating him to his monumental contributions to philosophy—the three Critiques which are the fountainhead of German idealism. Hume’s differentiation between reason and value had undermined the rationalist theory of self-evident rights, and his extreme rationalism in carrying to their logical conclusions the ideas of Berkeley and Locke convinced Kant that there was something wrong with the so-called “empiricist” methodology. And Rousseau’s anti-intellectual approach to human nature showed him that will was fully as important as reason.

Many histories of the development of political thought either neglect Kant or slight him; apparently he is considered by their authors to be primarily a moral philosopher and meta-physician. Apart from the fact that any attempt to jump from Rousseau directly to Hegel completely ignores the origin of Hegel’s most important conceptual tools, Kant contributed in [\*14] his own right ideas which have significantly influenced political speculation. Assuredly he did not discourse at length on sovereignty, pluralism, group personalities, or any of the other burning issues of our day. But if we recognize, as we must, that any doctrine of political obligation or political rights must be based on some sort of moral philosophy, or at least some attitude toward questions or morals, then we must indeed rank Kant’s *Critique of the Practical Reason* among the very few books which have fundamentally influenced political thought. The idea of the human will as an autonomous legislative agent, expounding the moral law, is one which has had tremendous impact on all modern idealist philosophers. Kant sets forth the cornerstone of the idealist political philosophy as follows:

“We are inevitably reduced to desperate circumstances if we deny that pure principles of right and justice have objective reality and are therefore capable of

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being acted upon . . . . A true theory of politics must begin by doing homage to moral obligation.”<sup>9</sup>

That is to say, any political theory which fails to recognize some objective moral value—a categorical imperative—at its foundation is doomed to failure. When moral principles, rather than being the anchor of the political doctrine, are derived from other considerations, which are mere objects of the phenomenal will in the sense of hypothetical imperatives, the [\*15] hope for any universally valid doctrine is destroyed, and the problem of political obligation is rendered insoluble.

Kant showed philosophy of all kinds an exit from the extreme skepticism of Hume without going to Hegel’s extreme of abstract idealism. His demonstration of the possibility of synthetic judgments *a priori*, of the necessity of concepts as well as percepts for knowledge gave epistemology a broader base than the sensationalism of Hume. His exposition of the laws of operation of the practical reason, as opposed to pure reason, put morality and religion on firmer grounds, while conceding nevertheless all of Hume’s logical objections to academic religious dogmatism.

On the other hand, though Kant laid the groundwork for Hegel’s metaphysical system with his recognition of a distinction between the noumenal and the phenomenal will, he refused to allow the noumenal will to be absorbed in the *Volksgeist* or in the nation state, as did Hegel. Kant’s regard for the individual, and his dislike of metaphysical subtleties prevented him from becoming a godfather of succeeding totalitarian theories and movements.

Hegel took over Kant’s idea of the separation existing between the noumenal and the phenomenal wills. For Kant, however, the noumenal will had been a *subjective* thing-in-itself which underlay all experience. With Hegel, however, the noumenal will is transformed into *objective Spirit*, no longer residing in the individual but representing the totality of experiences [\*16] and wills of various individual subjects. It is this transformation which lays the groundwork for Hegel’s formulation of the classical German idealist position in rights. Hegel’s view was, in a word, that the individual has no rights against the state, any more than the part has rights against the whole. The state, as objectified reason, is on such a much higher moral plane than the individual that to speak of individual claims against the state is to completely misconstrue the problem. The individual realizes himself, not by following the capricious dictates of his phenomenal will, but by obeying his noumenal will, represented by the *real will* of the society, which in turn is always embodied in the commands of the state. “*Das Gesetz ist das Recht, als das gesetzt, was es an sich wahr.*”<sup>10</sup> Thus the state becomes the source of morality, and consequently of individual rights and duties.

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9. Kant, Immanuel, *Perpetual Peace*, Appendix.

10. Hegel, G.W.F., *Philosophie des Rechts*, Section 217.

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L.T. Hobhouse, the British empiricist, regarded the first World War as the logical outcome of the putting of Hegel's philosophy of the all-embracing state into practice.<sup>11</sup> Though the Hegelian philosophical structure has profoundly influenced Anglo-Saxon speculation, the idea of the state as the "march of God in the world" has been too much for most of the Anglo-Saxon idealists. T.H. Green, for instance, is certainly indebted to both Hegel and Kant; but though often his phrasing is similar, one cannot help but get a completely different impression from [\*17] his *Principles of Political Obligation* than from the works of his Germanic predecessors.

Green objects strongly to the Lockean idea of natural rights.

The representation of society with its obligations as formed by contract implies that individuals have certain rights, independently of society and of their function as members of society, which they bring with them to the transaction. But such rights abstracted from social function and recognition could only be powers . . . i.e., they would not be rights at all.<sup>12</sup>

As might be expected Green becomes involved in ambiguities in insisting on the one hand that rights are derived from society and at the same time maintaining that there are rights (such as freedom from slavery) which individuals may rightfully claim even though the state does not recognize them. His failure to clearly distinguish between state and society adds to this confusion, and as a result it is very difficult to summarize his conclusions without doing violence to some facets of his thought. Probably the following is the most all inclusive statement that he makes.

In analyzing the nature of any right, we may conveniently look at it on two sides, and consider it on the one hand a claim of the individual, arising out of his rational nature, to the free exercise of some faculty; on the other, as a concession of that claim by society, a power given by it to the individual to put the claim in force. But we must be on our guard against supposing that these two distinguishable sides have any really separate existence. It is only man's consciousness of having an object in common with others, a well being which is consciously his in being theirs and theirs in being his . . . that gives him the claim described.<sup>13</sup> [\*18]

This statement reveals all of the candor and the genuine attempt to face the problem foursquare which is so characteristic of Green's work; but it also shows that such determination to include all aspects of the question may lead to great difficulty in developing the logical application of a theory which is clear on paper.

Green goes on to say that men have rights as members of a family or of human society even though all states refuse to recognize them; but notwithstanding he immediately reaffirms the idea that members of a state

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11. Hobhouse, L.T., *Metaphysical Theory of the State*, Ch. I.

12. Green, T.H., *Principles of Political Obligation*, Section 139.

13. Green, *op. cit.*, Section 139.

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derive their rights from the state.<sup>14</sup>

In our own times, the pluralist school in England, and legal theorists following in the footsteps of the English jurist John Austin, have contributed to the idea of rights. These are not vital to this study, but are noted for the sake of completeness.

The Austinian school bases its idea of rights on the logical development of the juristic view of the state; since law is the command of the sovereign, a right is a claim by an individual or group which is recognized by the sovereign and is therefore legally enforceable. This concept pertains to rights in the political-legal sense, and does not pretend to establish any moral basis for them.

Pluralism, with its emphasis on groups other than the state, adopts a functional approach to rights, which will [\*19] be more fully elaborated in the next chapter. Pluralists, because they reject the legal monists' conception of the state, naturally also reject the juristic theory of rights. H.J. Laski, the theorist of the British Labour Party, adopts a pragmatic attitude toward rights. "What I mean by right is something the pragmatist will understand. It is something the individual ought to concede because experience has proved it to be good."<sup>15</sup>

There is no lack of emphasis upon rights in current political discussion. With the development of the idea of the social service state and its increased emphasis on welfare and economic security, a number of thinkers have differentiated between what they call "economic" rights and "political" rights. This distinction is allied in some cases with the distinction made between "positive" freedom and "negative" freedom.

There is general agreement that these so-called "political" rights embrace those guarantees which stem from the democratic Anglo-Saxon political and legal heritage; freedom of speech, freedom of the press, freedom of religion, due process in judicial proceedings, and security in one's person and property against unreasonable seizure. None of these rights, as we understand them in the United States, is unqualified. However, there is always a *prima facie* presumption against their infringement. Henceforth, we shall refer to them as political-legal rights; *political* to show that they are concerned with political process, and usually operate as a limitation [\*20] upon the government itself; *legal* to indicate that they are recognized by a given government, if such is the case.

"Economic" rights, as they figure in present day debates, are of two different types. The first might be called "laissez-faire" rights: freedom of contract and freedom of enterprise. These rights are no longer accepted as uncritically as they once were, and the weight of opinion holds that they may be abridged in the interest of the general welfare.

The second type of economic rights are those which have grown up with the idea of the positive government, which actively seeks to provide for the

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14. *Ibid*, Section 141.

15. Laski, H.J., *The Problem of Sovereignty*, p. 18.

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general welfare. There is some difference of opinion among the advocates of these rights as to just what they embrace; however, freedom from discrimination, the right to work, the right to a living wage, and the right to some minimum subsistence are generally included.

Some believe that these new rights simply provide for economic freedom in the present day as did the laissez-faire rights in the nineteenth century. This is the view expressed by Alvin Hansen, the Harvard economist, when he says, "Then economic opportunity meant essentially a right to operate your own farm or small business. Today economic opportunity means largely a chance to get a job."<sup>16</sup> He goes on to state that the foremost among these economic rights is the right to work.

President Franklin Delano Roosevelt, in a campaign speech of October 28, 1944, set forth the following rights:

The right to a useful and remunerative job; the right to earn enough to provide adequate food, clothing, and recreation; the [\*21] right of every farmer to sell his produce at a return which will give him and his family a decent living; the right of every family to decent home; the right to adequate medical care and the right to achieve and enjoy good health; the right to adequate protection from economic fears of old age, sickness, accident, and unemployment; the right to a good education.<sup>17</sup>

The recent report of the President's Committee on Civil Rights catalogues at some length the rights which it considers fundamental to the American tradition.

Four basic rights have seemed important to this committee and have influenced its labors. We believe that each of the rights is essential to the well-being of the individual and to the progress of society.

The rights to safety and security of the person . . . .

The rights of citizenship and its privileges . . . . Because political process is customarily limited to citizens, there can be no denial of access to citizenship based upon race, creed, color, or national origin . . . .

The right to freedom of conscience and expression . . . .

The right to equality of opportunity. . . . The right of each individual to obtain useful employment, and to have access to services and fields of education, housing, health, recreation, and transportation, whether available free or at a price, must be provided with complete disregard for race, color, creed, or national origin. . . .<sup>18</sup>

In tracing the historical exposition of rights by these various thinkers, undoubtedly a technical distinction could be found between actual *definition* of the *term* right, and a statement of what rights do exist, ought to exist, or should be conceded. However, with most of the political philosophers the definition of the term is so closely bound up with their actual theories as to which claims for rights are valid that it has not appeared profitable to separate the two ideas.

16. Hansen, Alvin H., *Economic Policy and Full Employment*, p. 14.

17. Quoted in the *New York Times*, October 29, 1944.

18. *Report of the President's Committee on Civil Rights*, pp. 6-9.

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Nevertheless, in order to clearly define the subject of investigation with which we shall be concerned, further exploration of the [\*22] concept itself is indicated. We accept Carritt's definition, that a political-legal right or an economic-legal right is a claim, recognized by the state, of an individual or group upon other individuals, groups, or the state itself for a certain type of action. By analogy, a moral right is a claim by the individual which is ethically valid and *should* be recognized by the state. This definition is broad enough so as not to assume the ground of the argument as to what types of right actually are valid, and still exclusive enough so as to roughly delimit the subject matter.

However, we must go beyond mere etymological definition if we wish to make the discussion which will follow as meaningful as possible. What ideas are wrapped up in the term "right?" How best can we fully understand the real significance of the term? The concrete rights of which we have spoken differ widely in their operation; what may we abstract from these particular doctrines to give us insight into the generic structure of the concept itself?

