RIGHTS AND BORDERLINE CASES

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INTRODUCTION

Two competing theories of justice are currently dominating discussion within contemporary Anglo-American moral, social, political, and legal philosophy. The Welfare-State Liberal theory of John Rawls, developed most fully in his book *A Theory of Justice*,[1] contains a sustained defense of the partial redistribution of wealth within society in order to improve the position of the most unfortunate members of society. The Libertarian theory of Robert Nozick, presented in his book *Anarchy, State, and Utopia*,[2] is based on the claims that justice is the respecting of people's *rights*, that people's rights are respected when they are allowed to keep and control that to which they are *entitled*, and that people are entitled to any holding which they have legitimately acquired—that is, without using force, theft, or fraud (activities which would violate the rights of others). Since the kind of redistribution called for by Rawls' theory of justice would necessarily involve taking from some people (primarily through taxation) holdings to which they have a right, Nozick argues that an application of Rawls' theory will have unjust consequences: it will fail to show the proper respect for people's rights upon which any correct theory of justice must be based.

The present Article is an exploration of the concept of *a right*—a concept which is, as Nozick claims, central to the concept of justice.

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1. J. RAWLS, A THEORY OF JUSTICE (1971).
2. R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

The Article is based on the assumption that one way to develop an understanding of this important moral concept is to examine cases—called "borderline" here—where the ascription of rights seems doubtful or problematic. If we can understand what goes wrong in the doubtful cases, then perhaps we can develop a more satisfactory account of the clear cases. Although not written with such a purpose in mind, the Article may also be viewed as a tentative start toward showing that a generally Rawlsian theory of justice or rights can make an important place for those moral claims which Nozick calls entitlements.

THE PROBLEM

The nature and importance of the problem to be discussed in this Article has been well stated by Joel Feinberg:

> In the familiar cases of rights, the claimant is a competent adult human being, and the claimee is an officeholder in an institution or else a private individual, in either case, another competent adult human being. Normal adult human beings, then, are obviously the sorts of beings of whom rights can meaningfully be predicated. Everyone would agree to that . . . . On the other hand, it is absurd to say that rocks can have rights, not because rocks are morally inferior things unworthy of rights (that statement makes no sense either), but because rocks belong to a category of entities of whom rights cannot be meaningfully predicated. That is not to say that there are no circumstances in which we ought to treat rocks carefully, but only that the rocks themselves cannot validly claim good treatment from us. In between the clear cases of rocks and normal human beings, however, is a spectrum of less obvious cases, including some bewildering borderline ones. Is it meaningful or conceptually possible to ascribe rights to our dead ancestors? to individual animals? to whole species of animals? to plants? to idiots and madmen? to fetuses? to generations yet unborn? Until we know how to settle these puzzling cases, we cannot claim fully to grasp the concept of a right, or to know the shape of its logical boundaries.[3]

Feinberg's point can be summarized in this manner: We all recognize clear cases of individuals (competent adult human beings) to whom the ascription of rights, both moral and legal, is nonproblematic —indeed, it is obviously justified. We also recognize clear cases (such as rocks) of entities which not only do not have rights but *could not*

3. Feinberg, *The Rights of Animals and Unborn Generations*, in PHILOSOPHY AND ENVIRONMENTAL CRISIS 44 (W. Blackstone ed. 1974).

have rights, such ascription being conceptually ludicrous. In addition to these clear cases, we also are confronted with a large class of borderline cases—individuals who have *some* of the features normally found in individuals who are clearly rights-bearers, but who do not seem to have *quite enough* of such features to make us confident in ascribing rights to them. They are of such a nature (for example, severely retarded) that they lack certain features (such as the power of rational choice) normally found in rights-bearers. Indeed they may even be of such a nature (for instance, irreversibly comatose) that they seem disturbingly similar in relevant respects to those entities (such as rocks) which clearly cannot be rights-bearers. All these considerations tempt us to say that they are *not* rights-bearers at all.

