

1986

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Recommended Citation

Morawetz, Thomas, "Persons without History: Liberal Theory and Human Experience" (1986). *Faculty Articles and Papers*. 291.
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Citation: 66 B.U. L. Rev. 1013 1986



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PERSONS WITHOUT HISTORY: LIBERAL THEORY AND HUMAN EXPERIENCE*

THOMAS MORAWETZ†

For some time and from many standpoints liberalism has been under seige. It is attacked on both practical and philosophical levels. The last twenty years have seen the partial eclipse of the liberal Democratic agenda and the simultaneous erosion of the political label "liberal" as a term of confident self-regard. Ironically, the same period has seen a revival of political theory in general and of liberal theory in particular.¹ The relationship between liberal practice and theory is complex. Philosophic liberalism cuts across the boundaries of various practical political agendas; similarly, the practice of modern liberal politicians is rooted in various political theories. Certainly liberal theory is not coextensive with the current liberal political agenda.²

I shall consider whether liberal theory rests on a conception of experience that is inconsistent with human nature. I am concerned with the implications of the notion that liberal theory requires governmental neutrality with regard

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¹ For affirmations and reformulations of liberal theory, see B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) [hereinafter R. DWORKIN, *RIGHTS*]; R. NOZICK, *ANARCHY, STATE AND UTOPIA* (1974); J. RAWLS, *A THEORY OF JUSTICE* (1971); Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 113 (S. Hampshire ed. 1978) [hereinafter Dworkin, *Liberalism*]. For a comparison of Dworkin's position to that of Rawls and Nozick, see Dworkin & Magee, *Three Concepts of Liberalism*, *NEW REPUBLIC*, April 14, 1979, at 41. For critiques of liberalism, see S. HOOK, *THE PARADOXES OF FREEDOM* (1962); A. MACINTYRE, *AFTER VIRTUE* (1981); H. MARCUSE, *ONE DIMENSIONAL MAN* (1961); M. OAKESHOTT, *RATIONALISM IN POLITICS* (1967); R. WOLFF, *THE POVERTY OF LIBERALISM* (1968). For one of the more sweeping critiques of liberalism, see R. UNGER, *KNOWLEDGE AND POLITICS* (1975) (identifying liberalism with the underlying psychological, political, and epistemological strategies of modern philosophy since Descartes). For a narrower analysis that in part parallels the arguments of this article, see Galston, *Defending Liberalism*, 76 *AM. POL. SCI. REV.* 621 (1982).

² I discuss the relationship between liberal theory and practice in Part VI. See also Galston, *supra* note 1, at 627.

to conceptions of the good life and conceptions of how persons ought to live their lives. This notion is defended as the heart of liberalism by some of its most thoughtful and rigorous proponents.³ Likewise, this idea is the primary target of liberalism's most influential critics.⁴

In Parts I and II I explain the relationship between political and moral neutrality. The requirement that government be neutral with regard to conceptions of the good life has two bases. One is the conviction that any institutional preference is illegitimate because it rests on an illegitimate moral judgment. Judgments about the superiority or inferiority of ways of life are, in this view, unjustifiable in principle. The illegitimacy of the moral judgment infects the consequent political judgment. A second basis for the neutrality requirement is that, even if moral judgments about ways of life can be justified, any institutional preference is illegitimate because of the nature of institutional constraint and power. Private moral positions should not, in this view, be translated into institutional policies. In Part I I proffer evidence that liberal theory is based on the first of these arguments. In Part II I evaluate that evidence by drawing more clearly the distinction between the two views.

Part III is a critique of the notion of moral neutrality as the basis for liberalism. The examination unavoidably raises epistemological questions. What do we know about human experience and how do we know it? Are political and other judgments grounded in common sense or in the more formalized learning of the social sciences? In what way is the social and cultural self-understanding of man relevant to the liberal project and to political and moral neutrality? I argue that these questions, however intractable, must be raised if the foundations of liberal theory are to be understood.

In Part IV I return to the alternative bases of liberal theory and political neutrality to consider two special, but flawed, arguments about institutional morality. One argument insists that political neutrality is mandated by equality. A second argument rests on the possibility of institutional abuse. I show that the first argument is incoherent and the second, while coherent, mandates something less than political neutrality.

