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# Efficiency, Morality, and Rights: The Significance of Cleaning Up

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# COMMENT

## EFFICIENCY, MORALITY, AND RIGHTS: THE SIGNIFICANCE OF "CLEANING UP"

THOMAS MORAWETZ\*

### I. INTRODUCTION

The ultimate challenge in moral theory is to find a single criterion for moral judgment, a criterion that reconciles disparate moral intuitions and gives guidance in the solution of moral dilemmas. Such a criterion would have to be simultaneously descriptive and normative. It would have to fit and explain moral intuitions and at the same time represent a standard for correctness in moral judgment. Many contemporary writers despair of finding such a criterion and some argue that the task itself is impossible.<sup>1</sup> According to Lloyd Cohen, even Richard Posner fears to tread the high ground of moral metatheory in his original formulation of the wealth maximization criterion.<sup>2</sup>

Professor Cohen's article, *A Justification of Social Wealth Maximization as a Rights Based Ethical Theory*,<sup>3</sup> is therefore remarkably ambitious. It aims to accomplish several jobs, including the development of an all-encompassing moral metatheory, with brief and efficient arguments. The arguments are imaginative as well as efficient.

Professor Cohen's argument has several steps. (a) Social wealth maximization (as a moral criterion) does indeed fit our moral intuitions. (b) Social wealth maximization can also serve as an ultimate moral justification, one that explains our moral intuitions. (c) Contrary to general understanding, social wealth

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1. Among the most prominent and influential writers who have discussed this view are B. WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985) (especially chapters 2, 9, and 10); T. NAGEL, *THE VIEW FROM NOWHERE* (1986) (especially chapters 9-11); A. MACINTYRE, *AFTER VIRTUE* (1981) (chapters 1-5).

2. "Judge Posner's original formulation of this theory was not grounded on any fundamental moral justification. Rather, he argued that the correspondence between social wealth maximization and moral intuitions is an empirical fact . . ." Cohen, *A Justification of Social Wealth Maximization as a Rights-Based Ethical Theory*, 10 HARV. J.L. & PUB. POL'Y 411, 411 (1987). This is Lloyd Cohen's characterization of Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

3. *Supra* note 2.

maximization is a *rights*-based as well as a goal-based moral theory. This can be demonstrated by showing that the Golden Rule is in accord with the social wealth maximization theory. (d) Moral intuitions about so-called "cleaning up" examples illustrate the congruence between the Golden Rule and wealth maximization, and are generalizable to other moral intuitions. In Section II of this paper I shall look briefly at each of these claims to see what would be necessary to establish it and whether Professor Cohen succeeds in doing so.

In Section III I shall offer some more general observations about the kind of enterprise Professor Cohen undertakes. How does one set about offering a moral criterion and explaining moral reasoning? What counts as an explanation, and what are the data to be explained?

## II. WEALTH MAXIMIZATION AND RIGHTS

Professor Cohen is correct in thinking that the sharpest challenge to a theory of wealth maximization as a moral criterion is posed by the notion of rights.<sup>4</sup> In its most abstract form, the challenge is that the common foundation of *any* moral theory is respect for the needs and dignity of persons, that the *raison d'être* of the practice of morality is a commitment to the view that certain ways of treating persons are unacceptable, deserving of blame and condemnation.<sup>5</sup> This is characteristically expressed in the language of rights or entitlements. The notion of moral wrong, however, extends beyond violations of rights. Many ways of treating persons are morally criticizable even when they do not rise to the level of violations of rights. For example, one may be criticized morally as being inconsiderate, cowardly, selfish, and so on. These are moral criticisms, but they have little basis in any claim of right. Moreover, most ways of treating persons in a morally praiseworthy way go beyond observing their rights and entitlements. Kindness, generosity, and heroism are all positive moral attributes that involve supererogatory conduct on the part of the actor. A theory of rights, therefore, is not a general theory of morality.

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4. Cohen, *supra* note 2, at 415.

5. This has not always been the basic motivating conception of moral philosophy, and it can be criticized even within the constraints of modern philosophy as leaving little room for consideration of virtue and the well-lived life. These latter concerns were, in the conviction of many commentators, the focus of ancient moral philosophy.