But there are temptations in the other direction as well. We are inclined to say that even the severely retarded, for example, may not be treated just *any* way we feel like—that a certain kind of decent treatment is *owed* to them, just as a certain kind of decent treatment is *owed* to animals and the insane. I use the term "owed" at this point merely to indicate that we feel that the decent treatment is done at least in part *for the sake of these creatures* and not simply for our own sakes —to protect our sensitive feelings with respect to the hardships of other creatures—and that the decent treatment is *obligatory* on us and is not optional or supererogatory in the way that certain acts of kindness or beneficence are. For example, the feeling that we owe the severely retarded something and that any decent treatment we give them is not just a matter of charity is behind the temptation to say that even creatures such as these borderline ones *do* have rights. Perhaps they do not have as many rights as properly ascribable to competent adult humans, but they have some rights nevertheless. It is my hope in what follows to make a start toward sorting out our conflicting temptations here and to suggest a way, both conceptually clear and morally adequate, in which both sides can be satisfied—at least partially.

The Nature and Importance of Rights

I shall argue that we use the language of rights to do at least *two different* (though related) moral jobs, and that a failure to keep clear the distinction between these two jobs is behind a substantial amount of the fruitless philosophical controversy surrounding the question of whether borderline cases do or do not have rights.

One important function of the language of rights, stressed by such philosophers as John Locke and especially Immanuel Kant, has been to mark out the special kind of treatment (called "respect" by Kant)

which is particularly fitting or appropriate to *autonomous, rational persons.*[4] There does seem to be something special about such persons (Kant calls it their "dignity") in that their destinies, at least in large measure, can be rationally controlled by their own choices or decisions. They are, to use another Kantian phrase, self-legislating members of a kingdom of ends (a community of other self-legislators).

In the spirit of Kant, Robert Nozick uses the phrase "rational creature" as "short for beings having those properties in virtue of which a being has those full rights that human beings now have."[5] This special feature of persons seems to provide a ground for a special set of moral claims (natural or human rights) which are appropriate only for such creatures and not for any other animals. These basic natural or human rights are articulated by Locke as follows: "No one ought to harm another in his life, health, liberty or possessions."[6] This list is *negative* (it prohibits certain kinds of *interferences*) because only in this way can the special status of persons be protected and respected —their status as creatures who must be left their own "moral space" to work out their own destinies according to their own choices and decisions. Positive interference with them, even if benevolently or paternalistically motivated, would be an affront to their dignity or status as persons. Persons, Kant argued, are ends and not means only; they are not to be sacrificed or used as instruments or resources for the achieving of others' ends without their consent. They are inviolable. Stressing this inviolable nature of persons has been the central focus of many who have written on rights, and—for what I hope are obvious reasons—I shall label their accounts of rights as accounts of *Autonomy Rights.*

Those like Kant who have stressed Autonomy Rights have not regarded such rights claims as being the only important part of morality, but they have certainly regarded them as the *most important* part. Kant argues that those duties resting on rights are absolute and decisive (he calls them "perfect") when in conflict with any other moral considerations—for example, when in conflict with such "imperfect" duties as beneficence (helping others in need). These imperfect duties do not rest on rights (I do not violate another's rights simply by refusing to help him), admit of "latitude in time and manner of their fulfillment" (I must simply do *something* for *some* people *some* of the time) and

4. *See generally* I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (L. Beck ed. 1959) (originally published in 1785); I. KANT, METAPHYSICAL ELEMENTS OF JUSTICE (J. Ladd ed. 1965); J. LOCKE, TWO TREATISES OF GOVERNMENT (P. Laslett ed. 1965) (Second Treatise).

5. R. NOZICK, *supra* note 2, at 299.

6. J. LOCKE, *supra* note 4, § 6, at 311.

never take precedence over claims of genuine rights. *Rights claims are morally basic because the value of autonomy which they capture is evaluatively basic.* This, in very general and oversimplified terms, is the view of such writers as Kant and Nozick.