In Part V I use my examination of liberal theory to illuminate the concept of freedom. I try to clarify the relationship between negative and positive freedom and examine the role that political and moral neutrality plays in this debate. In Part VI I summarize my conclusions about the relationship between liberal theory and practice and the role of institutional neutrality in the liberal political agenda.

³ See Dworkin, *Liberalism*, *supra* note 1, at 127; J. RAWLS, *supra* note 1, at 446-52.

⁴ See Galston, *supra* note 1, at 621-22; see also "Between Utility and Rights" and "Rawls on Liberty and Its Priority" in H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 148-247 (1983).

I. INSTITUTIONAL NEUTRALITY AND HUMAN NATURE

A. Rawls, Dworkin and Neutrality

John Rawls and Ronald Dworkin, two of liberalism's most thoughtful and influential contemporary exponents, rely on the notion of institutional neutrality as a basis for liberal theory.⁵ Of course, any attempt to identify liberalism with contemporary writers, let alone with just two writers of any period, must run the gauntlet of predictable criticisms. Even the assumption that Rawls and Dworkin share a single theory demands more qualifications than I can set forth.

Rawls and Dworkin do not offer a theory of human nature.⁶ They claim to be skeptical of the possibility of finding a determinate theory of human nature;⁷ for them liberalism is the political theory that best accommodates such disquietude.⁸ Their explicit concern is the moral justification of political and legal constraint.⁹ When does constraint constitute just, fair, or respectful treatment? What kinds of constraint are compatible with diversity in pursuits of the good life?¹⁰ Their central moral concern mandates that persons be equally well-positioned in conceiving and carrying out their particular plans of life.¹¹

Under this view of institutional neutrality, liberty is a political value with a

⁵ See generally Dworkin, *Why Liberals Should Believe in Equality*, N.Y. REV. BOOKS, Feb. 3, 1983, at 3 (insisting on moral neutrality only to the degree required by the notion of equality); Dworkin, *What Liberalism Isn't*, N.Y. REV. BOOKS, Jan. 20, 1983, at 47; Dworkin, *What Is Equality*, 10 PHIL. & PUB. AFF. 186 (1981) (discussing distributional equality and theories of equal resources and welfare); J. RAWLS, *supra* note 1, at 114.

⁶ See *infra* text following note 32, where I distinguish between "thick" and "thin" theories of human nature.

⁷ See *infra* Part II.

⁸ In Parts II and III I explain and criticize the dependence of the liberal account of neutrality on moral skepticism. In Part V I argue that Dworkin, among others, tries to disassociate liberal neutrality from moral skepticism. Most liberal neutralists do not believe that political activity, as opposed to political abstinence, is necessary for the full realization of human potential. But what are the standards of human potential, and how fully realized must a life be before it can be encompassed by a determinate theory? I shall assume that a theory is determinate if it yields standards for judging whether others are living well or badly. I will leave open the question of whether a certain degree of moral responsiveness is a necessary part of living well.

⁹ See, e.g., R. DWORKIN, *RIGHTS*, *supra* note 1, at 272-75; J. RAWLS, *supra* note 1, at 202.

¹⁰ I have some reservations about the possible interpretations of the phrase "the good life." I wish it to connote shared intuitions about ways of living, particularly about what constitutes health and sickness, success and failure, and wisdom and folly.

¹¹ See R. DWORKIN, *supra* note 1, at 272-78; J. RAWLS, *supra* note 1, at 302.

distinctive role; liberty may be limited for its own sake, but for no other reason.¹² For example, when Rawls says that the right is prior to the good,¹³ he means that a particular plan of life is morally justifiable if it is constrained by principles of justice under which everyone is equally well-positioned to realize life plans within the context of certain basic liberties. Thus, the first principle of justice is that "each person has an equal right to the most extensive system of basic liberties compatible with a similar system for all."¹⁴ Dworkin's similar intuition is that the dispensation of political and legal rights must flow from government's equal respect and concern for individuals. Such rights must secure a system in which each person is positioned to realize the set of personal preferences that constitutes his or her individual conception of the good life.¹⁵

B. *A Closer Look at Neutrality*

Three dimensions of these views need further elaboration. First, the distinctive role of liberty in current liberal theory is illuminated by the tension between liberty and other values. Second, the neutralist account of liberalism may be explained as a critical rejection of utilitarianism. And third, the neutralist account implies an untenable view of human nature.

