

feature of legal argument, to consider the special qualities of institutional rights in general, which I consider in Section 4, and the particular qualities of legal rights, as a species of institutional rights, which I consider in Section 5.

But the explanation I give of institutional and legal rights exposes a third and different problem for the rights thesis. This explanation makes plain that judges must sometimes make judgments of political morality in order to decide what the legal rights of litigants are. The thesis may therefore be thought open, on that ground, to the first challenge to judicial originality that I mentioned earlier. It might be said that the thesis is indefensible because it cheats the majority of its right to decide questions of political morality for itself. I shall consider that challenge in Section 6.

These, then, are three problems that any full statement of the rights thesis must face. If that full statement shows these objections to the thesis misconceived, then it will show the thesis to be less radical than it might first have seemed. The thesis presents, not some novel information about what judges do, but a new way of describing what we all know they do; and the virtues of this new description are not empirical but political and philosophical.

3. RIGHTS AND GOALS

A. Types of rights

Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals. But what are rights and goals and what is the difference? It is hard to supply any definition that does not beg the question. It seems natural to say, for example, that freedom of speech is a right, not a goal, because citizens are entitled to that freedom as a matter of political morality, and that increased munitions manufacture is a goal, not a right, because it contributes to collective welfare, but no particular manufacturer is entitled to a government contract. This does not improve our understanding, however, because the concept of entitlement uses rather than explains the concept of a right.

In this chapter I shall distinguish rights from goals by fixing on the distributional character of claims about rights, and on the force of these claims, in political argument, against competing claims of a different distributional character. I shall make, that is, a formal distinction that does not attempt to show which rights men and women actually have, or indeed that they have any at all. It rather provides a guide for discovering which rights a particular political theory supposes men and

women to have. The formal distinction does suggest, of course, an approach to the more fundamental question: it suggests that we discover what rights people actually have by looking for arguments that would justify claims having the appropriate distributional character. But the distinction does not itself supply any such arguments.

I begin with the idea of a political aim as a generic political justification. A political theory takes a certain state of affairs as a political aim if, for that theory, it counts in favor of any political decision that the decision is likely to advance, or to protect, that state of affairs, and counts against the decision that it will retard or endanger it. A political right is an individuated political aim. An individual has a right to some opportunity or resource or liberty if it counts in favor of a political decision that the decision is likely to advance or protect the state of affairs in which he enjoys the right, even when no other political aim is served and some political aim is disserved thereby, and counts against that decision that it will retard or endanger that state of affairs, even when some other political aim is thereby served.¹ A goal is a nonindividuated political aim, that is, a state of affairs whose specification does not in this way call for any particular opportunity or resource or liberty for particular individuals.

Collective goals encourage trade-offs of benefits and burdens within a community in order to produce some overall benefit for the community as a whole. Economic efficiency is a collective goal: it calls for such distribution of opportunities and liabilities as will produce the greatest aggregate economic benefit defined in some way. Some conception of equality may also be taken as a collective goal; a community may aim at a distribution such that maximum wealth is no more than double minimum wealth, or, under a different conception, so that no racial or ethnic group is much worse off than other groups. Of course, any collective goal will suggest a particular distribution, given particular facts. Economic efficiency as a goal will suggest that a particular industry be subsidized in some circumstances, but taxed punitively in others. Equality as a goal will suggest immediate and complete redistribution in some circumstances, but partial and discriminatory redistribution in others. In each case distributional principles are subordinate to some conception of aggregate collective good, so that offering less of some benefit to one man can be justified simply by showing that this will lead to a greater benefit overall.

Collective goals may, but need not, be absolute. The community may

¹ I count legal persons as individuals, so that corporations may have rights; a political theory that counts special groups, like racial groups, as having some corporate standing within the community may therefore speak of group rights.

pursue different goals at the same time, and it may compromise one goal for the sake of another. It may, for example, pursue economic efficiency, but also military strength. The suggested distribution will then be determined by the sum of the two policies, and this will increase the permutations and combinations of possible trade-offs. In any case, these permutations and combinations will offer a number of competing strategies for serving each goal and both goals in combination. Economic efficiency may be well served by offering subsidies to all farmers, and to no manufacturers, and better served by offering double the subsidy to some farmers and none to others. There will be alternate strategies of pursuing any set of collective goals, and, particularly as the number of goals increases, it will be impossible to determine in a piecemeal or case-by-case way the distribution that best serves any set of goals. Whether it is good policy to give double subsidies to some farmers and none to others will depend upon a great number of other political decisions that have been or will be made in pursuit of very general strategies into which this particular decision must fit.