It might reasonably be said that the reason man desires rights is that he conceives them to be an aid in achieving some goal which he holds to be *summum bonum*. For each man, the living of his life in the manner which he would choose is one way of stating such a *summum bonum*, though it is obviously so all-inclusive that it would mean something different to each person. Closely tied up with both the idea of rights and the idea of a *summum bonum* is the word "freedom," probably one of [\*23] the most elusive and yet one of the most overworked and abused concepts in politics.<sup>19</sup>

The invoking of the word by all parties to the ideological struggle is unfortunate, because a variable which will satisfy so many different equations is apt to conceal fundamental differences of opinion and lead to confusion rather than clarification. Nevertheless, we must formulate our view of the idea, since it will inevitably figure prominently in any discussion or analysis of rights.

With most words, there is no objection to any reasonable meaning we may choose to give them so long as we use that particular meaning consistently. This way, at least, there can be no misunderstanding. However, the current state of political debate suggests an objection to any arbitrary definition of freedom, because of the tremendous emotional connotation of the word as a symbol. It is difficult to conceive of a political theory which could gain acceptance in the United States while roundly denouncing freedom. Thus we must realize that if we define freedom sufficiently narrowly so as to exclude those types of "freedom" which others advocate, we put them at a disadvantage by forcing them to condemn or at least to make reservations about freedom as we have defined it. However, it is impossible to do otherwise and still be able to attach some determinate meaning to the word. But we must remember that in defining it rather narrowly, we should be willing to admit that [\*24] it may not always

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19. See Fosdick, Dorothy, *What Is Liberty?*

be the highest good; that many people may be willing to sacrifice our version of freedom for other factors often included under the head of freedom in the “new” or “broad” sense.

We choose the traditional dictionary definition, to wit: the absence of external restraint which is a product or the conscious decision of some human agency. This is admittedly a narrow definition, but it must be conceded that it accords more closely with general usage than to the “broader” ones. The expansion of this idea of freedom into an almost meaningless generalization can probably be explained by the fact that because freedom in the narrow sense has been a thing fought for and cherished throughout the Anglo-Saxon political tradition, the original narrow meaning of the word was idealized into a synonym for all that men regarded as good or desirable in a political or legal sense. At the same time, with the increasing complexity and interdependence of society, it became apparent to all that freedom in the traditional sense was not always sufficient to achieve one’s ends; it was very possible to be free and at the same time starving and homeless. Rather than admit that freedom itself was not enough, modern political thinkers have chosen to so expand the concept of freedom so that it still represents the possibility of achieving one’s desires. The unfortunate consequence of this tendency has been to considerably distort the word so that it is often impossible to discuss it with any real precision. [\*25]

Actually there are three conditions necessary for the achievement of one’s desires, all three of which have been subsumed under the expanded idea of freedom.

The first of these is freedom in the traditional sense, the sense in which we shall henceforward employ it in this paper: the absence of external restraint which is the product of the conscious action of some human agency. This might be actual physical compulsion or restraint, but more often it is the direct threat of some consequence which shall be invoked upon the performance of a certain act.

The second is *ability* or *capacity* to achieve a desired end. A man may be completely free from external restraint and still not have the ability—physical, mental, or economic—to attain a certain goal.

The third factor is *opportunity*. A man may be wholly free from external human restraint, and have the ability necessary to the accomplishment of a given task, yet nevertheless fail to accomplish it simply because he lacks the opportunity to perform it

To illustrate, let us assume that I desire to climb up the side of a high cliff. If there is a law against trespassing on the cliff, then I am not *free* to climb it; there is external restraint being exercised over me in the matter. If the cliff is so extremely steep that I simply do not have the physical stamina or the mental fortitude to climb it, I may be perfectly *free* to climb it and still not do so because I am not [\*26] *able*. In this latter case it does violence to the English language to say that I am not *free* to climb the cliff.



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Thirdly it is possible that I might be both free and able to climb the cliff and still fail to do so because I lacked the *opportunity*. If a waterfall blocked my access to the cliff, it would be this lack of opportunity which prevented me from accomplishing a task for which I was both free and able.

If we define freedom in the narrow sense, and admit that it is but one condition necessary to the fulfillment of a desire, we are able to discuss it intelligently, and, as was previously remarked, to admit that in some cases it might be better to restrict freedom and increase opportunity and ability.

We are now able to supplement the formal definition of rights to which we had previously agreed. Rights are claimed by individuals for the purpose of achieving either freedom, ability, or opportunity to act towards a given end. The legal aspect of a right is therefore the state's recognition of a person's title to a certain degree or type of freedom, opportunity, or ability; the moral aspect of a right is the validation of an individual's claim to one of these three on the basis of some moral standard. It will be noted that most of what we have styled "political" rights are claims to freedom, while most of the "economic" rights are claims to ability or opportunity.

Thus, a political-legal right to freedom of speech is the recognition by the state of a person's claim to speak without [\*27] external human restraint to deter him. Obviously, this right as it exists in Anglo-Saxon countries is not absolute so long as there is legal remedy for slander, or sedition laws.

An economic-legal right to food and shelter is a recognition on the part of the state of the individual's claim to the *opportunity* or perhaps the *ability* to obtain these items regardless of his economic status.

An economic-legal right to work would be a recognition by the state of the individual's claim to the opportunity of performing a useful, remunerative task in the existing economic order.

This paper will deal primarily with the moral, rather than the legal, aspects of these claims by individuals to freedom, opportunity, and ability. Is there any way of determining whether or not these claims are valid, independent of their recognition by particular states? We shall investigate proposed moral bases for evaluating the claims of individuals, and attempt to formulate some criterion for determining the moral rights of the individual, and establishing their source. Are there *any* political or economic claims which the state ought to recognize? If so, *what* are they, and *why* ought the state recognize them?

Let us first turn to the functional theory of rights, and to the pragmatism from which it springs, to see what the functionalists believe to be a proper basis for evaluating the claims of individuals. [\*28]

## CHAPTER II. THE FUNCTIONAL BASIS OF RIGHTS

Functionalism, as a method of political analysis and a theory for the evaluation of political institutions has made a recognized contribution to contemporary political theory. Before turning directly to functionalism in

political science, however, let us briefly examine the background of the movement.

There has been a large degree of interaction between the ideas of functionalism and pragmatism since their respective inceptions, and the two are strikingly similar in many respects. Biological functionalism, which was given its impetus by Darwin and his successors, was one of the principal precursors of pragmatism. Pragmatism, on the other hand, when applied to social and political problems has resulted in the particular functionalist ideas which are found in the social sciences.

R.H. Tawney, in his *Acquisitive Society*, was one of the first to use the term "functional" as it is employed today in the discussion of rights. Though in this work he was more concerned with the economic organization of society than with political rights, his functional analysis of the economic system bears a striking outward resemblance to a similar analysis of political institutions. He criticized the capitalist society because reward was not on a functional basis; that is, [\*29] the various agents of production were not paid according to what he considered to be their contribution to the productive process. He proposed to remedy this by a reorganization of society, which would eliminate, among other factors, the role of private risk capital and the divorce of equity ownership from management, and would rebuild production on a basis which would give reward in proportion to contribution.

Tawney's work, though appearing shortly after the turn of the century, is in a sense a part of a larger movement which bore its fullest fruit after he wrote. This movement is best known as pragmatism, and it must be understood if we are to know the philosophical background of present day functionalism.

The movement as a whole is conveniently referred to as pragmatism, but that part of it in which we are particularly interested is the instrumentalism of John Dewey. Pragmatism strictly applied refers to the ideas of William James, who called it a new name for old ways of thinking. However, in retrospect it is clear that the pragmatism of James and the instrumentalism of Dewey, though starting as parts of the same larger movement, have led to different conclusions. Indeed, when one notes the relativism, the emphasis of scientific method and on the social nature of morality which characterize Dewey, one cannot but feel that James, with his irrationalism, was *sui generis*, or perhaps closer to Bergson than to Dewey. It is with that branch of the pragmatic movement which has regarded Dewey as its leader that we shall be concerned; and we shall find [\*30] it convenient to refer to this segment of thought as pragmatism.

It is difficult to formulate any exact definition of pragmatism. Being itself a revolt against an older academic dogmatism, it is not set forth as a series of abstract logical principles. Rather, its expounders prefer to speak, somewhat loosely at times, in everyday terms which deal with concrete applications of their ideas. As a result, the reader may be fairly certain of the spirit of pragmatism without having ever seen a formal definition of it.

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Pragmatism is concerned with the practical aspect of our mental lives; it is a theory of truth, a system for evaluating ideas and institutions, and a series of criteria for the reconstruction of traditional philosophy. Pragmatism says that an idea or concept is true if it works, if it serves its possessor as an instrument towards the attainment of some end. Truth is not the correspondence of an abstract idea with certain facts wholly dissociated from their continuum of reality, as the metaphysician would have it. Truth, like everything else, must meet the test of workability. An idea, no matter how true it is in an abstract metaphysical sense, might just as well be false if it is of no use to anyone in the accomplishment of some purpose. Every idea or concept must fulfill some function.

Dewey throughout his writings stresses the role of experience; he emphasizes the concrete particulars which men confront in their daily living in preference to any unifying metaphysical generalization. Traditional philosophy is taken [\*31] to task for being self contained, for having attempted a bifurcation between the real and the ideal, and for its hair-splitting logic.<sup>1</sup> Reconstruction must make philosophy a part of life, an aid in making experience more meaningful.

The point at which any type of general philosophy makes the greatest impress on political thought is in the realm of morals. An adequate political theory, if it is not to be wholly superficial, must be built upon some moral foundation, and it is by this means that metaphysics and social philosophy most often translate themselves into a cotangent political doctrine. It is the source of morality found in the general doctrine which will often determine the kind of state that will be realized in its application to problems of politics.

Dewey treats morality at some length in both *Reconstruction in Philosophy* and *Human Nature in Conduct*. A study of this treatment will show the connection with subsequent political branches of the pragmatic tree. It is in their treatment of morality that James and Dewey differ most greatly; the latter implies no such moral anarchy, with the choice completely upon each individual, as in the logical conclusion of James' ideas.

Dewey rejects traditional interpretations of morality as abstractions. For Dewey, morality is primarily if not solely a social phenomenon, as he repeatedly points out in both *Reconstruction in Philosophy* and *Human Nature and Conduct*. A [\*32] broad statement such as this demands amplification to free it from ambiguity; Dewey, however, with his dislike of sweeping generalization, does not make the meaning completely clear. It is not a question of whether or not morality *ought* to be social, says Dewey; experience shows us that it *is* social.

These two facts, that moral judgment and moral responsibility are the work wrought in us by the social environment, signify that all morality is social; not because we *ought* to take into account the effect of our acts upon the welfare

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1. Dewey, John, *Reconstruction in Philosophy*, Introduction.

of others, but because of facts . . . . Our conduct *is* socially conditioned whether we like it or not.<sup>2</sup>

The statement above exemplifies Dewey's treatment of morality from the descriptive point of view. In another place Dewey seems to imply the rejection of all but descriptive morality with the following words: "Just what is the significance of an alleged recognition of a supremacy [of the authority of right] which is continually denied in fact? How much would be lost if it were dropped out and we were left face to face with the actual facts?"<sup>3</sup>

In other parts of his works, Dewey expands his description of morals from the point of view of the social psychologist into a treatment resembling more nearly the normative approach. He attacks morals based on a "remote goal of perfection, ideas that are contrary in a wholesale way to what is actual."<sup>4</sup> He rebels at abstract ideals of the right which are developed [\*33] apart from concrete cases. In getting away from this idea, he says that the word right means the totality of social pressures exercised upon us to induce us to think and desire in certain ways. He notes that it will probably be objected that such pressure is not moral, but rather is force. He responds by saying that this pressure is very much part of our lives; it is not clear whether he means by this that for that reason it is moral, or not. He does declare that "failure to recognize the authority of right means defect in effective apprehension of the realities of human association . . . ."<sup>5</sup>

There are enormous differences of better and worse in the quality of what is social. Ideal morals begin with the perception of these differences. Human interaction and ties are there, are operative in any case. But they can be regulated, employed in an orderly way for good only as we know how to observe them.<sup>6</sup>

It is quite clear that Dewey treats morality in two, possibly three, different ways without clearly distinguishing between them. From the point of view of the social psychologist, morality *is* social. Concepts of right and good grow out of social experience, which is prerequisite for morality. In addition, Dewey is also a moralist without always being willing to admit it. The "better and the worse in the quality of what is social," the "orderly way for good," seem to imply some standard of right and wrong beyond the criterion of sociality. [\*34] "Growth itself is the only moral end,"<sup>7</sup> he says in *Reconstruction in Philosophy*. In view of these statements, it is not always clear whether Dewey means to regard the good as datum given in each case, with results to be evaluated on how nearly the given good has been realized, or whether he means to imply a normative social standard of morality. It is one thing to say that I *feel*

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2. Dewey, John, *Human Nature and Conduct*, p. 316.