Another quite different tradition in moral and social philosophy, best represented by John Stuart Mill and our contemporary John Rawls, involves the view that rights claims are *not* morally basic. Rather, they are *derivative* from more general moral principles. "To have a right," Mill suggests, "is to have something which society ought to defend me in the possession of."[7] The central idea here is that rights claims function, not to mark some specially fine feature of persons, but rather to mark out which of all moral claims *ought to be enforced by the state*; in other words, which ones *ought to be law.* On this view, a creature may be said to have a right to *X* if and only if it is morally reasonable, all things considered, to *guarantee X* to that creature as a matter of law.

Mill's own version of rights theory meets shipwreck in the answer he gives to the question: "How do we decide what is morally reasonable?" Mill, alas, is a utilitarian—one who claims that the basic or most important moral requirement is to maximize human happiness. This theory is so obviously morally bankrupt[8] that very few contemporary moral philosophers take it at all seriously. I will not take time here to reiterate all the things wrong with the theory. Suffice it to say, as a summary objection, that utilitarianism fails to pay attention to those important *autonomy* values discussed above and thus fails to articulate a satisfactory conception of *justice* or *respect for persons.* It does not, as any correct theory of justice would, rule out the sacrifice of persons for the general good.[9]

Just because Mill's ultimate moral theory is defective, however, it does not follow that his analysis of rights as claims that society ought to enforce is defective. Though John Rawls (a contemporary anti-utilitarian) says very little about rights, his analysis appears similar

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7. J. MILL, UTILITARIANISM 66 (Piest ed. 1957). According to Mill, society's mechanisms of defense are the *law* and the social pressure of *opinion. See id.* at 35-37. In order to simplify matters, I shall concern myself only with the former.

8. As John Rawls has shown, this theory could be used to justify such morally heinous practices as slavery. *See* J. RAWLS, *supra* note 2, at 158-59.

9. Even if a utilitarian does rule out such sacrifice, he will do so for the *wrong reason.* As Rawls has noted, slavery cannot be wrong because the benefits derived by the slaveholder can never outweigh the burdens imposed on the slaves. *See id.* This kind of argument fails to appreciate that any benefits derived by the slaveholder are *immoral to count* because they are benefits which are unjustly acquired by the exploitation of human beings and to which he thus has no *right.* Analogously, we do not wait before morally condemning a rape in order to make sure that the pleasure derived by the rapist did not outweigh the pain experienced by the victim.

to that of Mill.[10] However, he does not give a utilitarian answer to the question of what is morally reasonable for society to enforce. Rather, he says we should ask ourselves this question: "If a group of ideally rational beings came together in order to pick rules to govern their mutual relations, which rules would they be compelled (by the power of their rationality) to pick?" This decision-theoretical interpretation of classical social contract theory is basic in Rawls' outlook.

Since I believe that, in spite of certain very serious problems,[11] Rawls' theory is very helpful in illuminating certain moral issues, I should like to discuss it in a bit more detail. As already indicated, Rawls suggests that we use the idea of a social contract as a model of rational decision in morality. That is, we shall regard as rationally justified any moral principle (or any social practice) if that principle (or practice) would be unanimously agreed to, adopted, or contracted for by a group of rational agents coming together, in what Rawls calls the "original position," in order to pick principles and then practices to govern their relations with each other as members of a common community. The "original position" is simply a hypothetical situation of priority to moral rules and social practices. Unanimous consent is required because it captures our intuitive notion of what is *fair* as an agreement (because this precludes anyone's being coerced), and this intuitive notion of fairness is prior to developed moral rules or prin-

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10. What follows is not an attempt to give an accurate depiction of the exact details and structure of Rawls' argument in *A Theory of Justice*. As any student of Rawls will immediately realize, I am collapsing together certain elements in his theory (for instance, the distinction between the stage of the "original position" and the stage of the "constitutional convention") and am skimming over details (such as the distinction between "self-interested" and "mutually disinterested" motivation) which Rawls regards as theoretically important. I am also ignoring some serious problems faced by the theory. While such matters are of theoretical interest, a careful exploration of them is, in my judgment, simply not necessary for present purposes. It would be, indeed, merely a distraction in the present context. Thus the reader should perhaps view the following simply as a set of variations on a Rawlsian theme. The notion of a *minimum floor* which I shall employ is drawn from R.M. Hare's discussion of "insurance strategies" in Part II of his review of *A Theory of Justice*. Hare, Book Review (pt. II), 23 PHILOSOPHICAL Q. 241-52 (1973).