A discussion of a "criterion for morality" must therefore begin by acknowledging that there are indefinitely many terms of moral evaluation, from such general terms as "good" and "bad" and "right" and "wrong" to such specific terms of praise and blame as "courageous," "generous," "thoughtless," and "vicious." Each term surely has its own criteria for use.<sup>6</sup> Professor Cohen, in his search for a criterion, regrettably gives no indication which of the disparate terms of moral discourse and judgment he is trying to analyze. One has to assume he is talking about "good" and "bad" or "praiseworthy" and "blameworthy" in general.<sup>7</sup> Thus, if wealth maximization were a general moral criterion, its congruence with intuitions about rights would involve only part of its scope.

(a) The first part of Professor Cohen's argument takes up a descriptive rather than a normative task. He defends the view that wealth maximization as a moral criterion fits our moral intuitions. In later parts of his article he argues not only that it fits, but also that it stands as a justification. The most straightforward way of demonstrating fit would be to take representative moral intuitions, in especially difficult counterexamples, and to show that the theory accommodates such counterexamples. Presumably anticipating that this is a potentially endless<sup>8</sup> and therefore inconclusive task, Professor Cohen does not even start. Instead he tries to establish fit in three indirect ways.

The first way rests heavily on Richard Posner's argument for wealth maximization as a moral criterion.<sup>9</sup> Judge Posner, as Professor Cohen represents him, argues that utilitarianism and Kantianism represent alternative ways of accounting for moral intuitions and that both fail badly. It is hard to see what this argument by Professor Cohen establishes because it is defective in many ways. For one thing, it rests on a caricature of utili-

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6. If this were not true, the terms would all be synonyms.

7. In fact it is hard to know what to say—and the relevant difficulties permeate the literature on morality and wealth maximization. It is rarely clear whether the supposed congruence is said to implicate all of moral reasoning or some specially important branch of it. If it is the latter, the boundaries of the moral analysis are hardly ever made clear.

8. One way, the characteristic way, of foreshortening the process is to demonstrate that difficult apparent counterexamples can be accommodated. Because he assumes congruence, Professor Cohen does not take this route.

9. See Posner, *supra* note 2, at 119-35. Judge Posner's discussion of utilitarianism and Kantianism is at *id.* at 111-19. My remarks throughout this Comment are not intended as an examination or critique of Judge Posner's article but only of Professor Cohen's rendering of it and of Professor Cohen's independent arguments.

tarianism, in which morality is held to equal the maximization of pleasure. Jeremy Bentham, to be sure, interpreted the maximization of pleasure as the highest good, but it is likely that by "pleasure" he meant something more like well-being.<sup>10</sup> No Twentieth Century defender of utilitarianism takes seriously the notion that pleasurable stimulation or arousal (the sense of "pleasure" with which Professor Cohen saddles utilitarianism<sup>11</sup>) is to be maximized.<sup>12</sup> Also, the Cohen-Posner characterization of Kantianism bears no resemblance to views held by Kant or his followers.<sup>13</sup> Moreover, the logic of Professor Cohen's argument is defective. Even if he could show that a non-caricatured form of utilitarianism or Kantianism is a defective representation of moral intuitions, this would not begin to imply that wealth maximization is less defective. This would be like saying that if a snow plow and a tractor are both defective tools for brain surgery, and if a meat cleaver is different from both a snow plow and a tractor, then a meat cleaver is a fit tool for brain surgery.<sup>14</sup>

Professor Cohen's second indirect way of establishing the fit between wealth maximization and moral intuitions is to argue that because wealth maximization produces results that fit

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10. For examples, see R. HARRISON, BENTHAM 106-94 (1983) (chapters 5-7).

11. See Cohen, *supra* note 2, at 413-14 & n.9.

12. See, e.g., A. SEN & B. WILLIAMS, UTILITARIANISM AND BEYOND (1982); R. G. FREY, UTILITY AND RIGHTS (1984); H. MILLER & W. WILLIAMS, THE LIMITS OF UTILITARIANISM (1982).

13. It is one thing to say that Kant does not satisfactorily address all modern questions about the distinction between acting and omitting to act, but it is something else to say that he believes that inaction is never culpable. Moreover, the notion of a categorical imperative, an imperative without exceptions, is implausible only if the imperative is crudely sketched (in the way that Judge Posner and Professor Cohen sketch it). The norms that one is able and willing to universalize as categorical imperatives may be of great complexity: The implications of the categorical imperative for lying and torturing are not simply that one is enjoined from lying and torturing *tout court*. Rather the categorical imperative implies that one is never justified in lying or torturing except in those circumstances in which one would accede to being the victim of lies and torture oneself. To be sure, Kant's treatment of examples is often misleading, but Judge Posner and Professor Cohen carry lack of charity in interpretation to an extreme. See discussions of Kant's ethics in B. AUNE, KANT'S THEORY OF MORALS (1979) (especially chapters II and III); KANT: A COLLECTION OF CRITICAL ESSAYS (R. Wolff 1967) (especially pages 211-338).