(1) Certainly any treatment of institutional neutrality must address the inevitable clash between the value of liberty and other conflicting values. The perennial balancing questions over conflicting exercises of liberty illustrate this point. For example, conflicts often arise between the freedom to hold and use property and freedom of expression. (Consider, for example, speechmaking or pamphleteering on the grounds of a private university or shopping mall.¹⁶) In addition, any treatment of liberty must distinguish between unconstrained actions that are morally justifiable and those that are not. This second point is illustrated simply by the very existence of criminal law, which condemns certain unconstrained actions as illegitimate uses of liberty.¹⁷

¹² See H.L.A. HART, *supra* note 4, at 232-38; J. RAWLS, *supra* note 1, at 60-65.

¹³ J. RAWLS, *supra* note 1, at 446-52 (saying that considerations of right are prior to considerations of the good is a way of saying justice is prior to utility).

¹⁴ *Id.* at 302.

¹⁵ See Dworkin, *Liberalism*, *supra* note 1, at 127-28.

¹⁶ *E.g.*, *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (holding that state protected right to petition and leaflet on private shopping mall property does not infringe on property rights under the taking clause of the fifth amendment); *Cologne v. Westfarms Associates*, 192 Conn. 48, 469 A.2d 1201 (1984) (holding that state constitution permits political advocacy group to distribute leaflets on private shopping mall grounds).

¹⁷ This can be said about civil law as well. The criteria for criminalization are controversial in two ways. Controversies can easily arise over what conduct should be forbidden. In addition, there can be controversy over what it is that makes criminal acts criminal, i.e., what general feature (harm?) they have in common.

A theory of liberty can treat such balancing dilemmas in one of two ways. First, liberty can be regarded as an instrumental value, its significance in a particular act dependent on the significance of the end being pursued by that act. Significant and protectable ends might include security, enlightenment, and, in some instances, pleasure. The second approach, that chosen by Dworkin and Rawls, takes liberty as an independent value, significant even if we do not take into account the significance of other values or ends. Indeed, under their approach, liberty is an independent value precisely *because we* lack knowledge of the significance of other values.

In this second view, justifications for limiting or qualifying liberty must be framed by an appeal to liberty itself.¹⁸ According to Dworkin, rights are not to be understood and justified from an insight of the good life or from any hierarchy of values.¹⁹ Rather, they are justified by equal respect for individual lives and life plans. Such respect demands a procedure that heeds personal preferences (A's conception of living well for himself), but not external preferences (A's conception of how B should live).²⁰ Thus, equal respect really consists of maximizing the realization of each person's personal preferences to the extent possible without encroaching on others' realization of their life plans.

Rawls embraces a similar conception of liberty. The principle of maximizing liberties²¹ has basic and constant priority over all other principles of justice. This means that no increment in other values—general security or welfare, for example—can justify a diminution of equally distributed basic liberties.²²

Why do Rawls and Dworkin regard liberty this way? Their shared intuition

¹⁸ See, e.g., H.L.A. HART, *supra* note 4, at 208-21. I agree with Hart's interpretation of Dworkin. I am uncertain about the relationship between Dworkin's discussion of external and personal preferences and his discussion of policies in legislative decisionmaking. By properly determining and effecting policies, legislators are giving political voice to external preferences.

¹⁹ Dworkin, *Liberalism*, *supra* note 1, at 128-40.

²⁰ For a critique of this distinction, see H.L.A. HART, *supra* note 4, at 208-21; see also Nickel, *Dworkin on the Nature and Consequences of Rights*, 11 GA. L. REV. 1115, 1125 (1977) (critiquing Dworkin's theory of external preferences); Richards, *Rules, Policies, and Neutral Principles: The Search for Legitimacy in Common Law and Controversial Adjudication*, 11 GA. L. REV. 1069, 1090 (1977) (arguing that the justification of principles, unlike social rules, need not depend on group acceptance).

²¹ See J. RAWLS, *supra* note 1, at 195-257 (chapter IV); H.L.A. HART, *supra* note 4, at 226-32. Hart's discussion of the distinction between liberty and basic principles is very helpful. See also J. RAWLS, *supra* note 1, at 61 (Rawls's initial account of the notion of basic liberties).