3. *Ibid*, p. 326.

4. *Ibid*, p. 325.

5. Dewey, *op. cit.*, p. 329.

6. *Ibid*, p. 329.

7. Dewey, *Reconstruction in Philosophy*, p. 177.

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I ought to perform a certain act because society expects it of me and another to say that I *ought* to perform a certain act because society expects it of me.

It is this latter meaning—a normative social standard of morality—which has been Dewey’s main contribution to succeeding political thinkers. It appears that in adopting such an idea they have admitted through the back door that on which Dewey slammed the front door: an abstract moral standard independent of particular cases. The idea of social morality is difficult to state with precision; in general, it holds that that is right which society believes to be right, or that is right which is in the interests of the “common good.” This concept of good, sometimes as a reasoned argument, but more often as an assumption apparently considered self-evident, runs through much of present day political functionalist thought.

Instrumentalism as a theory of truth, as a way of approaching philosophical and moral questions, has been translated into the social sciences by a host of present day writers. Charles H. Cooley, in his work *Social Organization* undertakes [\*35] a functional approach to sociology, while Mary P. Follett combines pragmatism with an interesting development of group activity and personality in her functional study of government, *The New State*.

Political functionalism takes on its principal characteristics from the general doctrine to which Darwin and Dewey have been the principal contributors. “Function tended to be regarded as the original and treated as an independent variable, while structure was demoted to second place, a derivative and consequence of the play and sequence of functions.”<sup>8</sup> The influence of this idea in the social sciences has been the same as in biology; the growth, activity, and interrelation of factors have been stressed rather than attempting to fasten on to a particular stage of development an intrinsic character or essence. The purpose to be filled by a given political institution was the point of departure for a study, rather than the static mechanical structure. Constitutions, for instance, came to be looked at not as the fundamental documents on which were constructed entire governments, but rather as living factors in the everyday business of government, to be judged by the purpose which they actually served.

The implications of the functional method in the treatment of the question of rights are manifest. Rights must be judged by the actual function which they fill. David Bryn-Jones, of Carleton College, devotes considerable space to the exposition [\*36] of such a theory of rights in his book *Toward a Democratic New Order*.

Bryn-Jones briefly sketches the theory of natural rights as developed by the contract school and which culminated in the *American Declaration of Independence* and the *French Declaration of the Rights of Man and of the Citizen*. He concludes that this theory is unsatisfactory.

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8. Kallen, Horace, “Functionalism,” in the *Encyclopedia of the Social Sciences*.

Even assuming the existence of natural rights, it is probable that no two people would agree as to the rights that should be included within this category. Personal preferences would determine what would be regarded as natural by each. As a basis for determining and asserting the rights of man, the theory of nature is inadequate, because the concept of nature is ambiguous.<sup>9</sup>

The author then cites Burke's attack on the concept of natural rights in his *Reflections on the Revolution in France*. Though he admits that Burke's theories are not without ambiguity, the fact that they recognize the social purpose which rights must fulfill is declared to be a marked improvement over the natural rights theory.

The point that emerges from Burke's analysis may be stated simply. Rights must be established not by an appeal to an imaginary state of nature, but by an appeal to those which social life must serve . . . . The essential condition of recognition for any claim to a particular right is that it can be shown that this recognition will contribute to the advancement of social welfare and to the realization of desirable social ends . . . .<sup>10</sup>

[\*37] Here is the functionalist position succinctly stated. Social good is the ultimate criterion, "experience and reason the final arbiters." Rights do not inhere in the individual, but are rather granted to him by society to aid in the fulfillment of its purposes. Claims to rights are validated by the correlation of their exercise with the social welfare.

Superficially this doctrine seems to resemble that of Green; however it must not be forgotten that for Green both man as an atomistic individual and society as a semi-organic concept were subsumed by the ideal of the fulfillment of man's moral vocation. Even granting that the social welfare is validly measured by the popular will, nevertheless Green's standard in theory at any rate sets bounds beyond which the state cannot go, thus delimiting the range of rights in a somewhat more stable manner than the popular will, upon which in theory there are no limits. However, the majority rule theorists make a good case for the fact that in practice the majority does not seriously infringe on the rights of the minority.

Thus rights win recognition by proving themselves through experience to be in the interest of the general welfare, which is to be measured by the majority will.

Bryn-Jones admits that this thesis does not provide a "ready formula which claims are to be recognized as rights and which are to be rejected." He maintains, however, that it does provide a basis for reasonable discussion. To illustrate the application of the theory he gives detailed treatment to a concrete [\*38] example—the right to work.

Unfortunately, Bryn-Jones does not show the functional process (of evaluation of claims to rights) at work in his treatment of this right. He

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9. Bryn-Jones, David, *Toward a Democratic New Order*, p. 145

10. *Ibid*, p. 149.

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immediately grants that the goal which the right is to secure is a “desirable social end,” and devotes most of his analysis to the possibility of the state actually making this right effective. Thus we are denied the opportunity to see how the question of whether or not a particular claim accords with the purposes of society is answered.

Bryn-Jones concludes his chapter on rights with the observation that rights are not static; that they are actually the conditions and opportunities that man would have if society were what it ought to be.

Whereas Bryn-Jones outlines the functional treatment of rights in general, Donald Meiklejohn of William and Mary College focuses the functional approach on one particular right—freedom of speech and of the press.

His article, “Civil Liberties in the American Community,”<sup>11</sup> appeared in 1940, when the activities of Fascist sympathizers in this country made the issue with which he dealt a particularly crucial one. Meiklejohn rejects the justification of the right of freedom of speech or of the press either on the grounds of natural rights or on the grounds of “public utility” (after the manner of John Stuart Mill or Justice Oliver Wendell Holmes) because “neither succeeds in fusing the freedom into the demands of society.”<sup>12</sup> Thus at the outset he adopts [\*39] the functionalist position; the theoretical justification of freedom of expression is to be found in its function as an element in the formation of social policy.

Meiklejohn says that this idea is superior to the natural rights idea because a clear line can be drawn between freedom of speech exercised as a contribution to the formation and determination of the “public mind” and that which is used instead as a substitute for action. From a standpoint of public law this difference has obvious merits. Meiklejohn’s thesis seems to be the fruitful result of the application of the functional doctrine to a problem which has remained fully as important as it was when he wrote about it.

The *Report of the President’s Committee on Civil Rights*, in discussing the American heritage, strikes a balance between a completely functional interpretation and the older idea of individual rights.

“Freedom has come to mean the right of a man to manage his own affairs as he sees fit up to the point where what he does interferes with the equal rights of others in the community to manage theirs—or up to the point where he begins to injure the welfare of the whole group.”<sup>13</sup> (Emphasis mine.) The pervading spirit of the report is that rights are largely the conscious determination of the majority will as it is embodied in the legislature.

We may summarize the basic tenets of the functional [\*40] approach to rights as follows. Individual rights, like any other political institution, must

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11. Meiklejohn, Donald, “Civil Liberties in the American Community,” in *Ethics*, October, 1940.

12. *Ibid.*, p. 13.

13. *Report of the President’s Committee on Civil Rights*, p. 3.

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come before the bar of functionalism and justify themselves, not as inalienable claims or static concepts, but by the purpose which they serve in the political structure. A claim for a right is valid only so long as its exercise accords with the common welfare. The ambiguity of natural rights may be avoided by realizing that the popular will is a reliable indicator of the common welfare and of social purpose. [\*41]

### CHAPTER III. INSTRUMENTALISM AND FUNCTIONALISM EXAMINED

Instrumentalism and political functionalism are both parts of that larger pragmatic movement whose prevailing spirit is that of revolt against traditional philosophy. Dewey says that the task of traditional philosophy was “to justify on rational grounds the spirit, though not the form, of accepted beliefs and traditional customs.”<sup>1</sup> He stresses in this same chapter the role of the environment, both physical and cultural, in producing the various philosophies. Philosophy is declared to be opposed to, or at least divorced from, science, and closely akin to poetry.

Looking back on the history of philosophy during its more than two thousand years, we may certainly share some of Dewey’s skepticism. Much of it appears as barren speculation which has taken place in a world of its own. Even some of the greatest philosophers seem to have influenced primarily only succeeding philosophers; and withal the world of action in which we live has moved onward quite unconcerned and unaffected. Philosophy, heralded as the unifying discipline of which all more specific sciences and studies are merely imperfect parts, dissolves into dust under the hard light of commonplace reality.

This is the great contribution of instrumentalism to philosophy and knowledge in general. It urges those engaged [\*48] in speculation to come out of their closets, where they are occupied in pinching themselves to see if they are dreaming, out into the glare of the world around us, and to offer what they can to make that life more meaningful. Philosophy is to be judged by the contribution it makes to everyday life.

The pragmatic approach has won the field of battle in our own day, at least in America. But as the defeated legions of traditional philosophy depart, it becomes apparent that we have lost more than we have gained.

This is because we have substituted for an approach to problems of ethics and ontology which was basically correct, however grave may have been its defects, a theory which was only a criticism, a corrective for this approach. It is much as if the dentist, in his determination to remove the decay from a tooth, removed the entire tooth, leaving us only the drill. The dentist’s drill is an excellent device for repairing teeth, but it is of little use in chewing food.

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1. Dewey, *Reconstruction in Philosophy*, p. 18.



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Instrumentalism as a guide for traditional philosophy can certainly make the latter fulfill a more useful role in our lives; but instrumentalism by itself can make only a shallow pretext of dealing with fundamental problems. Traditional philosophy is banished because it has seemed unable to solve the ever recurring problems peculiar to an abstract discipline of this nature. Unfortunately, in dispensing with the method, we do not also dispense with the problems which have confronted us and will continue to confront us. We are left to face these [\*43] same problems with only the pragmatic method; a method which by itself is so inadequate as to be pitiful.

Dewey, in his emphasis on concrete particulars, condemns what he calls “empty abstractions.” But as Elliott points out,<sup>2</sup> Dewey constantly confuses so-called “empty abstractions” with universals absolutely essential to thinking. A good example is the concept of right. Dewey suggests (*supra*, p. [\*32]) that very likely we could entirely dispense with the idea of right, and simply be left face to face with the facts.

Note, he does not say that we should dispense with any particular *answer* to the question of right, or even that we should abandon hope of a solution to the question of right. This latter position is more extreme than the former, but it is merely one form of the statement of the doctrine of moral relativity, in support of which a convincing argument may be adducted.