One important point of detail, however, should perhaps be stressed. In suggesting that Rawls' theory can be used to provide a derivative analysis of at least certain rights as guarantees that society should enforce, no suggestion is being made that autonomy is unimportant in his theory. On the contrary, the contractors in Rawls' social contract theory are thought of as autonomous in something like Kant's sense; and what these contractors agree to protect or legally guarantee first is a set of certain basic liberties.

11. *See* READING RAWLS (N. Daniels ed. 1976). This is an anthology of critical essays on *A Theory of Justice* and contains a bibliography of other critical essays on Rawls' theory. Two book length attacks on Rawls' theory are B. BARRY, THE LIBERAL THEORY OF JUSTICE (1973) and R. WOLFF, UNDERSTANDING RAWLS (1977). Though serious and fundamental problems have been located in Rawls' theory, no one has yet, in my judgment, done to Rawls' theory what Rawls has done to the theory of utilitarianism—Rawls has not simply shown its weak points, but also *replaced it* with a theory that is clearly superior. Rawls' theory is certainly not the only game in town. but it still seems to me the best.

ciples. Indeed, according to the theory, such rules or principles will grow out of this intuitively acceptable setting. This is why Rawls speaks of justice *as* fairness. In an attempt to avoid begging any moral questions (for example, by smuggling certain controversial moral values into the very conception of rationality), Rawls stipulates that rational agents in the original position are primarily *self-interested*—primarily concerned to promote their own welfare (which includes promoting the welfare of those about whom they care deeply, such as members of their families). An important and controversial restriction on Rawls' model of a rational being is that such a being is said to operate under a "veil of ignorance"[12]—he is said to know what in general can happen to persons in various positions in society but not to know what *his* own actual position is likely to be. According to Rawls, this prevents the rational contractors from making choices on the basis of *morally irrelevant* considerations such as skin color. For example, in trying to decide whether or not to adopt a practice of slavery, each agent would know in general what it is like to be a slave, but none of the agents would know the probability of *his* being a slave.[13] Finally, Rawls suggests that each rational agent will value a set of primary goods (liberty, security, self-respect) and will always choose to minimize, as far as possible, threats to these goods. Rawls defines primary goods as "things that every rational man is presumed to want. These goods normally have a use whatever a person's rational plan of life."[14]

Given this brief sketch of an elaborate intellectual machinery, we are now in a position to see how Rawls attempts to show that rational persons would *not* choose utilitarianism as a basic moral principle. Since utilitarianism allows for the sacrifice of the few if this results in substantial benefit to the majority, it would never be unanimously agreed to in the original position. Rational agents, caring most about protecting such primary goods as liberty ("minimaxing," in the economists' language), and having no guarantee (because of the veil of ignorance) that they will not be members of the sacrificed class, will choose a principle which does not allow such sacrifice. To return to the slavery example: Since no rational agent would be willing to run the risk of being a slave, rational agents would not unanimously agree to a principle which allowed slavery. As one can easily see, Rawls views rational people as *cautious* people—people who plan their lives on the least favorable set of assumptions about how things will turn out.

12. *See* J. RAWLS, *supra* note 1, at 12, 19.
13. For Rawls, basic social choice is choice under nearly total uncertainty.
14. J. RAWLS, *supra* note 1, at 62.

Though they perhaps miss out on the bliss and exaltation of the gambler, they also (and this matters much more to them) miss out on the irrevocable disasters to which gamblers are prone.