14. The missing (implausible) premise is that there are only three possible moral theories, utilitarianism, Kantianism, and wealth maximization theory. Not only is it implausible that they are the only three candidates, but also it is not at all clear that they are each put forth to address the same questions or the same phenomena. Thus, when Professor Cohen says "[t]herefore, it is at least in the class of potentially explanatory and informative moral theories," Cohen, *supra* note 2, at 415, he is using a process that involves a logical howler.

moral intuitions in *easy* cases, one can validly presume that it will produce satisfactory results in hard cases.<sup>15</sup> Again, there are three problems here. First, Professor Cohen gives no indication what he means by the distinction between hard and easy cases. Are easy cases ones about which persons feel strongly, or ones that are non-controversial (whether or not they generate strong feelings), or ones that illuminate wealth maximization particularly clearly?<sup>16</sup> Different answers to this question would place the analysis in very different lights. Second, what justifies Professor Cohen's premise that wealth maximization clearly fits the easy cases? A general right of assembly and free speech, in all situations that are not likely to provoke violence, is widely recognized as a basic moral right. Such a right prevails even in situations where the exercise of free speech can be shown (empirically) to frustrate the processes of free trade and free bargaining, even when such social protest "gums up" the works of the economy. Is this an easy case or not?<sup>17</sup> Third, the logic of the argument at this point is again defective. One can rarely infer that because a tool works in easy cases, it can therefore be counted on to work in hard cases. A defective tool may be just the sort that works only until it is severely tested—an oven that works fine for bread and casseroles may not be adequate for the occasional soufflé.

Finally, Professor Cohen's third point about fit is simply an appeal to authority. He contends that "[n]o critic has yet produced a successful refutation"<sup>18</sup> to the claim that moral intuitions fit the criterion of wealth maximization. Because Professor Cohen does not survey the very extensive literature that claims to do exactly that,<sup>19</sup> it is hard to know whether he is unacquainted with it or whether he merely fails to find it "con-

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15. *See id.* at 414-15.

16. By the first criterion (strong feelings) the plight of the homeless presents a easy moral case for public relief; by the second criterion (controversiality) the case may be hard or easy and by the third criterion a public policy of non-protectionism is an easy moral example, notwithstanding the fact that it is controversial and that some would regard it as not involving morality at all.

17. As I discuss below, Professor Cohen's attention to rights extends only to procedural rights like fair treatment and impartiality rather than substantive rights. His position on substantive rights is not clear at all.

18. Cohen, *supra* note 2, at 418 & n.26.

19. Professor Cohen suggests that no one has put forth interesting counter suggestions. There are, however, many attempts to do this. *See Privacy and Economics*, 12 GA. L. REV. 393 (1978) (symposium); *Symposium on Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980).

vincing." One prevailing theme of the critical literature is that distributional considerations are crucial to our moral intuitions and that the criterion of wealth maximization fails to take them into account. In other words, it is morally significant how the parties to a transaction are initially situated and whether their behavior is, for example, constrained by exigency or misperception.<sup>20</sup> A defender of a wealth maximization criterion must show how his theory takes their moral relevance into account or, alternatively, why they do not need to be taken into account.

This failure to show congruence between the wealth maximization criterion and moral intuitions weakens Professor Cohen's argument but is in fact tangential. On one hand, the failure can be offset by a showing that his "cleaning up" examples show congruence and are generalizable to other examples of moral intuitions. I shall consider this argument in subsection (d).<sup>21</sup> On the other hand, Professor Cohen's main concern is metaethical. He claims that wealth maximization is as much a rights-based as a goal-based theory, and it is to this claim that I must now turn.

(b) What is the particular conceptual difficulty involved in arguing that wealth maximization is rights-based? Why have writers such as Professor Dworkin<sup>22</sup> and others<sup>23</sup> resisted such a suggestion *ab initio*?