Dewey goes far beyond even this position. He says, not merely that there are no absolute answers to the problem of right, but that there is no problem at all; and in thus denying the existence of any general question of right he misses the central issue of morality. In propounding his idea that somehow morality in the sense of *ought* emerges from facts or from social pressures, he does not even take into account the significance of the word *ought*. Hume’s bifurcation between reason, fact, and value may have been an oversimplification; [\*44] but it is only in the extremes of abstract idealism, at the opposite pole from pragmatism, that we find *is* joined to *ought*. As long as we deal with “facts” and existing situations, there is the possibility of objectively demonstrating an assertion regarding them. But the very etymology of the word *ought* refers to a state of affairs independent of that which exists. The word *ought* did not itself create this state of affairs to which it pertains; but rather the word, like all words, corresponds to an idea which exists in the mind. The very essence of morality is to transcend facts, and therefore a value judgment never springs from the facts themselves.

To recapitulate: existing situations, Dewey’s facts, contain no element of morality in themselves. The “fact” of one person stealing from another is neither morally right nor morally wrong; in itself it is moral in no sense of the word. The moral element lies in the judgment passed on this or any other fact by men; this judgment is a value judgment which is wholly extraneous to the actual fact itself.

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2. Elliott, William Y., *Pragmatic Revolt in Politics*, p. 226.

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Dewey shies away from treating any issues “in themselves.” We must deal only with concrete actualities in their social context, he would reply to the above criticism. He has the following to say about logical thinking, and it seems that his views could be transferred by analogy to our discussion.

The parrot-like repetition of the distinction between an empirical description of what is and a normative description of what ought to be merely neglects the most striking fact about [\*45] thinking as it empirically is—namely, its flagrant exhibition of cases of failure and success—that is, of good thinking and bad thinking.<sup>3</sup>

Thus it cannot be said that Dewey ignores the criticisms made along this line, but it does seem that he was not wholly aware of the basic truth which they contained.

Admittedly, the issues which we confront in our day to day living are never wholly good or wholly bad by any abstract standard. But the fact remains that in order to make any intelligent judgments on the complex issues which do confront us, we must have in our mind some scale of values. The pragmatists say that the question of value is to be met only as it arises. As a truism this should be acceptable to all, but the fact is that every deliberate decision that we make is based on some value judgment. With the exception of reactions of a purely instinctive nature, the delineation of which we leave to the psychologists, no group of facts or concrete situations that we meet in life produces a decision in our mind *of themselves*. The decision on our part to act is the result of applying our scale of values to the concrete instance. Often this process is almost automatic. Frequently, too, there is no question of a feeling on our part of right or wrong, but only of like or dislike. However, in many questions which are important to us there is an element of moral consideration in the end product. Often this end product, this ultimate decision which we make, will [\*46] overrule our ideas of right and wrong. We may feel that a certain action is morally better than another, but reject it in favor of a course of action considered morally less desirable because the latter involves less inconvenience to ourselves.

Granting all this, it is still true that there is an area in this mental scale of values where there is no gray, but only black and white. When we reject a course of action which we consider morally right in favor of one which is thought to be morally wrong, the fact that we do eventually choose the latter course does not make it right or half right. The complex of factors related to the two courses of action which influenced our decision was “gray,” neither all one way nor all the other, but the moral issue was nonetheless clear.

This approach might be validly criticized as tending to deal in limiting cases if we were to graft onto the concrete facts of life labels representing abstract concepts which might very likely not correspond to the real situation. Thus, just the moral issues in a practical question may involve conflicting

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3. Dewey, *Reconstruction in Philosophy*, p. 136.

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values such that we cannot say: This is good, that is bad. It may contain both much good and much bad simply because it is complex. But this criticism is not valid when applied to the realm of values itself. For these abstract values *are* limiting cases; they are concepts of morality, which, though originally abstracted from the realm of objects, are [\*47] treated by the mind as good and bad.

To illustrate: In my mind, I may feel that it is morally wrong for a person to steal, and I may also feel that it is morally wrong for a person to starve. Regardless of *how* these ideas came into my mind, they are now there as value judgments. To say that they are wrong because they deal in limiting cases is to criticize them for what they must be of necessity.

If I now go into the market-place and see a man stealing food, I may stop him and ask him why he did it. If he informs me that he did it to keep from starving, then the moral issue becomes complex; neither black nor white but gray. To declare arbitrarily that the man is wrong is to overlook the fact that when he stole he was starving. The final estimate of the situation must be determined by the relative weight which I assign to the values involved.

But to take the practical case by itself, and to say that because each situation which we encounter is complex that therefore there is no such thing as an abstract moral judgment is to overlook the source of morality. This man, starving and stealing as he was, had no labels “good,” “bad,” or “indifferent” pinned on him for all to see. The judgment was formed in my mind, from concepts which in themselves were pure.

Here we are face to face with one of the crucial weaknesses of pragmatism. It rejects the abstract standard of good and bad in favor of the “facts.” We have seen, however, that [\*48] the facts do not label themselves; yet pragmatism supplies nothing intelligible with which to replace the concepts of good and bad which it discards. Carrying this to its logical conclusion, we should expect to see the words good and bad, desirable and undesirable, banished from the pragmatist vocabulary. Such, however, is not the case. We are informed that growth is good; situations, facts, are good and bad. Where does the pragmatist get the material for judgments of this nature?

This is one of the great mysteries of pragmatism. Too often it seems, as was noted above, the abstract standards which were summarily turned away at the front door are re-admitted through the kitchen in only slightly altered form—in the guise of “social” morality. Particularly in the works which have applied the pragmatic method to politics, this social standard of morality appears throughout as an “inarticulate major premise.”

Undoubtedly a case can be made for such a standard of morality. But as with all other standards, it must be recognized that it is based on an indemonstrable first premise. The pragmatists, however, make no such recognition. This social standard of morality is seldom openly presented; rather in most cases it is treated as a self-evident truth. It is this oversight which has led to much of the current confusion in present day political theory. Because

the few crucial issues which underlie all subsequent development of a political [\*49] theory can be approached or even defined only with difficulty, a superficial approach which seems to do away with them is too readily accepted. The pragmatic heritage, originally styled reconstruction in philosophy, might better be called destruction of philosophy, which sacrifices on the altar of a false common sense the method of logical analysis and thought without which our problems can not even be apprehended, say nothing of comprehended.

The test of “workability” is one of the principal legacies which functionalism has taken over from pragmatism. Since every idea, every concept must submit itself to the bar of practicality, the functionalists proceed to evaluate institutions in this manner. The question which their doctrine logically permits them to ask of rights is “What purpose do they serve?”

Upon reflection, however, it should be clear that this question as it is is almost meaningless. Rights may serve an individual purpose, a social purpose, a biological evolutionary purpose; any one of these would be a valid response to the question formulated above. But once we obtain this answer, we are no further along in an evaluation of rights. To give the answer any meaning in a political context, we must have an implicit idea of what purposes rights *ought* to serve, what function they *should* fill. Then and then only will we be able to determine by comparison with the answer whether or [\*50] not current ideas of rights, or actually existing rights are in need of revision.

If there were common agreement among men on the purpose which right *ought* to serve, or agreement on which were desirable functions and which were not, then the functionalist approach would be an admirable method for determining whether rights were “working” or not. Unfortunately, there is no such agreement; this is precisely where the great political thinkers of the past, and the ordinary citizens of all ages have differed.

This functional analysis, inherited originally from biology, demands some overall value, by the contribution to which each individual component is measured. In biology the basis of analysis is survival—a biological organ is functioning properly when it contributes toward the smooth functioning and hence the survival of the whole organism.

To import this analysis into social problems, however, is to subtly change the entire nature of the analytic apparatus. Having passed into a realm where there is no agreed standard of purpose, the functionalists must of necessity assume one. The standard which they assume is this same social standard of morality which is found in pragmatism. This is good, that is serving the proper purpose, which contributes to the common welfare, to the social good.

There is no objection to the introduction of such a basis of evaluation if it is clearly realized that it assumes most [\*51] of the traditional ground of argument on the subject. To many thinking people, and to some of the great writers of the past, the paramount issue is not whether freedom of worship, for instance, adequately fulfills a social function, but whether it even ought to be judged by its fulfillment of a social function. The social standard which the

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functionalists assume is clearly a fundamental one, to which considerable attention should be paid.

However, too often the functionalists do not even treat this standard as if it were open to dispute; it seems to be considered a self-evident proposition. Most of their analysis is devoted to examining the particular social purpose of rights, after having summarily assumed that society or the community is the supreme end to be served, and that all lesser individual entities may be judged to be properly functioning or not by the progress or state of society.

Either one of these two steps—the formulation of the question of workability, or the functionalist assumption as to the social nature of rights, or both together—would be acceptable if it were borne in mind throughout that they represented two separate steps. The confusion results when the functionalists present us with both together, while proclaiming that they have made only the first. The question of whether or not rights are properly serving their purpose is formulated in such a manner as to include the assumption of the social purpose of rights, without making this assumption explicit. [\*52] In this manner all the appeal of the pragmatic method is brought to bear in favor of an obviously debatable assumption which is wholly separate from the method itself.

This analysis reveals also that pragmatism as a social philosophy is inadequate. We may criticize the functionalists for incorporating into their pragmatic outlook so very basic an assumption; nevertheless it is clear that some such assumption is absolutely necessary for the pragmatist to evaluate any political, social, or ethical issues. The crucial questions in the social sciences demand definitive value judgments for solution; yet we have seen that pragmatism gives us none. The pragmatic method, taken as it should be—a tool in the aid of other, more basic systems—is an asset in any social evaluation. The pragmatic method, taken as it too often is today, as a self-sufficient analytic apparatus, is unequal to the tasks it sets for itself. Its inadequacies lead to the incorporation with it of nebulous and debatable criteria of social values which actually are no part of pragmatism as a theory of truth. The first great weakness of the functionalist approach remains its assumption that we are in possession of some objectively demonstrable standard by which to judge the functioning of rights.

Some authorities writing in the functionalist vein emphasize a different aspect of the question. Exemplified by Laski, in his *Parliamentary Government in England*, their thesis is that with the advent of the positive, welfare state, [\*53] we need no longer be so concerned with the rights of the individual. With the state avowedly seeking the welfare of its subjects, individual rights are often an obstructionist influence, and prevent the realization of the social aims of government. They may well have been necessary when government was in the interests of the few; but now that majority rule has been recognized in most democracies, individual rights are too often the last resort of the few against the many.

Henry Wallace, when he says that there has been too much emphasis on “Bill of Rights democracy,”<sup>4</sup> and others who criticize “empty” political freedoms and rights, follow in this tradition. There exists a growing sentiment to the effect that it is best to let the government, as the embodiment of the sovereign majority will, work out as it sees fit the problems confronting it.

Does the “new, positive state” resolve the opposition between the individual and the government, the opposition which has perplexed political thinkers for two thousand years? What I believe to be the correct answer to this question comes not from the nineteenth century liberals, the present day liberals, or the conservatives, but rather from the extreme left: the communists. Edward Hallett Carr, the British career diplomat, phrases the Russian point of view as follows: [\*54]

Confusion of thought is often caused by the habit common among politicians and writers of the English-speaking world of defining democracy in formal and conventional terms as “self-government” or “government by consent.” What these terms define is not government, but anarchy. Government of some kind in the common interest is necessary precisely because men will not govern themselves. “Government by consent” is a contradiction in terms; for the purpose of government is to compel people to do what they would not do of their own volition. In short, government is a process by which some people exercise compulsion on others. This is as true of democracy as of other forms of government. . . .<sup>5</sup>

Carr supplies us with an excellent analysis of the idea of government by consent.