What does all this have to do with rights? I will suggest the following as a Rawlsian-inspired analysis: An individual should be understood as having a right to *X* if and only if a law guaranteeing *X* to the individual would be chosen by rational agents in the original position. This concept of a right I shall call a *Social Contract Right.*

We have, then, *Autonomy Rights,* concerned to respect the choices and decisions of persons, and *Social Contract Rights,* concerned to provide morally justified legal guarantees. These are related, but a few moments of reflection should persuade us that they are not identical. If you promise that you will meet me for dinner and then simply stand me up without good reason, you have shown insufficient respect for my humanity, treated me with contempt, and violated an autonomy right of mine. For surely it is part of the meaning of "I promise," sincerely uttered in the proper circumstances, that it gives a right to the person to whom the promise is made. But should all such rights be enforced by law? Surely not. Any state which sets for itself the goal of enforcing every promise, no matter how trivial, would be financially bankrupt and morally intrusive. This is why only certain promises (regarded as important enough to be made into *contracts*) are enforced by the state.

Consider another example: Suppose I am poor, unable to afford decent food and medical care. Does this mean that any of my autonomy rights have been violated? Not necessarily. Others may simply have exercised their right to leave me alone. They have neglected me but not interfered with me, and autonomy rights require only noninterference. And yet, many would want to say, the poor have a *right* to a decent standard of living, education, and health care. But why, if no considerations of autonomy are involved?[15] A Rawlsian answer here strikes me as plausible: Rational persons, in the original position, would want to protect themselves against certain major losses and harms. Thus they would probably agree to a *minimum floor* of security below which no member of society would be allowed to fall. Even selfish people, caring about their own welfare, would want to guard against the kind of destruction of primary goods that would result if they became severely disadvantaged, as people often do, through no

15. In real, as opposed to hypothetical cases, it is going to be difficult to claim that autonomy is not involved at all. One's status as a rational agent, a maker of free choice and decisions, is going to be impaired by severe hardships.

fault of their own, but simply through their "bad luck on the social and natural lottery."[16]

In summary, most Autonomy Rights are going to be adopted as Social Contract Rights (though not all, as my promise example shows), because rational agents in the original position will surely want to protect themselves against interference with their ability to determine their own future by their own choices. Social Contract Rights are going to be broader in scope than Autonomy Rights, however, because rational agents in the original position—in addition to caring about the protection of their autonomy against interference—are going to want to protect themselves against certain major hardships and sufferings. They know that they are sentient as well as sapient. They are thus likely to adopt minimum floors of security (income, health care, and the like) and speak of these as *rights*. There will be neither confusion nor immorality here so long as they remain clear about the status of these rights—that they are Social Contract Rights and not Autonomy Rights. The main point in calling them rights is to emphasize that they are *guaranteed*—nonoptional.

What if autonomy as a value seems to compete with minimum floors as a value? Which will take precedence? In the original position, decisions will be made—not just about what rights to recognize—but about the priority of these rights claims. This is a difficult problem, but not, in my judgment, obviously insoluble.[17] At this point, I shall

16. J. RAWLS, *supra* note 1, at 74.

17. Whatever the rational solution will be, it will *not* be the highly counterintuitive one sometimes suggested by Kant—namely, that all autonomy rights (grounding perfect duties) will, no matter how trivial, take precedence over any other moral consideration (perhaps grounding an imperfect duty), no matter how serious. To borrow an example from Joshua Rabinowitz: No morally decent society is going to forbid that I simply take Jones' rope to throw to a drowning person if Jones, who (let us grant) has a Nozickian entitlement to the rope, refuses to let me have it or says I may have it only if I pay him several thousand dollars for it. It is a Kantian perfect duty that I do not take Jones' rope and "only" an imperfect duty that I attempt to save the drowning person. What response can we make to this point except "so what?"