All rights-based theories have a common motivation. The motivation can be explained in terms of four facts. The first is that every individual, in principle, is vulnerable to harm by other individuals and by the state. The second fact is that the state, insofar as it involves a monopoly of power, can in principle deploy its power to minimize or at least alleviate harm to persons. The third fact is that the state, in a more general way,

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20. One pervasive difficulty in understanding the project of defending the wealth maximization criterion is in determining whether it is about decisions or transactions on the macroscopic or microscopic level. Professor Rawls is clearly concerned with setting general rules or constraints for society and his enterprise is clearly macroscopic. In fact he cautions his readers that his principles of justice are not relevant to individual bargains or other decisions. Professor Cohen makes no such distinction. With regard to the moral parameters of individual bargains, the constraints of exigency, mistake, and so on, are surely relevant. See J. RAWLS, A THEORY OF JUSTICE 3-117 (1971) (chapters 1 and 2).

21. See *infra* notes 38-42 and accompanying text.

22. R. DWORKIN, A MATTER OF PRINCIPLE 237-89 (1985) (part 4).

23. See *Privacy and Economics*, *supra* note 19; *Symposium on Efficiency as a Legal Concern*, *supra* note 19.



sets and maintains many of the conditions under which individuals live and may in doing so affect lives beneficially or harmfully. And, finally, the fourth fact is that in practice individuals will be variously situated, some in a position to take care of their needs and interests with their own resources and others in a position of vulnerability and actual need.

Any theory of rights will have two constraints, one concerned with the recognition of needs and with the maintenance of minimally acceptable well-being, and the other concerned with freedom and liberty and the optimal conditions in which individuals define and realize personal goals. These constraints allow room, of course, for an infinite array of theories, and Professor Rawls and Professor Dworkin offer two among many possible ways of conceptualizing these constraints and tensions between individuals and the state.<sup>24</sup> What any theory of rights cannot do, it seems to me, is to turn its back on these tensions and proceed as if they did not exist.

The most abstract yet simple criticism of a theory of wealth maximization is that it assumes away the tension by making two implausible assumptions. The first assumption is that in a system of wealth maximization all individuals will be more or less<sup>25</sup> optimally and equally situated to realize their preferences; the second is that one who is optimally situated to realize his preferences is thereby optimally situated to realize his rights. The first of these assumptions is one rejected by Professor Rawls and Professor Dworkin, among others. It involves, they argue, the fallacy that what benefits the collectivity necessarily benefits its individual members, the fallacy of regarding individuals as component and perhaps interchangeable parts of the whole.<sup>26</sup> The second assumption brings the entire analysis

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24. Professor Rawls's principles of justice are an attempt to distinguish morally justified from morally unjustified interventions by the state into the lives of persons. Only interventions that fit the principles of justice are justified. The strategy of seeking "reflective equilibrium" is the strategy of comparing intuitions with general principles and revising the principles until there is a match, until counterexamples are accommodated. See J. RAWLS, *supra* note 20, at 48-51. Professor Dworkin's derivation of rights from the principle of concern and respect for others is in some ways derivative from Professor Rawls and in other ways distinguishable. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 150-205 (1978) (chapters 6 and 7). Chapter 6 is an analysis of Professor Rawls's theory.

25. The underlying assumption may be that tinkering with the rules to eliminate inequities resulting from idiosyncratic situations will, on balance, only make things worse.

26. See J. RAWLS, *supra* note 20, at 23-28; R. DWORKIN, *supra* note 24, at 94-100.

within the domain of morality. In itself, a system of preference satisfaction is not a moral system. Once preference satisfaction is linked to rights, it assumes moral relevance.<sup>27</sup>

Where does Professor Cohen stand in regard to these assumptions? His *main* argument is neither, as we have already seen, a congruence argument (that moral intuitions are congruent with wealth maximization goals) nor an argument that the goals of the collectivity are the same as the goals of the individual members. Methodologically he begins with the individual rather than the collectivity. He is concerned to establish that from the individual's standpoint, wealth maximization as a personal principle of action and as a principle of decision-making for the collectivity coincides with his intuitions about what is moral. In other words, he does not try very hard to *show* that wealth maximization is simultaneously a personal principle of action and a principle of political or social or institutional decision-making. He presumes this and thus makes the same first assumption that, as we have seen, Professor Rawls, Professor Dworkin, and others reject and criticize.<sup>28</sup> Rather, he tries to buttress the second assumption, that for the individual wealth maximization as a principle of action is justified by moral intuitions and justifies them in turn.<sup>29</sup> In making this argument, he limits his palette to moral intuitions about rights.<sup>30</sup>

Professor Cohen thus sidesteps the most difficult problem about rights. If society (or the state) is not the individual writ large, if rights-talk arises only from the recognition that society (or the state) is an artificial entity that functions in part to mediate among conflicting individual projects and between the indi-

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27. Both Professor Rawls and Professor Dworkin do assume that preference satisfaction is in general to be respected and maximized by a system of morality. This is what in Professor Rawls's work motivates the hypothesis of the "original position" in which persons express their general preferences about the structure of institutions. See J. RAWLS, *supra* note 20, at 118-92 (chapter 3). Professor Dworkin's discussions of liberty are motivated by the desirability of a system in which persons are best able to realize preferences and goals. See R. DWORKIN, *supra* note 24, at 240-65 (chapters 10 and 11); R. DWORKIN, *supra* note 22, at 205-33 (part 3).