²² See J. RAWLS, *supra* note 1, at 195-257 (chapter IV); H.L.A. HART, *supra* note 4, at 226-32. Hart's discussion points out complexities and subtleties in Rawls's argument that I do not consider here.

is that no one way of living deserves special moral preference in the institutional fabric of society. Any such assignment would be arbitrary and in some sense discriminatory.²³ In developing this conception of liberty and neutrality Rawls and Dworkin presuppose that there are two levels of theory. The first level is the attempt to describe the good life, to assign a moral preference to one way of living. For Rawls and Dworkin, no such institutional preference can be justified; all preferences are equally worthy of respect. At the second level of theory is the justifiable preference for a system that maximizes the realization of life plans. Dworkin repeatedly says that the core of liberalism is that "government must be neutral on what might be called the question of the good life."²⁴ In what follows I question their distinction between these two levels of theory.²⁵

(2) The fundamental agreement between Rawls and Dworkin on the special role of liberty helps us locate their account of liberalism on the map of moral and political analyses. In particular it helps us understand their shared rejection of utilitarianism. It is important to appreciate both what links them to utilitarianism and what in it they reject.

Liberal theorists criticize utilitarianism for not taking seriously the individual's own moral importance.²⁶ The utilitarian's justification of action is the collective common good. The welfare of any particular individual may in principle be overridden for a sufficiently great benefit to the community. In particular, each exercise of liberty or freedom is to be weighed against other constituents of the common good. In utilitarianism, liberty does not have constant priority as it does in Rawls's theory.²⁷ Similarly, Dworkin's notion of equal respect is intended as a corrective of the utilitarian "mistake."²⁸ He attempts to explain the moral significance of individual choices and to refer to the requisite conditions for melding conflicting life plans. At this level of criticism, liberalism claims to address utilitarianism's failings.²⁹

²³ See *supra* text accompanying notes 38-40.

²⁴ Dworkin, *Liberalism*, *supra* note 1, at 127.

²⁵ See *infra* Parts II, III and IV.

²⁶ See R. DWORKIN, *RIGHTS*, *supra* note 1, at 94-100; J. RAWLS, *supra* note 1, at 22-27.

²⁷ Compare J. RAWLS, *supra* note 1, at § 82 (stating that liberty takes priority in ideal circumstances, although urgent material acquisitions can have some priority in nonideal circumstances) with J. MILL, *ON LIBERTY* 125-27 (1891) (arguing that society is justified in enforcing upon each citizen a proportionate share of the labor needed to free society from injury).

²⁸ R. DWORKIN, *RIGHTS*, *supra* note 1, at 199 (violations of human dignity, for example, are said to have no place in a utilitarian account).

²⁹ I am not suggesting that the utilitarian cannot reply effectively to the liberal's criticisms. Utilitarian writers have busied themselves with replies to Rawls and Dworkin and with refinements to utilitarianism. See generally R. BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* 214 (1979) (discussing the interplay between rational choice and utilitarianism); Sen, *Rawls Versus Bentham: An Axiomatic Ex-*

None of this can obscure the shared dimensions of this version of liberal theory and utilitarianism. Both claim to be neutral with regard to differing conceptions of the good life. Both identify living well with the realization of life plans, whatever they may be. And each theory seems to have an arbitrary stopping point. Liberal theory rests with the intuition that if no preference can be justified, government must dispense rights so that all the governed are equally well situated to realize their individual life plans. Utilitarian theory rests with the intuition that if no preference can be justified, governments are required to secure the optimal mix of collective satisfactions.³⁰ Both intuitions, though not obviously untenable, are decidedly incomplete. What does it mean for the liberal to say that persons should be equally well situated? Should the content of the life plan be taken into account in determining whether a person is situated as well as others? For example, should a life plan that is evidently the product of self-delusion give rise to an inference that the chooser is not well situated and that the government is obliged to alter his circumstances? The liberal theorist would surely resist this kind of intervention, but it is not clear what theoretical adjustments he would have to make to accommodate this reservation. A utilitarian's response to this problem, on the other hand, would be to decide whether intervention would optimize the mix of collective satisfactions or, more simply, whether intervention would make society as a whole better or worse off. This too is an elusive task.

(3) There are several ways of characterizing the distinction between those theorists that are and those that are not neutral with regard to a conception of the good life. Dworkin, for example, identifies these respective poles unpersuasively with liberalism and conservatism.³¹ But a theory that is not neutral (one that commends a particular view of the good life) may be radical

amination of the Pure Distribution Problem, in *READING RAWLS* 283 (N. Daniels ed. 1974) (a comparison of the decision rules yielded by the Rawlsian conception of justice and by classical utilitarianism).