Government in most of its functions is objectified force, whether it collects taxes, drafts us into the army, or forbids us to drive on the left hand side of the road. In fact, the only way to assure order and stability in a society is to take away from other individuals and groups the right to use force and concentrate in the government the monopoly of force which is one of the characteristics of a sovereign state. To claim that the “positive” state changes this fundamental attribute of government is to fall into the same error as did Rousseau, when he said that for men to be just as free under government as they were without it the government’s acts must have unanimous consent. True, such unanimous adherence is the only way the conflict between government and the individual can be reconciled; but if we could assume unanimity on the questions with which government deals, we would have philosophical anarchy, with no [\*55] necessity for government.

Most of the advocates of the positive welfare state admit that this state will take a more active part in the life of its citizens, will actively seek the welfare of its inhabitants; in plain words it will pass more laws, make more regulations. By our above analysis, this will clearly bring it into conflict with the individuals more, not less, often than older types of states. The monarchy of

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4. Quoted in Wriston, E.M., *Challenge to Freedom*, p. 35.

5. Carr, Edward H., *Soviet Impact on the Western World*, p. 7.

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seventeenth century France, which Louis XIV characterized in the immortal words, “*L’etat, c’est moi,*” was absolute and undemocratic; but it impinged on the lives of its subjects at far fewer places than does the democratic social welfare state. Let it be added that this is in no way to condemn the welfare state for this fact; government *per se* is neither good nor bad. But it is necessary that we clearly recognize that the welfare state does not reconcile the conflict between liberty and authority. Its wider range of activities will necessitate the use of its sovereign force more frequently.

It then becomes a question of force by whom and for whom. The defenders of the social welfare state imply that as long as the force is wielded by the majority, guarantees against government oppression are not necessary.

There are two possible views of this statement. From the quantitative aspect, the number of people involved on each side, we may think it better that the government, embodying [\*56] the will of the majority, be allowed considerable free rein even though the minority may suffer, although we would not feel this way about a government which embodied the will of only a select few.

On the other hand, from the point of view of an individual being coerced by the government, the force which is compelling him to do that which he would not do voluntarily is just as real whether exercised by a majority or a minority. The process by which the decision of the government was reached, which if democratic allowed him a share in the decision, may command his respect; the method of the government in carrying out its decision may meet with his approval; but these qualitative and quantitative differences in the possible types of government action do not alter the basic fact that such action by any government is force.

Thus we are brought back to the question of the nature of individual rights. If government is a process by which some people exercise compulsion over others, if that government is the embodiment of the majority will, is it too the ultimate source of rights, or is there an area where even the majority may not exercise compulsion on individuals? Once more we are faced with the question of the derivation of rights; are they social in nature, contingent upon their contribution to the social welfare, or do they inhere in the individual?

Green, in his *Principles of Political Obligation*, [\*57] develops a case for the social derivation of rights which laid the groundwork for its adoption by many present day functionalists. Green sets forth the essence of his idea as follows:

Men were supposed to have existed in a state of nature which was not a state of society, but in which certain rights attached to them as individuals . . . . “Natural right” meaning right in a state of nature which is not a state of society, is a contradiction. There can be no right without the consciousness of a common interest on the part of members of a society. Without this there might be certain powers on the part of individuals, but no recognition of these as powers of which they allow the exercise, nor any claim to such recognition; and without this recognition or claim there can be no

right.<sup>6</sup>

We must at once concede that Green is correct insofar as he insists that we treat man as living in society. He properly calls the Lockean concept of an atomistic man dwelling in solitude on a hilltop a figment of the imagination. However, it should also be clear that merely because we agree to treat man as a member of society, it does not necessarily follow that he must derive his rights from the express grant of the particular society in which he lives. Admittedly, moral rights are social in nature insofar as they presuppose a social group in which they will be exercised; but this does not mean that they are bestowed upon individuals by the legislative body of the society wherein they reside.

It is apparent that no matter what approach we use to the problems raised by the political pragmatists and functionalists, we are eventually brought face to face with this issue of the moral basis of individual rights. We have [\*58] criticized much of present day functionalist theory for assuming the whole ground of this crucial question. However, we cannot make this criticism of thinkers such as Green and Tawney, who frankly face the issue and develop arguments for the social derivation of rights, or for certain moral rights of the individual with which we may not be wholly in accord.

The question of the proper function of rights, of the validity of the newer economic rights, and of the possible limitations on the rule of the majority, can only be settled by an analysis of the moral basis of individual rights. To this question we now turn our attention. [\*59]

#### CHAPTER IV. THE MORAL BASIS OF INDIVIDUAL RIGHTS

In the first chapter, when we were attempting to determine how to make an inquiry into the problem of right meaningful and really significant, we decided that this could be accomplished by approaching the problem through political obligation. What rights, if any, should the state recognize in order that I should have some sort of moral obligation to obey it?

In investigating and criticizing the functionalist view of rights, it has become evident that before we can treat the question of *particular* rights which the state should recognize, it is necessary to adopt some theory as to the basis of rights in general. The functionalists declare that since rights must contribute to the social good, their source is in the majority will of the community. It would do them an injustice if we were to equate their statement of the case with the Hegelian idea that man as an individual has no rights against the abstract state; rather, it seems that the functionalists mean that individuals have no rights which the remaining majority of individuals like themselves is unwilling

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6. Green, *Principles of Political Obligation*, Section 31.



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to grant them. We have seen that another alternative basis for rights would be some form of the Lockean idea that man possesses some “inherent” rights which cannot be revoked by the majority. The conflict between these two [\*60] ideas is an important one.

Since rights are claims by individuals for some sort of action by the government, we must necessarily investigate the purpose of government. To ask, “for what reason did men form the state?” would be to indulge in a Lockean assumption regarding the artificiality of the state which has been thoroughly discredited by succeeding thinkers. But Locke’s basic problem can be raised with the more reasonable question, “Why do men prefer government to anarchy?” It seems quite obvious that they *do* prefer government; anarchical movements have never claimed more than a tiny fraction of the population of any country, and the movements themselves have been mostly in the form of a nihilist protest against particular governments, the literature of philosophical anarchy notwithstanding. Revolutions against actual governments have always been followed by the setting up of some other type of government. We do not mean to strike any moral note; whether or not men *should* prefer government to anarchy, or whether *eventually* they will choose anarchy need not concern us here. Historical evidence and common sense inform us that at present men do prefer government to anarchy.

In order to serve our purpose here and not prejudice our later discussion of rights, we must keep this inquiry into the purpose of government on a very broad basis. Obviously the Russians conceive the purpose of government differently than do the English or the Americans. We do not [\*61] wish to deal with the advantages of particular types of government (e.g., socialism, democracy, etc.) but rather with government in general. We must reduce particular manifestations of the phenomenon of government to some least common denominator: what is it that *all* types of government provide which make them preferable to the *absence* of government? (In the discussion which follows, we shall use the terms “government” and “state” synonymously as meaning the political organization of a society or community. These latter two terms will be used synonymously also, to represent a group of individuals in a geographic area whose activities bring them into relationship with one another.)

When we set out to speculate upon what men desire out of life, and why by their preferences they indicate that government aids them in attaining their desires more than does its absence, we are apt to be either dogmatic or vapid. However, it does seem that the idea of a *summum bonum* which we discussed in the first chapter: the desire of each man to live his life in the manner he would choose, is a reasonable starting point; if it errs it is not on the side of dogmatism.

We decided in the first chapter that there were three essential factors in enabling each man to attain this desired goal, or to at least proceed toward it; these were freedom, ability, and opportunity. How does the institution [\*62] of government change these factors?

Government of any kind obviously restricts freedom; that is, it subjects those under it to external restraint. However, this is not to say that we are necessarily less free with government than without it. There are external restraints which are the product of conscious human agency without government as well as with it. Armed brigands may exert a far more severe restraint upon us than the policeman, the soldier, or the sheriff. It must also be remembered that there are restraints which are other than governmental, which are not the threat of force. Certain social pressures which prevail in given areas exert a definite restraining influence on freedom of action or even of speech or worship, with or without government.

The institution of government accretes to itself a monopoly of all physical force. In so doing, it relieves us from the uncertainty and fear which would exist if there were numerous groups and individuals which could exercise force, though at the same time it uses this very monopoly of force to restrict freedom. This exchange assures of a certain predictability by which to guide our actions; it is easier to predict the actions of one agency which employs force than it is to predict the action of a dozen different agencies or individuals.

This very increase in predictability of the actions of others simultaneously increases our ability and our [\*63] opportunity to do what we wish. If a man planted a field of corn in an area where there were no government, he would be uncertain until he had actually disposed of the last of his harvest what part of his labor he would be allowed to realize. There is a chance that he could realize one hundred per cent of it; but there is also a chance that he would enjoy none of the proceeds. The crucial point is not the amount realized, but the fact that under government every man is reasonably certain of knowing in advance approximately how much of his crop he will be able to realize. The government may actually forbid the raising of certain types of crops (e.g., opium poppies); but at least the individual is forewarned.

As Hobbes pointed out, no man in a state of nature can ever be sure of defeating opponents who combine against him. Even he who is physically strong may be defeated by an aggregate of physically weaker men. The chief characteristic of the absence of government, with men as we know them today, would be the absolutely unstable, unpredictable character of the social life. The total amount of physical force used or threatened would probably be greater than that employed with government. It can easily be seen how limited would be both ability and opportunity in such a state of affairs.

Government, by restricting the freedom of those under it, increases their ability to achieve their ends and their opportunity. Let us take the simple example of the use of roads. With highway laws as we know them, we are not [\*64] actually as *free* as we should be without them. We can drive only on one-half of the road when proceeding in a given direction. We cannot exceed a certain speed limit. In a state of anarchy, with no rules, the whole road would be available to me at any speed I chose. Open to me, that is, in the sense that there was no threat of physical force if I did not drive on one side of it below a

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certain speed.

However, so far as ability to utilize the road is concerned, the situation is reversed. Starting from San Francisco to Los Angeles over a road where the government enforces highway regulations, I can be reasonably certain of arriving at my destination (unless it is a holiday weekend). Under these same conditions in the absence of government, my chances of reaching my destination will be seriously impaired by the possibility of head-on collisions. Here we have sacrificed complete freedom and received in return greater ability to achieve our purpose. Is the sacrifice worthwhile? Most people would say that it was, because the road was a means to an end in all of the cases. Freedom of full access to the road is secondary compared to the objective of arriving at the place to which the road leads. If the possibility of realizing this objective is increased for everybody, few would condemn the exchange.

Government, then, by increasing stability and predictability, reducing the employment or threat of physical force, and giving ability and opportunity in return for freedom, [\*65] enables us to more nearly achieve the particular ends which each of us desires. Is there then no limitation upon the government? As long as it assures us of stability, as long as it alone uses force, can there be no objection to it?

Obviously, to maintain this position is to fly in the face of historical evidence. There have been revolutions against particular governments, though as was previously pointed out each revolution was followed by the institution of a new government which still manifested what we have called the basic characteristics of government. Hence it must be true that the state, in the opinion of its subjects, can overstep its bounds to such an extent as to incite revolution. This is seen if we note that the absence of the characteristics of government; unpredictability, uncertainty, the constant threat of violence and physical force; in general, blind chance; is a bad form of existence, but it is not, as Hobbes claimed, the worst *conceivable* form of existence. A state which held the majority of its subjects in abject slavery would be considered by most to be worse than no state at all.

There is a second, somewhat more subtle objection, which most men have to the state of affairs which exists without government. It is to the fact that there is no appeal above physical force. First of all, we dislike physical force because it may rob us of the fruits of our labor, and at any rate the constant threat of it destroys predictability. But [\*66] just as great an objection to the "state of nature" is the idea that *physical force, in itself, is morally wrong*. There is an idea that each individual human being is entitled to a certain consideration, to a certain area of activity, even though he is unable to force observance of this title. The state of nature automatically rules out any such possibility, for force of one form or another is the final arbiter. It is an affront to human rationality to be forced to accept a creed in which issues are decided in favor of those who can adduce the most force to physically support their view.