There is insight in Kant's attempted ordering, however, and I think it is this: That the *most important* of the perfect duty requirements resting on the *most important* rights (those which protect autonomy in a serious sense) can be said to take precedence over even the most important of the imperfect duty requirements. Killing Jones, spoiling his health, or taking his liberty away for a substantial amount of time, for example, do not seem acceptable steps to take even to save a drowning person. Taking his rope, however, does not seem to be in the same ballpark with these intrusions. Unless Jones is really weird, the temporary loss of his rope will not interfere with his autonomy in any serious way—it will not keep him from leading one of those meaningful lives which are, according to Nozick, bound up with the concept of rights. *See* R. NOZICK, *supra* note 2, at 50-51. Some of these Kantian insights are captured in Rawls' notion of the priority of liberty, and his claim that his principle of "most extensive liberty compatible with like liberty for others" is lexically ordered prior to all other moral principles. In saying all this, I am admittedly making some assumptions I cannot presently defend: (1) that autonomy rights claims can be ordered on a scale of moral importance and; (2) that interferences with life, health, and liberty are typically more serious rebukes to autonomy than are threats to money and possessions. I think this

resist the strong temptation to consider in even greater detail the fascinating abstract issues raised by the Rawlsian outlook on rights, and return to the more practical issues with which I began.

BORDERLINE CASES AGAIN

I shall not attempt to consider all of the borderline cases noted by Feinberg, but shall confine myself to a discussion of the extent to which, if at all, *children* have rights, and the extent to which, if at all, *retarded individuals* have rights. I shall further confine my discussion to *very young* children and individuals who are *more than minimally* retarded. If we consider 17 year-old "children," or "retarded persons" with IQs of 85, it would seem unduly severe to treat them as any less than autonomous persons with the rights appropriate to that status. The actual location of the dividing line between, for example, child and adult, is bound to be somewhat arbitrary and the cases barely on either side somewhat arbitrarily classified. Thus, it is useful, at least at the start of a discussion of these issues, to consider individuals noncontroversially within the class in question.[18]

Children

Young children certainly are not fully rational and autonomous (to the degree of normal competent adults) and thus clearly cannot be held to enjoy the basic Autonomy Right of having their destinies determined by their own choices and decisions. However, there is one very good reason for often *treating* them *as if* they had such a right. Treating children as though they are autonomous aids them in *developing* into genuinely autonomous persons; treating them as responsible persons aids them in *becoming* responsible persons. Such "fictions" have a way of becoming self-fulfilling prophecies. We shall, of course, want to place limits on such treatment in the interest of the child and pick our instances of fictional autonomy ascription wisely. For example, if a

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ordering will have something to do with what I want to call the "internal" relation that one's very self (the person that one is, the meaning in one's life) stands in to one's life, liberty, and bodily integrity, as contrasted with the "external" relation that one stands in with respect to money and tangible things. These are themes I hope to be able to develop at some length in a future paper: to try to make sense of the "internal-external" metaphor (now admittedly just a vague intuition), establish its moral significance, and put it to use. For example, I will attempt to show where philosophers like Nozick go wrong in identifying taxation with forced labor.

18. A full treatment of these issues would obviously require finer distinctions—with rights graded accordingly—than can be captured by the vague terms "very young" and "more than minimally retarded." Here I am simply concerned to give a general idea of how, in my judgment, discussion of these issues should proceed. For a more detailed treatment, see Murphy, *Incompetence and Paternalism*, 60 *Archiv für Rechts- uund Sozialphilosophie* 465-86 (1974).

small child decides that he does not want to take the penicillin prescribed for a streptococcus infection in his throat, this would be a bad case in which to let his decision prevail in the interest of developing future autonomy.

Of course, as a normal child grows older, he will acquire greater and greater autonomy. Rights to self-determination can be correspondingly extended, paternalism being phased out gradually. But do not children sometimes, particularly when very young, have a *right* to paternalism—action in their interest either to prevent certain kinds of harms (such as child abuse, subjection to parental superstition with respect to proper medical care) or to provide them with certain benefits (such as a proper education) necessary for having or developing a satisfying life? Here I would answer *yes*—children do have such rights to paternalistic intervention on their behalf. However, the younger and less autonomous they are, the greater the need for intervention—it is *paternalism* after all. What this shows is that the rights here cannot be Autonomy Rights but must be understood as Social Contract Rights. Rational agents in the original position, knowing that they could be born into the class of children and knowing that—even as adults—they will care deeply about any children they may have, will surely want to establish certain minimum floors for children—certain levels of security and education below which no child will be allowed to fall. Thus, paradoxical as it may initially seem, I should argue that there are rights to be treated paternalistically. The paradox disappears, of course, if we remember that we are speaking of rights—not as ways of respecting autonomy—but as legal guarantees society should provide, perhaps as ways of allowing autonomy to develop in those cases where it is not yet present.