³⁰ For a discussion of utilitarianism as a maximizing theory, see Marshall, *Egalitarianism and the General Happiness*, in *THE LIMITS OF UTILITARIANISM* 35 (H. Miller & W. Williams eds. 1982); see also S. SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* 29 (1982) (arguing for a utilitarian conception of the collective good that provides a standard by which "some human interests can be judged more important than others").

³¹ See Dworkin, *Liberalism*, *supra* note 1, at 128. Dworkin seems confused about the nature of conservatism. In his discussion of the conservative's attitude toward a market economy, he equates the dispositions of the utilitarian with those of the conservative. The utilitarian would favor a market economy but the conservative might well constrain it. *Id.* at 130. Dworkin undercuts his own position when he suggests that neutral principles can equalize the unequal opportunities available to individuals when seeking to realize their life plans. *Id.* at 132-33. It is unclear why the methods that determine when individuals have unequal opportunities are not the same methods that yield information about personal interests.

or revolutionary rather than conservative. And a conservative theorist may in certain ways espouse neutralism. In purporting to reject conservatism generally, Dworkin rejects only the special strain of conservatism that treats any consensus developed over time as meriting perpetuation *because* it is the received tradition. This particular type of conservative theory is indeed undermined by the insight that traditions can be the repository of prejudice and inhumanity as well as of wisdom.³²

Another way of characterizing the distinction is as follows. Liberal theorists who offer a theoretical defense of neutrality characteristically rely on what I call a "thin" theory of human nature. Conversely, critics of such theorists can be said to rely on a "thick" theory. A thin theory is committed only to the notion of persons as framers of a conception of the good life, as loci of arbitrary preferences. Both liberals and utilitarians hold such a thin theory. Living well, in this view, means being in a position to choose and to satisfy one's choices. (The liberal distinguishes himself from the utilitarian by drawing different implications from the thin theory for the special place of liberty among values.) A thick theory, on the other hand, requires substantive standards for what it is to live well.

Having now identified some marks of the liberal theorist's concept of human nature and experience, with its emphasis on individuals as choosers of life plans, I shall argue in Part II that this concept governs moral as well as political judgment. The liberal theorists will be seen to offer a form of moral skepticism. In Part III I criticize the concept of human nature and experience underlying this form of moral skepticism.

II. NEUTRALITY AND MORAL SKEPTICISM

The liberal theory of neutrality may be motivated by either political or moral skepticism, two quite different rationales. Political skepticism questions the trustworthiness of governments and government officials and is not a theory of human nature per se. Political skeptics hold that if governments are allowed to allocate rights favoring a particular way of living, governments will abuse that power. Similarly, if persons are allowed political expression of their opinions about how others should live, they too will abuse that power.³³ Accordingly, we cannot allow political institutions or

³² See R. DWORKIN, *RIGHTS*, *supra* note 1, 248-53.

³³ I do not consider whether Dworkin intends his strictures to apply to the decisions of legislators as well as judges and to citizens as well as officials. *See id.* at 89-90. Dworkin implies that judges, but not legislators, act improperly when they employ a conception of society's interest as a whole (such as setting policy rather than deciding on the basis of principle). Yet when Dworkin revises or refines this distinction, and condemns the expression of external preferences, he discusses legislators, citizens, and judges as actors in political roles.

citizens as political actors to favor a particular view of the good life. The possibility of coercion and abuse of those with different views of the good life is too strong.³⁴ The choice seems to be between limiting official power, on the assumption that officials cannot moderate themselves, and limiting the options of the governed, on the assumption that they might choose badly. The political skeptic opts for the former. In this light, the agenda of so-called political liberals fits liberal theory badly. The minimal role political skeptics allow government is more easily fitted to a conservative agenda.³⁵

Whatever its merits, however, political skepticism cannot explain the position of Rawls and Dworkin. Political skepticism is an element of a remedial or non-ideal theory of just government, not an element of an ideal theory. Such skepticism anticipates political failure and tries to prevent it. Rawls's theory, though, is explicitly non-remedial.³⁶ For Rawls, liberty has constant priority over other values, not for prophylactic reasons, but because of the just circumstances of political association.