Indeed, all the various particular rights which we have mentioned, be they claims to freedom, ability, or opportunity, all have this characteristic in common; they represent claims by an individual to a certain kind of treatment which he is incapable of securing for himself by force or power.

The great appeal of government to men is that it represents the possibility of rising above this state of affairs where physical force is the dominant element. As long as the force which can be brought to bear by various individuals or groups in support of their desires is so nearly equal that the victory of no side is assured, then physical force will be the method of settling disputes. But if one agency, namely, the government, draws to itself the possibilities and opportunities for the use of force which previously resided in [\*67] the various individuals and groups within the state, force will be supplanted by agreement made within the structure of law provided by the state.

When we say that force will be supplanted, however, it is clear that we must make one important reservation; the government with its monopoly of force has no physical limitations upon it, insofar as internal affairs are concerned. The result of removing the possibility of physical force from non-political phases of social activity has been to give the government a practically unlimited amount. This fact has important consequences.

For clearly, if my basic rights depend for their moral existence upon the consent of the government, the difference from the "state of nature" is one of form and not of substance. The majority rule government which is the source of all basic individual rights is only an institutionalized state of nature. Once more, superior physical force determines the bounds which shall be set to my actions. This is not to say that there will not of necessity be bounds, and that these ought not to be determined by a majority rather than a minority; but if there is no limitation upon the majority, the *moral* idea of right is just as nonexistent as it would be without government.

As Carr says, government is the process by which some people exercise compulsion on others. This is inevitable. But the reason we have rejected the idea of anarchy is because [\*68] we feel that compulsion should not be the final arbiter in certain matters. If I have no rights which are not subject to the will of the majority, then government as well as nature equates rights with force to get them accepted or ability to win consent to their exercise. A right in the true sense of the word is something beyond force, beyond persuasiveness; it is a claim which I have as a human being to freedom, ability, or opportunity; and a morally valid right is one which should be recognized even though I cannot compel its recognition, or persuade those who have supreme force at their command to acknowledge it.

Too many of those who would flatly reject the anarchical concept of the superiority of force readily embrace the theory of majority rule derivation of rights. The moral issue is the same in either case; a right which exists only at the pleasure of the majority is only a temporary reprieve from the commanding

force which the state can muster. The only physical limitation on the power of the state is self limitation; in this sense it is truly a Leviathan. If the only moral limitation upon its actions is the concepts of right and wrong of those who are in control of it, then we have not only a physical but a moral Leviathan as well.

The moral Leviathan, the state which determines its own ends by majority will and recognizes no limitation upon the moral rightness of its findings, is justified by some [\*69] on the grounds that the social good or common welfare which it avowedly pursues is itself the highest and proper moral end for a state.

This brings us to the issue of moral relativity. There is no idea more misunderstood and abused in our time than this concept of moral relativity. It is invoked by both the extreme right and the extreme left, and denounced by both. Orthodox theologians berate "this slippery moral relativity,"<sup>1</sup> while exponents of communist philosophy hail moral relativity as one of their principal weapons.<sup>2</sup> Many social theorists, and the Vienna school of logical positivists, seem to feel that it means that the existing mores in a particular community are morally right.<sup>3</sup> In spite of this fact that it is invoked by all parties to the political controversy, a correct understanding of the idea and its ramifications is a strong argument for limitation on the state as a source of rights.

We have outlined the basic tenets of moral relativity in the preceding chapter. Without attempting to shade in the finer subtleties of the issue, the basic thesis can be summarized as follows: Because all moral questions involve a value judgment in their use of the word *ought* or the use of the words *right* or *good*, no moral proposition can be objectively demonstrated to be correct. [\*70]

Dewey implies,<sup>4</sup> and many of his followers openly state, that this uncertainty simply shows the backward state of the study or discipline of ethics. If only we could have a "scientific" morality, they say, we could eliminate all this unfortunate relativism.

Anyone who correctly understands the case for moral relativity will see at once that this argument fails to grasp the import of the idea. It is not because morals are more backward than natural sciences, but because they are completely different, that moral relativism exists. The trouble with most moral philosophy up to the time of Kant was that the epistemology which underlay it was entirely inadequate. Men did not know what they could know and what they could not know, and as a result often assumed propositions to be true or false which were by nature indemonstrable one way or the other. The advocates of "scientific" morality embrace this same error. Against the argument that "it can't be done," Dewey protests that this is what was said by other doubters as each discipline successively came under the scientific method. In view of this expansion of the scientific method, we certainly cannot say that we shall

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1. See Lewis, C.S., *The Abolition of Man*.

2. See Carr, *op. cit.*, pp. 90-95.

3. See Schlick, Moritz, *Problems in Ethics*.

4. Dewey, *Reconstruction in Philosophy*, Ch. VII.

“never” have a scientific morality. But we may say that with epistemology as we know it now, and with our present understanding of the question of value, the scientific method would not aid us in our quest for moral certainty. [\*71]

This scientific approach to morality can be traced back to the prevailing spirit of the French Enlightenment. This was an era when science was making tremendous strides. Lavoisier, Pascal, Laplace, and Newton, following in the footsteps of Galileo and Copernicus, had made significant contributions to scientific knowledge. The scientific method was the new philosopher’s stone which would eventually make man in all his rational perfection the master of the physical universe.

This optimism of the Enlightenment gave way to the Romanticism of the nineteenth century. Romanticism, typified in political philosophy by Rousseau, in literature by Goethe, exalted the irrational in man; will succeeded reason as the essence of humanity.

In reaction to this Romanticism there sprang up once more a trend which emphasized the scientific method. However, in place of what they called the naive insistence of the Enlightenment on “self-evident truths” and “inalienable rights” which set men apart from the rest of the physical universe, these new thinkers proclaimed a full-fledged revolt against the medieval tradition of the divinity of man from which the Enlightenment never completely freed itself. Not only was science to solve the world’s problems, but man was to take his place along with other rocks, plants, and animals; all were merely elements in a larger pattern of a mechanical universe. [\*72]

This new scientism, ushered in by Auguste Comte in the middle of the nineteenth century, was more different from the Enlightenment than appears on the surface. For the great humanist thinkers of the Enlightenment, science and its method were to be a tool in the solution of the problems confronting man. For Comteian sociology and its successors, man with all his regrettable, unpredictable eccentricities was just another of the problems confronting science.

With his stress upon scientific morals, with his emphasis on concrete factors which can be observed and tested, as opposed to the intangible elements of the world process, there can be little doubt that, although Dewey belongs to the great intellectual movement which stems from the French Enlightenment (and beyond that from the Renaissance), his direct intellectual ancestor is neither Diderot nor Rousseau, but Comte.

If there is no certainty which can be inter-subjectively demonstrated,<sup>5</sup> we are reduced to the ultimate integer of morality—the individual. The fountainhead of morality is in the human personality. Moral relativity forces us to return to the individual conscience as the source of value judgments.

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5. For other views on this question, see Brecht, Arnold, “Beyond Relativism in Political Theory,” *American Political Science Review*, June, 1947.

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This does not mean that the individual functions [\*73] in a vacuum in the formulating of moral judgments. We must treat the individual in society, and a man's moral judgment may be influenced by the opinions of others, but the "texture of the social fabric," or by any number of other considerations. But this does not alter the fact that these social pressures receive their sanction as value judgments by the stamp of the individual conscience.

From this analysis, it is clear that although a reasonable case can be made for the fact that the state *should* always act according to the popular will, or in the interests of the greatest number, the case cannot be conclusively demonstrated. The fact that the ultimate, and only reliable, source of value judgments is in individuals themselves indicates that the highest moral purpose the state can fulfill is not to adopt or impose any arbitrary theory of morality, but to be itself amoral. To put this in another way; the highest end which the state can serve is to serve no end at all, but merely exist as a means for the individuals within it to realize their own ends. It must be recognized that the state as such is not a source of morality, though it may be used to settle conflicts which arise through the individuals within it pursuing different moral ends. However, when the state acts to settle such a dispute it does not impose the stamp of superior morality on the particular cause in favor of which it decides.

Here we find the basic dichotomy between the German idealist theory of the state and the Anglo-Saxon theory. German idealism explicitly proclaims that the highest source [\*74] of morality is the state itself; the Anglo-Saxon tradition, inarticulate and confused as it is on this subject, generally has recognized the moral primacy of the individual. By the standards of moral relativism, the Anglo-Saxons are on firmer ground. The German idealists have committed themselves to a positive and indemonstrable moral theory in which the acts of the state *ipso facto* assume a moral quality. The Anglo-Saxons have realized the uncertainty of moral questions, and have chosen to have the state refrain from adopting any positive morality, leaving it to each individual to decide for himself.

Let us briefly summarize our discussion thus far. We have seen that the two basic reasons why man prefers government to anarchy are: (1) Though government inevitably restricts to a certain extent the freedom that would be found in a state of anarchy, the institution of government insures us social stability and predictability in the actions of others, which in turn increase both our ability and our opportunity to achieve our desired ends; and (2) government, with its monopoly of force, offers us a hope of rising above the level of the "state of nature," where force is the final arbiter of all decisions. Government, by accreting to itself a monopoly of force, removes from other agencies of society the possibility of equating right with might. This is fundamental in the appeal of government to men, because genuine belief in the moral personality of man demands that we [\*75] recognize that there are certain areas in human relations which cannot be submitted to the arbitration of

force or the threat of it. Though none of us may agree on what is right, we are all convinced that, where there are certain areas in which *one* party to a dispute *is* right, it is more important for the right to prevail than for force to win the day.

This last advantage of government is effective only if we realize that there are certain basic claims which an individual possesses to a certain treatment which are *morally valid* regardless of the recognition of them by any group, including the state. If the individual must appeal to the state as a *source* of rights, then the institution of government is a change in degree but not of kind from anarchy; in either case it is that entity which shall have the most force at its command which shall prevail.

Thus we have here two basically opposite tendencies of government, both of which endear it to men. One is that it increases ability and opportunity, the other is that it represents the possibility of achieving a state of affairs where force is not the solution to all questions. This latter state of affairs can be achieved, however, only by the state exercising moral as well as physical self-limitation upon itself. When it fails to do this, might once more equals right.

Here we see the full impact of this idea upon the [\*76] doctrine of political obligation. Is there any reason why I *ought* to obey a particular law which is objectionable to me, more reason than I would have to obey the command of a man so much more powerful than I am that I must necessarily bow to the force which he commands?

In the case of a majority rule state, where the individual has no rights which are not granted by the state, the fact that the decision had been made by a majority might commend itself to me as an inducement to obligation. However, it is conceivable that a decision of the majority could be so unjust that it would not matter to me how great the numbers that had voted for it; I might have fared better without any government at all.

In the case of a state which recognizes basic rights in the individual which are beyond the power of the state to completely abrogate, I have an added incentive to moral obligation. For in this case the state represents not only the majority, but it represents an institution which will stand as a bulwark against all others *and against itself* in preserving for me those rights which I claim as a moral personality. With the state which recognizes rights which are not bestowed by it, but rather are permanent limitations upon its authority, my obligation stems from the fact that this state enables me to live in a system such as would be impossible without government. My obligation will not be merely for particular laws to which I subscribe, but to the very institution of government itself. [\*77]

When the decision in the majority-rule state goes against me, I may well reflect that my obligation is no greater than it would have been had all the people in a state of anarchy come individually to a meeting place, bringing their weapons, and there decided the issue which concerned me. The government has accredited to itself all the physical force, yes; but if it in its monopoly



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recognizes no more limit on its use than did the various free proprietors in the absence of government, the moral issue is no different. I may respect the decision of the majority, but this will be more convenience than morality. As Rousseau says, to accede to force may be prudent, but it is certainly not moral.