28. See *supra* note 24 and accompanying text.

29. Professor Cohen compares his own and Judge Posner's account of the strategy of reflective equilibrium with that used by Professor Rawls. He obscures the important differences. Professor Rawls is concerned with the mutual modifiability of intuitions and theoretical formulations in the light of reflective comparisons. Inherent in this process of reflection is relative uncertainty and unclarity about the emerging complex rules of justice. The norm of wealth maximization is not treated by Professor Cohen or Judge Posner as subject to reflective modifiability in the same way.

30. See *supra* notes 6-7 and accompanying text.

vidual and the state, then it is highly implausible that the same principles that guide the individual in decision-making should also guide the state. Is wealth maximization the principle that does and should guide the individual, or the principle that does and should guide public policy? Professor Cohen, following Judge Posner, appears at the beginning of his essay to be talking about public policy, and this is reinforced by his emphasis on rights, a notion usually generated by thinking about the individual and the state. On the other hand, virtually all of his arguments are about the way the individual conceives the aims and moral justification of his actions, and I am forced to assume that *that* is Professor Cohen's chief, if covert, concern.

(c) Professor Cohen tries to show that social wealth maximization is a *rights*-based moral theory in two ways, first by showing that intuitions about wealth maximization coincide with the Golden Rule, and second by showing that this coincidence is exemplified in "cleaning up" examples. I shall be concerned with the first point in this subsection.

The classic formulation of the Golden Rule is "Do unto others as you would have them do unto you."<sup>31</sup> On its face, the rule says nothing about rights. One might argue that it is tacitly about rights with the following reasoning. All accounts of value are, logically, either teleological-consequentialist—accounts that locate the value of an act in the value of the goals it is intended to achieve—or deontological—accounts that maintain that an act can have value in itself regardless of its consequences. The Golden Rule seems to be deontological: An act is valuable (or morally correct, or good) if it is done in the spirit of the Golden Rule regardless of its consequences. The concept of rights is also a deontological concept: The satisfaction of rights is good in itself. None of this shows however that the Golden Rule has anything to do with rights. All it shows is that both are deontological concepts. We must assume therefore that Professor Cohen is using a variant of the Golden Rule, perhaps "Others have a right to be treated by you as you would wish to be treated by them."<sup>32</sup>

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31. The most commonly cited formulations of the Golden Rule trace their origin to the Bible, *Matthew 7:12*.

32. Most commentators regard the Golden Rule as an account of the notion of moral goodness and moral considerateness in general. They would resist transformation of it into a rule about rights; the transformation is itself counterintuitive.

What could this reformulated rule mean? There seem to be three possibilities. The least plausible possibility is that, given one's particular and idiosyncratic wishes regarding the conduct of others, one has a duty to do similar things for them. If you want others to invite you to baseball games, you have a duty to invite them to baseball games (whether they like baseball or not). This is silly both because any sensible rule would make reference to the wishes of others and because it is hard to see how wishes can in themselves give rise to duties. The second possibility remedies at least the first of these two defects. It says, if you want others to satisfy your wishes, you have a duty to gratify their wishes. This formulation, like the first, seems to elevate what is at best a counsel of prudence ("If you want others to favor you, it would be wise to favor them") into a duty without any justification for doing so. The third possibility is the most plausible because it is the most general. It says that anyone who wishes to be treated fairly and without partiality by others has a duty to treat them fairly and without partiality. In this form, the Golden Rule surely makes sense as a basis of duties and rights. What are its implications?

The right to fair and impartial treatment is in some ways a very weak and a very special right. It is a formal right rather than a substantive right, such as the right to minimal subsistence, security, or free speech and assembly.<sup>33</sup> It simply says that whatever the governing rules are, they should be applied with regard to the prescribed criteria of decision rather than other, possibly arbitrary and irrelevant, criteria. *Any* rule can be applied fairly or unfairly.