Similarly, political skepticism is not what motivates Dworkin. Were he a political skeptic he would be obliged to investigate the line between the use and abuse of relevant knowledge about living well, obliged to distinguish benign from malign external preferences. But he does not do so. To the contrary, Dworkin wants to neutralize all effects of external preferences: all use is abuse.³⁷

Thus, the form of liberalism found in Rawls and Dworkin is grounded not on political skepticism but on moral skepticism.³⁸ Liberals generally deny that the criteria of the good life can ever be known. This is a view with a long pedigree, and I can do no more here than evoke the more familiar elements of the argument. One venerable basis is the so-called "is-ought" dilemma,

³⁴ See J. MILL, *supra* note 27, at 29-39. See also R. WOLFF, *supra* note 1, at 19-21 (a lucid discussion of the ways in which Mill's position has been used to support both welfare state liberalism and libertarianism).

³⁵ Certainly the modern welfare state offers up a rich set of questions requiring decision. Society must decide which aspects of human nature engender good citizenship and therefore deserve encouragement.

³⁶ See J. RAWLS, *supra* note 1, at 8-11 (analyzing the concept of social justice, not the ways it can be achieved in ongoing, imperfectly just, societies).

³⁷ See R. DWORKIN, *RIGHTS*, *supra* note 1, at 234-48; Dworkin, *Liberalism*, *supra* note 1, at 134. Clearly Dworkin accepts this conclusion, which seems inherent in the definition of personal and external preferences.

³⁸ Dworkin argues that he is not a skeptic: "Liberalism cannot be based on skepticism. Its constructive morality provides that human beings must be treated as equals by their government, not because there is no right and wrong in political morality, but because that is what is right." Dworkin, *Liberalism*, *supra* note 1, at 142. It should be clear that this does not answer the critic's charge that (a) any meaningful understanding of equal treatment must involve judgments about original opportunity, and (b) such judgments involve a determination of others' interests in such a way that preferences (life plans) are not determinative of interests.

which involves the claim that there is an unbridgeable gap between descriptive and normative judgments.³⁹ No description of the world or of experience can yield conclusions about what persons ought to do, particularly about how they ought to live their lives. To be sure, a moral skeptic concedes that we can investigate what makes people happy, what preferences people tend to have, and what their bodily needs are. But this investigation cannot determine whether persons ought to seek happiness (or how they ought to seek it), whether they ought to satisfy preferences (or which preferences they ought to satisfy), or whether they ought to be mindful of bodily needs.

It follows that man's accumulated knowledge is irrelevant to any conclusion about what persons ought to do to achieve the good life. Is the good life grounded in self-denial or self-indulgence? Perhaps one could decide this if one could uncover a distinctive human function, just as one can conclude that one has a good car in the light of the distinctive function of cars. But persons are not artifacts like cars and, it is said, one cannot claim a distinctive function for human beings.⁴⁰

To summarize, the fundamental maxim of liberal theory as moral skepticism is that autonomy (the realization of individual identity)⁴¹ consists of first, being able to act according to one's values, second, being the author of a life plan, and third, being aware that one is the author of such a plan, that one has this special kind of liberty. What distinguishes moral skepticism at this point is the view that no normative judgments can be made about particular life plans because there is no critical standpoint for evaluating

³⁹ For the traditional source of this argument, see D. Hume, *Treatise of Human Nature*, in 2 THE PHILOSOPHICAL WORKS 245-46 (T. Green & T. Grose eds. 1964). See also MacIntyre, *Hume on "is" and "ought"*, in THE IS-UGHT QUESTION 36, 37 (W. Hudson ed. 1969) ("The standard interpretation [argues that] . . . Hume [is] asserting . . . that no set of non-moral premises can entail a moral conclusion."). Twentieth-century ethicists generally accepting Hume's argument include R. HARE, LANGUAGE OF MORALS 29, 44 (1952); P. NOWELL-SMITH, ETHICS 36-38 (1954); and A. PRIOR, LOGIC AND THE BASIS OF ETHICS 32-33 (1949).

⁴⁰ Attempts to theorize about the function of individuals (and the good life) are likely to find methodological support in Aristotle. See R. SULLIVAN, MORALITY AND THE GOOD LIFE: A COMMENTARY ON ARISTOTLE'S NICOMACHEAN ETHICS 28-33 (1977) (explaining Aristotle's analysis of the components of human action). But Aristotle is not the major naturalist targeted by Hume and others who employ the "is-ought" argument.