Thus far the discussion has been abstract; we have spoken of the "claims of the individual as a moral personality" without being at all specific as to that of which they consisted. What we hope to have shown is that this universal revulsion against force indicates that government must recognize the claims of individuals to a limitation on the use of its power. Just what these particular limitations are, we shall take up in the next chapter.

#### CHAPTER V. WHAT RIGHTS SHOULD THE STATE RECOGNIZE?

We have seen that the two qualities of government which make it preferable to anarchy and which provide some grounds for political obligation in the ethical sense of the term are that it provides stability, opportunity, and ability, and that it represents that possibility of rising above the arbitration of all issues by force which man in both his moral and his rational capacities demands.

It is clear that these two qualities may actually produce opposite effects, and may be in conflict with each other. The government which strove to reserve a huge area of operation to each individual in deference to his moral claims might do a bad job of providing stability or insuring opportunity. Likewise, that government which sought to provide complete stability and a prescribed degree of opportunity to each individual might have to pervert the basic claims of some of its citizens in so doing. Obviously, these two conflicting, almost dialectical, aspects of government operate in practice, though not in principle, as limitations on each other. That is, both are equally good grounds for political obligation, but often we must strike a happy balance between the two where they are mutually exclusive.

Generally speaking, the political rights of which we have spoken are claims which the individual makes, not as a [\*79] means to some higher end, but ends in themselves. Freedom of worship, for instance, is not something which we desire *in order* to achieve some higher end, but it is rather something which we desire *in itself*. The same could be said of freedom of speech. The Anglo-Saxon concept of due process, though if separated into its various elements might be considered as means to higher ends, taken in the aggregate amounts to a claim by each individual to fair play<sup>1</sup> in governmental process and is so important as to rank as an end in itself.

Though it cannot be demonstrated, we would classify these claims as among those moral rights which the individual has, not at the pleasure of

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1. See Frankfurter, Felix, Opinion in *McNabb v. United States*, 318 U.S. 332, 347 (1943).

superior force, but by virtue of his rational and moral nature. But before we can state positively that the state should recognize them, we must look to the other aspect of government: its provision of stability and opportunity. We see that while certain extremes of free expression would be such a threat to stability that this factor would outweigh the moral claim, nevertheless it can be said that generally the recognition of these rights by the government would not jeopardize its other functions, and therefore they should be recognized.

Another factor to be taken into consideration in the evaluation of individual claims is the amount of force involved in their recognition by the government. Since the diminution of force is the corollary of the moral status of the individual, if in order to secure to certain individuals a [\*80] claim it were necessary to coerce many others, this might operate as a consideration against the recognition of these rights. However, such is not the case with these political rights, for there are only two parties involved: the government and those claiming the right. This is because the government is the only potential violator of this right of free speech, for instance, if we define this to mean freedom from external restraint in the expression of opinion.

However, it can be argued that freedom of expression is also menaced by various social pressures. Certainly many of us do not openly advocate what we believe even though we know the government will not interfere, because we fear the various agencies which can give effect to the community will through means other than force. Frankly, these subtler pressures are beyond the scope of this paper. In passing we might note that while we must concede that though even with a hands-off policy by the government there is not as much freedom of expression as we would think desirable in an ideal society, it is questionable to what extent government could aid in the alleviation of these social pressures.

Thus, because they are valid moral claims by individuals which do not except in extreme cases interfere with the stability and opportunity which the state should provide, and because no governmental force is necessary to secure their enforcement, we conclude that the government [\*81] should recognize the traditional political freedoms: freedom of worship, freedom of expression, and due process.

Let us next consider the so-called "laissez-faire" claims to economic rights. In the first place, it should be noted that the idea that laissez-faire is roughly equivalent to the absence of government is erroneous. As Ralph Barton Perry has so ably phrased it,

The beginning of sound thinking on this matter is to see that the economic system known as laissez-faire capitalism is not an effect of the "silence of the law," but is founded on legal rights. Men who are merely let alone to do as they please do not compete with one another, they plunder one another.<sup>2</sup>

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2. Perry, Ralph Barton, "Liberty in a Democratic State," in *Freedom: Its Meaning*, ed. Ruth Manda Anshen.

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The legal system which underlies the system of private enterprise is made up of elaborate common law doctrines of property conveyances, titles, inheritances, incorporation, etc. Thus, to say that without government men would have complete “freedom of enterprise” is misleading; there would be no *legal* restrictions on what they could do, but there would be very little chance of their achieving what they set out to accomplish, because of the uncertainty of the social order. Likewise with “freedom of contract”; without government a man could make any sort of contract with any man whom he pleased; but he would have to remember that in case of breach by the other party there would be no courts to which he could appeal [\*82] to enforce the agreement.

Although freedom to pursue one’s own ends to that degree that they do not interfere with the pursuit of ends by others is an end in itself, to which the individual has moral claim; freedom to operate under a legal system set up for his benefit by the government in complete disregard for other demands by other people upon the government is not. That is to say, freedom of opportunity in the sense of the absence of arbitrary restrictions upon enterprise by the government is a condition which all governments should observe, since it is vital to the attainment by individuals of their desired ends. At the same time, we cannot say that the government is permanently restrained by any fundamental moral claim from changing in any way an elaborate and detailed legal system, which in its absence would have no *legal* basis and not a great deal of *moral* basis. The government must weigh the claim to unrestricted opportunity on the part of some against the claims to opportunity and ability of different kinds claimed by others.

We have said that the government cannot be held to be morally obligated to maintain a rigid and unchanged legal system; but in the interests of stability and predictability it should be added that for the government to change the legal structure is one thing, while for the government to empower its agents to alter normal legal arrangements upon the basis of individual cases is another; this latter [\*83] procedure may undermine that stability and predictability which is one of the essential characteristics of government.<sup>3</sup>

It is difficult to make any categorical statement as to the validity of the laissez-faire economic rights. The claim to unrestricted opportunity, which is valid though certainly not absolute, is too often confused with claims that a particular law remain unchanged in order to give those who benefit by it the continuance of such benefits. While the individual has a moral right to peacefully employ his capacities to the full without external coercion, he has no claim on the state for the permanence of a detailed system of laws without which he would be unable to do anything. In some cases, the government may have to infringe his claim to unrestricted opportunity in the interests of the claims of other individuals to any opportunity at all. This is the theoretical justification for anti-trust laws.

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3. See Hayek, Friedrich A., *Road to Serfdom*, Ch. V.

Lastly, we must consider the newer type of economic rights, the claims of individuals to the ability to earn subsistence, the opportunity to work, ability to provide for themselves in old age, ability to meet unpredictable eventualities such as sickness and accident.

It should be noted, first of all, that these rights are claims to ability and opportunity, rather than freedom. When we speak of the "right to work," this does not imply that in its absence there is external coercion being exercised [\*84] upon a man to prevent him from working. The man who claims the right to work does not desire "freedom" to work; he desires opportunity to work. Likewise with the man who desires the right to medical care does not mean that he is denied it by threat of force, but rather that he does not have opportunity to obtain it, or financial ability to obtain it.

We have previously noted that the three necessary factors to secure the wants of each individual—freedom, ability, and opportunity—may not always be mutually compatible in all cases. In the analysis of the right to work, the individual's claim to an opportunity to earn a living, we shall see this conflict exemplified.

In one sense, the right to work in the abstract sense is a moral right of the same category as that of freedom of speech. Though the actual purpose of work is to enable us to secure other things which we desire, the indignity and debasement of the human being who is simply unable to find a place for himself in the economic system is so great that it must be conceded that the right to work is a morally valid claim. It is not fair for a set of institutions to exist under the government which denies to an individual any chance to make use of capacities which he is ready and able to employ.

However, when we come to apply this abstract moral right to concrete cases we see the subtle implications of its [\*85] recognition. To what extent shall this right, this claim, be recognized? If a man is unable to find work under the existing economic conditions, may he appeal to the government itself to provide him with that work? Yes, if the moral right is to be at all meaningful, for obviously it is ridiculous to grant an abstract right and deny the possessor of it any remedy to secure its enforcement.

Here we see the difference between these economic rights and the political rights which we have previously discussed. The latter requires only abstinence on the part of the government from involving any coercion which would violate the right. The former, however, demands not merely that the government agree to the exercise of the right, but that it take positive action to enforce it.

The forms of positive action which the government can take are numerous. Probably the most elementary manner in which it could secure the right would be to itself provide the work. This fulfills the form, without always fulfilling the substance of the individual's claim to a place in the economic process (as witness the WPA leaf-raking activity). Even to do this, the government must impose taxes on the productive part of the economy in order to pay the men whom it hires. Thus to a certain extent it is an abridgment of their "right" to

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their profits; but I do not think it can be maintained that the latter has higher claim upon the government than the former. [\*86]

We cannot treat the tremendous economic implications of this question here.<sup>4</sup> There are more drastic methods which the government could take to secure work, but there is grave concern lest these steps violate other individual claims which are just as fundamental.

The claim of the individual to the right to work is usually associated with such other claims as the claim to a decent income, security in old age, medical care, good food, housing, and others. However, there is here an important differentiation to be made. The right to work, as a claim to the opportunity to at least attempt to make use of the ability which one possesses, is a claim so fundamental as to fall within that area which the individual *should* be granted by any government. However, many of these other claims are not claims to opportunity or freedom, but rather to ability. The abilities to be secure in old age, to live in a decent home and eat decent food, are all desirable, without doubt. However, very often the reason that people go without them is not the result of governmental coercion, as was the case with the political freedoms, or of a system of institutions supported by the government which denies the individual a *chance*, but rather it is the result of inability to conquer our physical surroundings.

We have seen that in all cases of evaluating rights, we must balance the ability, opportunity, and stability which [\*87] the government must provide with the morally valid claims of the individual to a limitation of its power. In the rights which we have previously considered and granted, the countervailing factors against valid moral claims were not great; here, however, we come to a question where it is not merely a question of the government simply limiting itself, as with the political freedoms, or of the government undertaking on its own to secure the claim, but rather we have a problem where the government must exercise coercive force on other individuals to secure to those who claim them those economic rights.

It should also be noted that there is another significant difference between the political freedoms, freedom of opportunity, and the opportunity to work on the one hand and these claims to economic security. It is actually a corollary of what we have just said. When we recognize the claims of an individual to freedom of expression and worship, or to the opportunity to employ his native ability and talents under the existing economic system, we are recognizing rights to which we feel he has a claim regardless of his ability to enforce them. But we must be wary of extending this area of valid claims incommensurate with ability too far. When we extend it beyond the realm of the manner in which the individual is treated into the area of the actual reward he shall receive or the status which he shall attain we face important new problems. For the

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4. For elaboration of government "full employment" programs, see Hansen, *op. cit.*, and Beveridge, William, *Full Employment in a Free Society*.

physical [\*88] goods of the world are finite in number, and to say that an individual who is unable, *in spite of having the opportunity to fit himself into the economic system*, to achieve security for himself is nevertheless entitled to it, means simply that he shall have it at the expense of other more successful or more fortunate individuals. We maintain that while opportunity to achieve security is a fundamental moral claim, the actual ability to be secure does not have this same high status. For the recognition of such a claim on the part of the government means a corresponding diminution of freedom and increase of coercion in the case of others who must furnish this security to those unable to achieve it for themselves.