Interpreted in this way, the Golden Rule and the right to fair and impartial treatment are compatible with seriously immoral conduct. The person who is willing to take his chances in a Hobbesian state of nature simply satisfies the Golden Rule by respecting a situation in which all are subject to the anarchy of a state of nature. The person who is willing to participate in a regimen of cruelty and exploitation satisfies the Rule by respecting the right of all to participate equally in mutual cruelty and exploitation. This observation has led commentators to say

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33. The distinction between substantive and formal rights is not always sharp. The formal right to impartial and fair treatment is sometimes said to represent the (putative) equal right of persons to respect and dignity. The latter right seems to bridge formal and substantive rights.

that Kant's categorical imperative is purely formal and empty of content, and that Kant must make substantive assumptions about desires and attitudes in order to generate a recognizably moral position.<sup>34</sup> Similarly Professor Rawls must make many assumptions about the dispositions of persons in the "original position" before he can generate rules of justice, and in making these assumptions he opens himself up to criticism.<sup>35</sup>

The implications of all this for Professor Cohen's argument is that, in appealing to the Golden Rule and to the putative rights that flow from it, he does not begin to touch on the violations of substantive rights that, according to critics, flow from a regime of wealth maximization. All he demonstrates is that the norm of wealth maximization should be applied fairly rather than unfairly. One may accept this conclusion and maintain that wealth maximization is incompatible with the recognition of substantive rights and therefore diverges from moral intuitions. Professor Cohen compares the generation of the norm of wealth maximization with the generation of principles of justice in Professor Rawls's work.<sup>36</sup> The differences are very important. The persons in Professor Cohen's or Judge Posner's equivalent to the "original position" are said to adhere only to the Golden Rule, only to the moral ideal of fair and impartial treatment. This intuition, as Professor Rawls recognizes,<sup>37</sup> cannot be treated as a full-fledged account of rights but only as the beginning of one. By assuming that he is dealing with a full and sturdy account of rights when he is not doing so, Professor Cohen makes his job of reconciling wealth maximization and rights much easier than it really is.

(d) Professor Cohen argues that so-called "cleaning up" examples show the coincidence of rights and wealth maximization as moral norms. He does this by parading them as instances of

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34. See Ebbinghaus, *Interpretation and Misinterpretation of the Categorical Imperative*, in KANT: A COLLECTION OF CRITICAL ESSAYS, *supra* note 13, at 211; Harrison, *Kant's Examples of the First Formulation of the Categorical Imperative*, in KANT: A COLLECTION OF CRITICAL ESSAYS, *supra* note 13, at 228; Kemp, *Kant's Examples of the Categorical Imperative*, in KANT: A COLLECTION OF CRITICAL ESSAYS, *supra* note 13, at 246.

35. See Daniels, *Equal Liberty and Unequal Worth of Liberty*, in READING RAWLS 253 (N. Daniels ed. 1974); Hart, *Rawls on Liberty and its Priority*, in *id.* at 230; Barber, *Justifying Justice: Problems of Psychology, Politics and Measurement in Rawls*, in *id.* at 292; Michelman, *Constitutional Welfare Rights and A Theory of Justice*, in *id.* at 319; Sen, *Rawls Versus Bentham: An Axiomatic Examination of the Price Distribution Problem*, in *id.* at 283; Miller, *Rawls and Marxism*, in *id.* at 206; Scanlon, *Rawls' Theory of Justice*, in *id.* at 169.

36. Cohen, *supra* note 2, at 417-20.

37. J. RAWLS, *supra* note 20, at 195-200.

the Golden Rule, using the Golden Rule (as we have seen) as a link between the concept of rights and wealth maximization, and claiming that "cleaning up" examples are generalizable to other moral intuitions. The claim of generalizability is crucial to his discussion.

Professor Cohen considers two examples of "cleaning up," the serial use of a bathroom and the serial use of a classroom blackboard. In both cases one may adopt either a rule that one should always clean up after use, giving the new user a clean facility, or that the new user should have the burden of cleaning up before use. One may also adopt no rule at all and leave the matter to personal preference. Professor Cohen contends that these examples show the coincidence of wealth maximization and moral intuitions about rights: Implementation of the Golden Rule—whereby each user has a duty to prepare the facility in the way he would wish it to be prepared—results in maximal preference satisfaction, and preference satisfaction is equivalent to wealth maximization.<sup>38</sup> There are several odd features of this argument.