⁴¹ Some of the assumptions in the Humean tradition of British empiricism parallel those of twentieth-century European existentialism. For example, in J. SARTRE, NAUSEA (1949) and A. CAMUS, THE STRANGER (1942), the overarching preoccupation is with radical freedom, the freedom to create through one's own choices whatever moral universe there can be. In addition, one of Kant's major themes is the individual's liberation from a personal history and submission to freely chosen rules and principles. Kant is of course a major influence on Rawls. See generally I. KANT, CRITIQUE OF PRACTICAL REASON 45 (C. Beck trans. 1956).

them. Values exist within life plans, but life plans as a whole cannot be ranked or judged by appeal to them. The implementation of external value preferences, views about how others should live, are seen as usurpations of personal autonomy.

The moral skepticism implicit in Rawls and Dworkin, which is at the heart of modern liberalism, stands in stark contrast to a long tradition of liberal thought. John Stuart Mill, the paradigmatic traditional liberal theorist, was essentially a political skeptic.⁴² For him, critical standpoints for making moral judgments did exist. But Mill believed that the resulting models of the good life should not be embodied in the rules of political association.⁴³ Such rules, justified as being for the good of others, may be attacked as paternalistic.

III. A CRITIQUE OF MORAL NEUTRALITY AND MORAL SKEPTICISM

A. *Knowledge About Values*

Rawls and Dworkin do not claim to be moral skeptics. My suggestion that they are moral skeptics despite themselves is based on what is missing from their work as much as on what is there. For a non-skeptic, it is possible to know the criteria for living well and successfully. Obtaining such knowledge undercuts moral neutrality by undermining the notion that all life plans are equally worthy of respect and that equal respect of persons entails equal regard for their capacities as autonomous and self-conscious choosers of life plans. I shall consider how an argument for such knowledge can be made and what its (superable) obstacles are.

More than a quarter of a century ago, H.L.A. Hart, following David Hume,⁴⁴ referred to the minimal content of natural law, those few universal features of social experience that could be expected to shape the basic content of virtually all legal systems.⁴⁵ Predictably, social experience universally recognizes and responds to such needs as food, shelter, and security.⁴⁶ Hart's list was hardly an advance over the list Hume compiled 200

⁴² The interpretation of Mill on this matter is controversial. Chapter Two of *ON LIBERTY*, *supra* note 27, is largely given over to a description of the ways in which governments have abused their power over individuals and a warning that they are generally likely to do so. In Chapter Four, on the other hand, Mill implies that individuals are typically the best judges of their own interest. But throughout the entire discussion he never takes the position of a moral skeptic.

⁴³ See J. MILL, *supra* note 27, at 125-33.

⁴⁴ D. Hume, *supra* note 39, at § 2.

⁴⁵ See H.L.A. HART, *THE CONCEPT OF LAW* 189-95 (1961). Hart appears to consider it a virtue of his account that the minimal content of natural law rests on a truism about human nature. It is difficult to see why more sophisticated and controversial claims about human nature (drawn from psychology, anthropology, etc.) might not also be candidates for foundational theories.

⁴⁶ *Id.*

years earlier. It selected only timeless, uncontroversial, and self-evident features of experience. Yet if these features would have been as evident to an observer at the dawn of history as they are to a contemporary, one might ask whether there are other such features that have been uncovered through the cumulative activity of human imagination. Why are the efforts to understand human nature by philosophers, artists, and others irrelevant? Though the liberal as moral skeptic is committed to perceiving such resources as meager and even nonexistent, an observer without skeptical bias might think them inexhaustible.

Two points undermine the skepticism that buttresses a commitment to neutrality. First, Hart's modest argument bridges the abyss between descriptive and normative discourse. Hart's point is not just that legal systems happen to respond to certain human needs and that some of those needs happen to be widespread. Hart says it is a "natural necessity" that the law serves these needs.⁴⁷ For Hart, this truth about the law is contingent merely on the plausible notion of "human beings and the world they live in retaining the salient characteristics which they [now] have."⁴⁸

Secondly, *any* political program, even one predicated explicitly on neutrality, is in fact a normative constraint on the function of legal systems. To be sure, a program based on Hart's minimum content for legal systems does not in itself subvert neutrality. The features Hart picks out are not in themselves incompatible with a scheme that is basically neutral among life plans. However, the full political agenda that espouses neutrality must fail by its own standards to the extent that it misconceives the normative character of governing in general. Thus, there is inevitably a reservoir of shared knowledge about human nature and successful living. Equally inevitably, those who govern will have to draw on that reservoir.