Once again, it is a question of balance and of moral considerations which are in the end indemonstrable. We have said that one of the fundamental reasons for government was that it assured men of certain basic freedoms and opportunities to which we felt they were entitled as human beings regardless of whether or not they had the power or ability to secure such treatment for themselves. We also noted that the recognition of these claims by government did not result in the serious diminution of the freedom and opportunity of other individuals; very often it actually led to the diminution of coercive force employed.

There is actually no logical reason why this analysis cannot be extended to include the "right to economic security." [\*89] We reject this extension because the recognition of it on the part of the government involves too much curtailment of other claims, and because while we feel that any human being is morally entitled to the *opportunity to achieve* his ends, he is in no sense entitled to the *right to attain* them, when this right can be had only at the expense of others.

Much of the above argument implies the recognition on the part of the government of some sort of system of private property. Any thoroughgoing analysis of private property as an institution or as a moral claim is beyond the scope of this paper. We remark that it seems that the individual definitely has a basic moral claim to the results of his enterprise, the fruits of his labor.<sup>5</sup> This is an admittedly loose and general statement; it should be added that the recognition of private property as a moral claim on the part of the individual does not necessarily imply the existence of corporate privileges or inheritance rights as they now are. But however the government chooses to recognize this claim, in whatever manner it is finally institutionalized, the limitations upon its exercise should be in the institution itself rather than in some arbitrary agent of the government.

We have now applied our theory of rights to the case of particular rights; but it remains to observe how these will work in practice. We must realize now that even the fundamental rights which we have declared that the government [\*90] *should* recognize are by no means absolute; the recognition of moral

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5. For an interesting development of this argument, see Tawney, *op. cit.*

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claims by the individuals must be weighed in practice against the demands for ability and opportunity and the necessity for preserving the state, without which no moral claims would be recognized. However, it should also be noted that these practical considerations are limitations on, rather than complete subversions of, our theoretical analysis. Logic must on occasion bow to common sense; and though our basic premises and fundamental convictions are of a qualitative nature, their application in practice is tempered by political necessity, which usually requires a quantitative solution.

When the sanitation department of a city requires that restaurant owners keep rat droppings out of the flour which they use for baking, they are obviously limiting to a certain extent the freedom of that restaurant owner to employ his talents and possessions in the manner which he desires; nevertheless the tremendous service to the community which is that second part of the government's function would seem to outweigh the claim of the restaurant owner. However, if the government were to fix the prices which a restaurant owner could charge and tell him what meals he could serve, the scales would swing the other way. The public still might benefit; but we have now entered the area where the individual is entitled to certain consideration regardless of public benefit. (It is conceivable that in case of war, when [\*91] the preservation of the state is the paramount concern, this problem would be answered in a different manner.)

Does a man have a right to stand up in a crowded theater and shout "Fire?" No, he does not. Though freedom of speech in the abstract is a moral claim which the state must recognize, this is an extreme where once more the public order is elevated to a paramount consideration. Obviously, to make a legal application of this doctrine considerably more elaboration would be necessary in order to know just *where* to draw the line. It is impossible to undertake such elaboration here. However, since we have decided that free speech is a moral claim which inheres in the individual, our doctrine would limit freedom of speech only in extreme cases. What do we mean by extreme? The reader must gather from the spirit of this study. [\*92]

#### CHAPTER VI. CONCLUSION

Our criticism of pragmatism and functionalism may be summarized as follows:

(1) In spite of the valuable contribution which pragmatism made in attacking the metaphysical abstractions of traditional philosophy, by itself it is inadequate as an approach to the crucial problems of social and political morality. The failure of the pragmatists to either squarely face the question of value judgments or else carry their relativism to its logical conclusion results in a superficial method which leaves the door open for the introduction of extraneous standards of morality which are no part of pragmatism.

(2) Functionalism, in evaluating political institutions by the pragmatic standard of workability and the biological standard of function, has been forced to introduce a standard of morality which insists that rights shall fulfill a social purpose. Without this, their analysis would be meaningless.

(3) Many of the functionalist school treat the idea that rights shall fulfill a social purpose as a self-evident proposition, as an "inarticulate major premise." However, other more profound thinkers, particularly Green, have recognized the problem and made a case for the social derivation [\*93] of rights; that is, in practice, the derivation of moral rights as well as legal rights from the popular will embodied in the government. We have rejected this because we feel that it did not represent a significant change from the absence of government; a state in which the only appeal on moral issues is to the majority is only institutionalized force. The basic grounds for political obligation reside in the possibility which the state represents of departing from the state of anarchy where force is the supreme arbiter, to a system where the government with its monopoly of force is able and obliged to secure for the individual certain basic claims to which he is entitled as a human being. Thus rights are not validated by social approval, but inhere in the individual himself.

Historically speaking, this position is probably in the tradition of Locke. However, Locke made a fundamental error in assuming that these rights actually *existed* in a state of nature; that it was only *rarely* that man failed to treat one another as dictated by these moral claims. There are moral claims to which the individual is *entitled* with or without government, but only under government can there be hope for *securing* them. Therefore, the idea that government is a necessary evil is wrong from our point of view; government is the *sine qua non* for the obtaining by the individual of that treatment to which he is morally entitled. But, on the other hand, if the government does not recognize these [\*94] fundamental claims of the individual, the grounds for political obligation are no longer existent, since the government is failing in its responsibility to raise society above the level of the equation of might with right.

A study in recent comparative government gives us good reason to believe that this recognition of the rights of the individual is the principal factor which differentiated the Anglo-Saxon political tradition from the totalitarian states found in other parts of the world. Democracy, as it is referred to in everyday terms, actually involves the elements of respect for the individual and the minority as well as the idea that the policy of the government shall be determined by the popular will. However, there is a tendency among some writers to stress only the majority-rule elements in democracy, and to contend that as long as issues are decided by the majority we shall have liberal democracy. This is not borne out; not only does it neglect the fact that the majority-rule tradition itself in political theory embodies safeguards for the rights of the minority and concern with how the majority comes to power, but it ignores also that basic respect for the individual which even majority-rule



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theorists sometimes overlook.

There is little reason to believe that Hitler's regime or Stalin's regime were not approved of by the majority of the people living under them. Assuredly the democratic tradition of majority rule involves more than the mere assent [\*95] of the majority, but this is often overlooked by those who claim that if only the actions of a state are in accord with the wishes of the majority, it is democratic. The rise of dictatorships has occurred, not because the majority of the people were determined to put power into the hands of a few, but because it seemed that by dispensing with that part of the majority-rule tradition of democracy which demands respect for the rights of the individual, the contemporaneous will of the majority could be given more immediate effect. They failed to realize that the system of majority rule, if it is not to be extremely short-lived, must recognize the rights of the minority.

Actually, totalitarian states are models of functionalism. It is not the same kind of functionalism that is applied to democracies, but unfortunately the difference appears to be one of emphasis rather than of principle. As Hayek stresses,<sup>1</sup> everything in a totalitarian state is evaluated functionally, from physics to chess.

The difference between totalitarian functionalism and democratic functionalism is that in the former the state itself, as a metaphysical and psychological entity completely apart from the individuals in it, is what must be served. In democratic functionalism, it is the democratic state, consciously bent on securing the welfare of its citizens, to which all rights must answer. [\*96]

It should be pointed out that this difference loses some of its magnitude in practice. The totalitarian state exists independently of its citizens only on paper or in the minds of its *ad hoc* philosophers; if it did not consciously strive to improve the lot of its people, or at least convince them that it were so doing, it would be short lived. On the other hand, it is unfortunately true that with some of those who would develop democratic planning on a large scale, the welfare of the citizens is equated with their *idea* of the welfare of the citizens.

In conclusion, if our criticism of the pragmatic functionalist approach to rights could be generalized under one heading, it would be that they set too low a value on the individual human being. One cannot help but get the impression that with the functionalist man is too often only another factor in a gigantic social process which is itself the paramount consideration. For functionalism and its pragmatic roots can be traced in part back to nineteenth century positivism, and its idea that man along with all the other material manifestations in the universe could be subsumed under the glittering headings of science, fact, and scientific method. The functionalist evaluates individual rights, not by how well they serve the individual, but by how well they serve the society in attaining purposes of its own which may be wholly different from those of the individual to whom the rights are granted. [\*97]

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1. Hayek, *op. cit.*, Ch. VIII.

Functionalism has contributed much in giving us new criteria by which to evaluate elements or parts of a composite whole; but it does itself a disservice when it extends this analysis into an area where the various elements (e.g., the individual, the state, and society) are not related as parts and whole. Lest this point of view be considered unduly anthropomorphic, we wish to note a difference which exists between the factual approach and the value approach to man's place on the earth.

Since the time of Copernicus, it has been in bad taste to contend that the sun revolves around the earth, or to say that Atlas supports the world with his bare hands. The teleological concept of causality, so popular with medieval thinkers, has been discredited by modern scientists, as has the idea that the behavior of natural phenomena is the result of the direct intervention of a Creator. It is only common sense that in any attempt to understand the physical universe we accept a simple, scientifically demonstrable explanation of a certain event in preference to an elaborate anthropomorphic explanation. For to utilize our environment we must understand it.

The nineteenth century idea that science was gradually increasing man's understanding of natural processes, that elements which had formerly seemed to be governed by a number of complex laws or whose behavior had been inexplicable were gradually being revealed as basically simple, has not [\*98] been fully borne out in the twentieth century. Tennyson's expression of this conviction,

One God, one law, one element,  
And one far-off divine event  
Towards which the whole creation moves,

does not have the weight of modern science completely on its side. Einstein and Planck, for instance, have discovered beyond what was thought to be elemental simplicity. Where this regression will end is difficult to say, especially for someone like me who is completely ignorant of the whole subject.

In spite of this tendency toward oversimplification, we may certainly agree that in the realm of empirical evidence and scientific hypotheses, if we wish to understand we must go in with an open mind. The Darwinian theory of evolution by random mutation and its subsequent elaboration have not only tended to contradict certain religious teachings, but they have in general been a blow to human pride. Nevertheless, if the weight of the evidence favors such a conclusion, we must accept it; for outdated anthropomorphic prejudices will not aid us in mastering our environment.

In the realm of value it is a different story. Here we are no longer dealing with a phenomenon which has *only* an empirical existence in the world about us. This is the aspect of value which concerns the social psychologist, but his treatment of the case by no means exhausts the content [\*99] of the idea. Values and value judgment have their origin in and a noumenal existence in the human mind, in its self-consciousness. To treat them in any but an anthropomorphic way is to miss this essential characteristic.

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In the realm of value, when we seek to “explain” morals or to make them “scientific” by classifying them along with other social phenomena, we have looked at only one side of their existence. Admittedly concepts of social and political morality, ideas of the individual’s relation to society and to the universe have an empirical existence as given social data in a particular case. But the descriptive moralist neglects the origin of ethical ideas in the individual self-consciousness as an intuited reality, to which the first is but as the shadow to the substance. This side of morality and value can be neither apprehended nor comprehended by ordinary hypotheses applied to empirical data. Morality in this sense must always be anthropomorphic.

Man has an empirical existence, which the functionalists and pragmatists recognize and interpret. But they imply that this is all; that the individual human being is one more element of empirical data to be catalogued and judged by how well it fits into the overall pattern. They miss the equally important, non-empirical reverse side of this existence; whether we call it spiritual, divine, or something else matters little. Their concept of the individual human being is two-dimensional; they see him only as an object [\*100] moving in the exterior world, instead of in his three-dimensional reality, man, “the glory, jest, and riddle of the world.”

A truly meaningful basis of rights must start from the individual as a three-dimensional entity. Though not exalting a Nietzschean superman, it must recognize in the individual human being the ultimate integer upon which all solutions to political, social, and moral questions are to be based. [\*101]

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