Retarded Persons

Autonomy considerations are even less relevant here than they were with respect to children. Retarded persons normally have little chance of ever becoming autonomous, and so the "fictional" argument given for sometimes treating nonautonomous children as if they were autonomous will not apply here—at least not nearly to the same extent. Here we are dealing with a class of persons who will never be in a position where it could reasonably be claimed that their destinies ought to be determined by their own choices and decisions, so if there are rights here, they will for the most part be rights to a certain kind of paternalistic protection.

Are there such rights? Again I should be inclined to answer *yes*,

and again the answer is based on social contract grounds. Anyone could become mentally defective or have a mentally defective child (about whom one might care very deeply), and thus rational persons presumably would want to provide a certain minimum floor below which such people should not be allowed to fall. Here what will be relevant is to guarantee a certain level of security and a certain level, not of education, but of training. At the very least (if we have any sense of the good)[19] we shall want to protect them against suffering, including any kind of mental suffering of which they may be capable. The right to be protected against such suffering is like the right to security and training in that it is clearly a Social Contract Right and not an Autonomy Right. In other words, it is simply that which any decent society would guarantee by law to its disadvantaged members.[20]

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19. I believe that rational agents, as parties in the original position, can have a less selfish conception of the good than that which seems to be stipulated by Rawls. The primary good which Rawls allows them to value is good *to themselves* or *their immediate families*—it is *their* liberty, security, and self-respect which they value and want to secure. The motive for this restriction seems to be the laudable one of wanting to avoid begging any substantive questions in the theory by smuggling in controversial moral claims into the model of rational choice. But are there not noncontroversial moral views, views which constitute the "facts" on which morality is based or which are the presuppositions for its very intelligibility? Surely, for example, it is noncontroversial that *suffering is bad* and, within moral limits, is to be opposed. Another way of stating this is that the *interests* of any creature have a prima facie claim to satisfaction—something which rational agents, who understand what morality is, can surely accept. *See* Feinberg, *supra* note 3, at 49. This expanded notion of primary good will have two interesting results. With respect to borderline cases it will, unlike a theory totally grounded in self-interest, make it possible to see the social contract rights extended in these cases as at least in part extended for *their* sakes, and not merely our own. The alternative, as Feinberg notes, is highly counterintuitive. Second, even animals may gain entry into the world of rights given an expanded conception of the good. Rawls himself might want to agree with much of this, for his conception of the good might not be as selfish or as individualistic as I have suggested, though it is extremely common for his critics to interpret him in this way. *See* Rawls, *Fairness to Goodness*, 84 PHILOSOPHICAL REV. 536 (1975).

20. Parties in the original position may know that people frequently value objects, such as works of art, and thus may want legal protections for these objects. Does this mean that a stone (if made into a sculpture) may have rights after all? In answering this question *no*, I should want to make three points: First, the Rawlsian apparatus requires our imagining certain misfortunes that might befall us and attempting to protect ourselves against them. It could befall me that I might become mentally disabled, but it seems to make no sense at all to suggest that it might befall me that I could become a stone. I cannot imagine myself as an occupant of *that* position. Animals pose interesting problems in this regard. *See* Nagel, *What is it Like to be a Bat?*, 83 PHILOSOPHICAL REV. 435 (1974). Second, given the expanded conception of the good noted above, see discussion note 19 *supra*, parties in the original position will sometimes act for the sake of sentient creatures in order to protect the interests of those creatures. But a stone (even if a great work of art) does not have either a sake nor does it have any interests. Third, my entire discussion is to be understood as accepting Feinberg's conceptual restrictions on the meaningful use of the concept of a right, and I agree with him that ascription of rights to stones is unintelligible. This is why I used phrases such as "creatures have a right to *X* if and only if" and "individuals have a right to *X* if and only if" and *never* the phrase "objects have a right to *X*." The upshot of this is the following: Laws protecting works of art or any other objects do not confer rights on these objects. If any rights are recognized here, it is simply *our* rights as human beings (or the rights of future generations) to enjoy these objects. Here we are acting for our own sakes. *See* Hubin, *Justice and Future Generations*, 6 PHILOSOPHY & PUB. AFF. 70-83 (1976).