Rights also may be absolute: a political theory which holds a right to freedom of speech as absolute will recognize no reason for not securing the liberty it requires for every individual; no reason, that is, short of impossibility. Rights may also be less than absolute; one principle might have to yield to another, or even to an urgent policy with which it competes on particular facts. We may define the weight of a right, assuming it is not absolute, as its power to withstand such competition. It follows from the definition of a right that it cannot be outweighed by all social goals. We might, for simplicity, stipulate not to call any political aim a right unless it has a certain threshold weight against collective goals in general; unless, for example, it cannot be defeated by appeal to any of the ordinary routine goals of political administration, but only by a goal of special urgency. Suppose, for example, some man says he recognizes the right of free speech, but adds that free speech must yield whenever its exercise would inconvenience the public. He means, I take it, that he recognizes the pervasive goal of collective welfare, and only such distribution of liberty of speech as that collective goal recommends in particular circumstances. His political position is exhausted by the collective goal; the putative right adds nothing and there is no point to recognizing it as a right at all.

These definitions and distinctions make plain that the character of a political aim – its standing as a right or goal – depends upon its place and function within a single political theory. The same phrase might describe a right within one theory and a goal within another, or a right that is absolute or powerful within one theory but relatively weak within another. If a public official has anything like a coherent political

theory that he uses, even intuitively, to justify the particular decisions he reaches, then this theory will recognize a wide variety of different types of rights, arranged in some way that assigns rough relative weight to each.

Any adequate theory will distinguish, for example, between background rights, which are rights that provide a justification for political decisions by society in the abstract, and institutional rights, that provide a justification for a decision by some particular and specified political institution. Suppose that my political theory provides that every man has a right to the property of another if he needs it more. I might yet concede that he does not have a legislative right to the same effect; I might concede, that is, that he has no institutional right that the present legislature enact legislation that would violate the Constitution, as such a statute presumably would. I might also concede that he has no institutional right to a judicial decision condoning theft. Even if I did make these concessions, I could preserve my initial background claim by arguing that the people as a whole would be justified in amending the Constitution to abolish property, or perhaps in rebelling and overthrowing the present form of government entirely. I would claim that each man has a residual background right that would justify or require these acts, even though I concede that he does not have the right to specific institutional decisions as these institutions are now constituted.

Any adequate theory will also make use of a distinction between abstract and concrete rights, and therefore between abstract and concrete principles. This is a distinction of degree, but I shall discuss relatively clear examples at two poles of the scale it contemplates, and therefore treat it as a distinction in kind. An abstract right is a general political aim the statement of which does not indicate how that general aim is to be weighed or compromised in particular circumstances against other political aims. The grand rights of political rhetoric are in this way abstract. Politicians speak of a right to free speech or dignity or equality, with no suggestion that these rights are absolute, but with no attempt to suggest their impact on particular complex social situations.

Concrete rights, on the other hand, are political aims that are more precisely defined so as to express more definitely the weight they have against other political aims on particular occasions. Suppose I say, not simply that citizens have a right to free speech, but that a newspaper has a right to publish defense plans classified as secret provided this publication will not create an immediate physical danger to troops. My principle declares for a particular resolution of the conflict it acknowledges between the abstract right of free speech, on the one hand, and competing rights of soldiers to security or the urgent needs of defense on the other. Abstract rights in this way provide arguments for concrete rights,

but the claim of a concrete right is more definitive than any claim of abstract right that supports it.¹

B. Principles and utility

The distinction between rights and goals does not deny a thesis that is part of popular moral anthropology. It may be entirely reasonable to think, as this thesis provides, that the principles the members of a particular community find persuasive will be causally determined by the collective goals of that community. If many people in a community believe that each individual has a right to some minimal concern on the part of others, then this fact may be explained, as a matter of cultural history, by the further fact that their collective welfare is advanced by that belief. If some novel arrangement of rights would serve their collective welfare better, then we should expect, according to this thesis, that in due time their moral convictions will alter in favor of that new arrangement.