(1) One peculiarity of the examples is that they seem to be situations in which most persons would not want to have rules and would not consider rights and duties to be relevant. In the blackboard example, perceptions of convenience and courtesy are so variable and the inconveniences so minor that any imposition of rules creating rights and duties would be more trouble than they would be worth. In the bathroom example, preferences may be stronger and failure to "clean up" may be blameworthy but there is the same disinclination to think in terms of rights and duties. I suspect that Professor Cohen is drawn to these examples because he thinks they demonstrate the relevance of fairness. What they really show is that fairness as a procedural *right* usually accompanies the assertion of substantive rights.<sup>39</sup>

(2) Although preference satisfaction is a factor in "cleaning up" examples, such examples are peculiarly ones in which gen-

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38. Cohen, *supra* note 2, at 428-31.

39. The procedural right to fair and impartial treatment should be distinguished from other procedural rights, for example the rights of those accused of crime as set down in the Fourth, Fifth, and Sixth Amendments of the United States Constitution. These rights are justified as a way of spelling out the constraints of fair treatment but they are a specific crystallization of those constraints. They are tied to the substantive right not to be deprived of liberty without due process.

eral preference satisfaction has nothing to do with wealth maximization. The paradigm of wealth maximization theory is the bargain between parties, a transaction conducted on the basis of perceived needs and preferences, with each party emerging from the transaction better off. The infinite series of such transactions produces wealth maximization. "Cleaning up" examples on the other hand are not bargains or transactions but serial solitary decisions, and they are decisions about returning part of one's environment to its *status quo ante* use. While each actor may have preferences with regard to cleaning up, it does not follow (in these examples, peculiarly) that the actor whose preferences have been satisfied therefore emerges from the process better off. These decisions involve system maintenance rather than any possible cumulation of benefits (or goods, or wealth).

(3) Two moral intuitions seem relevant to "cleaning up" examples. The first is that whatever rule is adopted should be applied fairly and equitably, without partiality. In other words, each party should respect the Golden Rule in this context. The second is that if one rule is generally perceived to be less onerous than another, the less onerous rule is to be adopted. Thus, if cleaning up after bathroom use is less objectionable or unpleasant than cleaning up before use, the first rule is the one to be chosen.

These two moral intuitions are so general that they can be generated by almost any moral examples at all. As we have already seen, they under-determine morality. They amount, respectively, to the intuition that a system of morality should be fair and impartial and the intuition that, other things being equal, a moral system should respect individual preferences and work to realize them. The first intuition is weak because fairness is only a formal constraint and all kinds of rules and procedures can be immoral substantively and still be fair.<sup>40</sup> The second intuition is weak for a different reason. A belief that a moral system must operate to produce preference satisfaction is subject to two qualifications by the nature of morality itself. For one thing individuals must be equally positioned to effect their preferences. Otherwise those who are better positioned,

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40. A confiscatory tax that deprives all persons of ninety percent of their earnings can be morally unjustifiable but fairly administered. A system of random torture in which victims are selected by lot may also be said to be fair.

those who have greater power and wealth *ab initio*, will be likely to exploit and victimize those who are relatively powerless. For another thing there is always the possibility of "false consciousness," of self-delusion. Preferences are to be honored only to the extent that they are likely to redound to the good of the actor. To be sure, most actors most of the time are the best judges of what is good for them, but that is a far cry from saying that on principle and conceptually all actors are the best judges and none are ever self-deluded.<sup>41</sup>

The major oddity of "cleaning up" examples is that relevant differences in power are hard to imagine<sup>42</sup> (because situations do not involve bargains or transactions) and preferences in these cases are unlikely to diverge from correct perceptions of benefit (because benefit in these cases amounts to convenience or inconvenience and that is a matter of subjective judgment). "Cleaning up" examples are thus poor vehicles for raising the deeper and most obvious moral objections to wealth maximization through preference satisfaction as a moral ideal.

It is hard to see how "cleaning up" examples can play a significant role in the kind of argument Professor Cohen claims to give. They have little, if anything, to do with rights or with wealth maximization. To the extent that they do have anything to do with the Golden Rule or with preference satisfaction, they exemplify certain obvious *necessary* conditions of moral behavior but they tell us nothing about what is *sufficient* for morality. And almost any other examples would do as well.