CONCLUSION

At this point, it would be useful to have a tidy *list* of exactly those rights which will be possessed by children and the retarded. I will plead my philosophical vocation as an excuse for not providing such a list, however, since it could be compiled only if we leave the world of abstract thought and begin to gather actual empirical information (which I do not possess) on the exact characteristics of children and retarded persons—what they are in fact capable of at various stages. I have been concerned simply to provide a moral framework in which discussions of their rights can be clarified; and I hope that others, if they accept the framework, will be able to fill in the practical and factual information necessary for its actual employment. At this point the philosopher must give way to the lawyer, the behaviorial scientist, and the physician.[21]

I would, however, close with one caution to those who may be inclined to draw up lists of rights for children, the retarded, or any other disadvantaged people. The caution is simply this: Do not give into the romantic and knee-jerk liberal temptation to multiply rights beyond necessity. Autonomy Rights may seem restrictive, but Social Contract Rights are restrictive also—they are, remember, concerned with *minimum floors.* The more one attempts to go above the minimum to assert something more substantial as a matter of right, the more one runs the risk of developing a list of "rights" which are either so economically expensive to support or so morally intrusive to enforce that no sane society will in fact support or enforce them.[22] They will be paid at most a kind of lip service in manifestos—something which cheapens the concept of a right, makes people cynical about rights, and deprives them of their moral force. Social Contract Rights require, not simply noninterference, but *positive* steps to aid. The positive step taken in most complex modern societies, of course, is taxation. If, for example, we are going to have programs to benefit the retarded, someone is going to have to *pay* for such programs. If they are minimum floor programs resting on Social Contract Rights, then taxation may be the appropriate mechanism for funding. If they go beyond this, how-

21. After reading the present essay, Professor David Wexler of the University of Arizona College of Law called my attention to the monograph A. STONE, MENTAL HEALTH AND THE LAW: A SYSTEM IN TRANSITION (National Institute of Mental Health, 1975). Its author, Alan A. Stone, is a Professor of Law and Psychiatry at Harvard University. His discussion, *see* especially *id.* at 15-19, overlaps mine to a certain extent and explores some of the interesting constitutional issues arising in this area.

22. A reasonable minimum floor will, of course, be in part a function of what any particular society, or the entire world, is economically and technologically capable of at a given time in history.

ever, private funding seems in order. When we are under the spell of some good cause, and when we see that the chances of private funding of such a cause are unlikely, we are tempted to manufacture even more "rights" so that we can make our cause eligible for public funding through taxation. But the money available in society is not manna from heaven, to use Robert Nozick's metaphor, falling on the ground to be used for whatever good purpose we see fit. It is *earned* by people and is something over which they may plausibly claim to have a right.[23] Rational persons in the original position would want to protect themselves and their families against certain disasters, and this is why they would agree to minimum floors. Such persons also, however, would surely want to control at least a substantial portion of their earnings to spend as they see fit, and this is why they would be reluctant to agree to anything above minimum floors. Thus, crusades to go above minimum floors as a matter of *right* tend to themselves run the risk of inviting violations of other important rights. If such violations are also economically expensive, they will be opposed for both practical and moral grounds. The final victim of this sort of tension will simply be the important concept of a right itself.

23. Granted the insight of this Nozickian claim, a qualification (perhaps overly cynical) must be added: Many people with substantial wealth in society have done nothing remotely resembling *working for* or *earning* that wealth as we normally understand these terms. Nozick sometimes seems to attempt to marshal our Puritan sympathies for the work ethic (and even our Marxist sympathies for the labor theory of value) on behalf of people who, though very wealthy, neither work nor "mix their labor" with anything: "Consider . . . how they grow; they toil not, neither do they spin."