I do not know how far this anthropological theory holds in our own society, or any society. It is certainly untestable in anything like the simple form in which I have put it, and I do not see why its claim, that rights are psychologically or culturally determined by goals, is a priori more plausible than the contrary claim. Perhaps men and women choose collective goals to accommodate some prior sense of individual rights, rather than delineating rights according to collective goals. In either case, however, there must be an important time lag, so that at any given time most people will recognize the conflict between rights and goals, at

¹ A complete political theory must also recognize two other distinctions that I use implicitly in this chapter. The first is the distinction between rights against the state and rights against fellow citizens. The former justify a political decision that requires some agency of the government to act; the latter justify a decision to coerce particular individuals. The right to minimum housing, if accepted at all, is accepted as a right against the state. The right to recover damages for a breach of contract, or to be saved from great danger at minimum risk of a rescuer, is a right against fellow citizens. The right to free speech is, ordinarily, both. It seems strange to define the rights that citizens have against one another as political rights at all; but we are now concerned with such rights only insofar as they justify political decisions of different sorts. The present distinction cuts across the distinction between background and institutional rights; the latter distinguishes among persons or institutions that must make a political decision, the former between persons or institutions whom that decision directs to act or forbear. Ordinary civil cases at law, which are the principal subject of this essay, involve rights against fellow citizens; but I also discuss certain issues of constitutional and criminal law and so touch on rights against the state as well.

The second distinction is between universal and special rights; that is, between rights that a political theory provides for all individuals in the community, with exceptions only for phenomena like incapacity or punishment, and rights it provides for only one section of the community, or possibly only one member. I shall assume, in this essay, that all political rights are universal.

least in particular cases, that the general distinction between these two kinds of political aims presupposes.

The distinction presupposes, that is, a further distinction between the force of a particular right within a political theory and the causal explanation of why the theory provides that right. This is a formal way of putting the point, and it is appropriate only when, as I am now supposing, we can identify a particular political theory and so distinguish the analytical question of what it provides from the historical question of how it came to provide it. The distinction is therefore obscured when we speak of the morality of a *community* without specifying which of the many different conceptions of a community morality we have in mind. Without some further specification we cannot construct even a vague or abstract political theory as the theory of the community at any particular time, and so we cannot make the distinction between reasons and force that is analytically necessary to understand the concepts of principle and policy. We are therefore prey to the argument that the anthropological thesis destroys the distinction between the two; we speak as if we had some coherent theory in mind, as the community's morality; but we deny that it distinguishes principle from policy on the basis of an argument that seems plausible just because we do not have any particular theory in mind. Once we do make plain what we intend by some reference to the morality of a community, and proceed to identify, even crudely, what we take the principles of that morality to be, the anthropological argument is tamed.

There are political theories, however, that unite rights and goals not causally but by making the force of a right contingent upon its power, as a right, to promote some collective goal. I have in mind various forms of the ethical theory called rule utilitarianism. One popular form of that theory, for example, holds that an act is right if the general acceptance of a rule requiring that act would improve the average welfare of members of the community.¹ A political theory might provide for a right to free speech, for example, on the hypothesis that the general acceptance of that right by courts and other political institutions would promote the highest average utility of the community in the long run.

But we may nevertheless distinguish institutional rights, at least, from collective goals within such a theory. If the theory provides that an official of a particular institution is justified in making a political decision, and not justified in refusing to make it, whenever that decision is necessary to protect the freedom to speak of any individual, without regard to the impact of the decision on collective goals, the theory pro-

¹ See Brandt, 'Toward a Credible Form of Utilitarianism', in H. Castenada and G. Nakhnikian (eds.), *Morality and the Language of Conduct* (1963) 107.