### III. ON THE GENERAL IDEA OF A JUSTIFICATION OF MORALITY

The general problem that Professor Cohen claims to be addressing is one of the most venerable and justifiably central issues of philosophy, that is to say, of human self-understanding. By way of exploring some methodological land-mines that lie buried in this well-trod ground, I shall comment briefly on two

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41. One underlying issue is whether paternalistic legislation is ruled out in principle or whether, on the other hand, paternalism is in most instances inadvisable because it interferes with well-grounded personal preferences. The second formulation is much easier to justify than the first. See, for example, essays in *PATERNALISM* (R. Sartorius ed. 1983).

42. It is necessary to make allowance for the handicapped, for example, who may find it especially difficult to "clean up." But apart from this incapacity all are likely to be equal in their capacity to do so. Although this kind of equality exists in cleaning up situations, it is not to be expected in more complex settings, particularly those that involve bargaining.



important methodological distinctions. Each distinction deserves much more generous treatment.

A. *Description and Justification—The Use of Examples*

What puts a commentator or theorist in position to say how we *should* engage in moral judgment? In other words, is there such a thing as “normative metaethics?” Presumably the first job is descriptive: Moral judgment is a phenomenon on many levels, on the level of action, emotion and feeling, and language. Persons act morally (or not), have moral feelings, and make moral judgments about their actions and those of others. It is a difficult job to get the description of moral judgment right because it involves (1) uncovering the criteria of use for many disparate moral terms, (2) determining the relationships among terms like “the right,” “the good,” “virtue,” and so on, (3) seeing the ways in which some uses are consistent or controversial, (4) inquiring into the relationship of judgment and action, and (5) exploring the ways in which feelings shape moral action and judgment, the ways in which feelings are determined by human nature and by idiosyncratic experience, and related issues. There is an additional conceptual gulf between public and private morality. The acts of the state, in their moral significance, are not necessarily to be seen as the acts of individuals writ large. The state dispenses justice in a different way from individuals (if individuals dispense justice at all) and the state makes possible the recognition of rights in a way that is literally inconceivable in the unorganized collectivity of persons. All of this is the project of descriptive metaethics.

We speak of acts being justified morally (or justified in other ways). We make judgments that use the term “justification.” But what could we possibly mean by saying that the system of moral judgment as a whole is justified or not? What could we possibly be using as a criterion, as a measure? How do we “judge” judgment? At best we can say that the system of judgments has within it inconsistencies. If consistency is a norm, a logical desideratum, then we can judge an inconsistent system as flawed by that standard.

I am not certain whether Professor Cohen thinks he has offered a justification for the system of moral judgment. Nor am I clear about whether he thinks that wealth maximization is the sort of external consideration, a fulcrum, that can be used to

move or reform the system of moral judgment as a whole. It is not even clear whether he thinks that reform is needed. He tells us first that moral intuitions coincide with wealth maximization as an ultimate norm and that there are no counterexamples. If this is so, then he is simply making explicit what has been implicit in moral judgment. I have tried to argue that the case for coincidence is never made and that the proposition is inherently implausible. Beyond this, it is clear that Professor Cohen thinks some kind of justification for the system of moral judgment, something beyond description, is called for and that he has given it. I do not understand what this job of "normative metaethics" is in principle and therefore I do not understand Professor Cohen's attempt to carry it out.

### B. *Goal-Based and Rights-Based Morality*

There is an important asymmetry between goal-based and rights-based accounts of morality, or more generally between teleological and deontological moral theories. Any theorist must begin with certain intuitions about what is good and right. These intuitions are the *explananda*, the things to be explained. An account that invokes goals is an *explanans*, an explanation of the intuitions. The explanation may or may not succeed. What is in question is whether moral intuitions do or do not come together under a particular goal or set of goals. Does all moral conduct involve the pursuit of happiness, or are some pursuits of happiness immoral? Is all wealth maximizing conduct moral, or are some instances immoral? And so on. The idea that some acts are moral in themselves regardless of whether they involve the pursuit of the hypothesized goal is the residual idea we are left with when the explanation in terms of goals fails. Thus a deontological theory is not a separate kind of explanation; it is left over when a teleological explanation is defeated by examples.

Professor Cohen's disdain for serious consideration of examples suggests that he thinks goal-based theories in general and wealth maximization in particular are more easily defended and intuitively more obvious than in fact they are. In addition, the attempt to show that they do not violate our intuitions about rights, if it were carried out successfully, would not show that they are in fact "rights-based," only that there is no friction between theories of the two kinds. At the same time, Professor

Cohen's conception of what we mean by "rights" is unacceptably narrow, extending at most to a timid representation of a right to fairness. The job he takes upon himself is thus hardly begun.