Our cultural products survive, when they do, presumably because they both reflect and generate widely shared satisfactions and understandings. Novels, plays, movies, and other art forms not only express what we are but shape and alter our self-understanding. This process has been described as a hermeneutic circle.⁴⁹ Philosophical skepticism notwithstanding, there is no shortage of analyses that try to make explicit what is implicit in a given culture. It is probably a truism to say that social and political culture reflects and molds self-understanding. Our fundamental decisions—what we choose

⁴⁷ *Id.* at 195.

⁴⁸ *Id.*

⁴⁹ A traditional hermeneutic circle describes how the whole and the part, in the process of learning, are related in a circular way: in order to understand the whole it is necessary to know the parts, and in order to teach the parts it is necessary to know the whole. See D. HOY, *THE CRITICAL CIRCLE: LITERATURE, HISTORY, AND PHILOSOPHICAL HERMENEUTICS* vii, 166-68 (1978); see also H. GADAMER, *TRUTH AND METHOD* 11 (1975) (expanding the role of the circle to describe man's self-understanding).

to criminalize, how we choose to house, feed, medicate, and educate, for example—are all arenas of substantial consensus as well as arenas of controversy.⁵⁰

B. *Naturalism and Relativism*

What does this tell us? What does the attempt to understand human nature over time and in the face of diversity yield? It is easy to identify the Scylla and Charybdis of this task. On one hand, a unified image of the fully realized good life can be drawn from cultural representations of health and pathology, and from theories of psychology, sociology, and pedagogy. On the other hand, this image is arguably shattered by the simultaneous flourishing of mystical religious fundamentalism and earthbound Western humanism. The list of contrasting views of the good life is almost endless. The attempt to describe human nature, to be a naturalist, seems to falter in the face of relativism. And the relativist is, of course, the liberal theorist as moral skeptic.

The naturalist has several replies to relativism. The first is to argue that Western culture represents a powerful consensus. If one can trace a continuing thread in the dialogue over the nature of the good life from Aristotle through Freud and Kant, from Milton to Tolstoy and Bellow, from Michelangelo to Picasso, then perhaps the view of human nature arising from this "discussion" is to be taken more seriously than others. A second reply is that the naturalist is not trying to give an account of human nature valid for all times and places, but one valid for those times and places where categories of judgment involve arguments for and against liberalism. They are necessarily part of the so-called Western humanist tradition. Third, the theory of human nature that the naturalist is willing to defend may be expressed in subjective rather than objective characteristics and therefore may more convincingly be said to be universal. It may use notions like self-control, satisfaction, and self-knowledge, virtues like honesty and kindness. Such notions of success and failure in living are arguably trans-cultural.

I shall not take these three possible bases for naturalism any further, although I think each has merit. I want instead to consider a fourth reply, namely, that naturalism and relativism are not truly alternative positions at all. This view is that naturalism is a position that is the spontaneous expression of one's cultural and personal history. Each individual's personal history recapitulates to some extent the culture's history, the rediscovery of the cultural, social, and personal assumptions which give rise to standards of

⁵⁰ At times agreement seems to predominate; one can rest assured of a general dismissal of radical dissenters. At other times the range of possible alternatives seems very wide and there can be much disagreement. See generally J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980) (discussing the nature of value consensus).

judgment. Such standards are expressed as knowledge about when others are acting in their own interest or against it, when they are flourishing or suffering. Relativism, on the other hand, is an unnatural position because it mandates standardlessness and commends agnosticism toward any knowledge of human flourishing, of success and failure.

It is easy to misunderstand this point. I am not giving a reason for embracing naturalism and rejecting relativism. My point is more complicated because it is dialectical. Though we live within a particular culture, we are compelled to be, at the same time, distanced from it. While holding and employing values, we simultaneously question them and know how limitedly we can defend them. We question the unknown or partially known reasons for our beliefs. This is to say that the values of self-examination and self-criticism have special roles in our culture. They are, from the naturalist point of view, ingredients necessary for living what many regard as a rational and successful way of life. But they tend to undercut their own ground by making it inevitable that we see the allure of relativism as a challenge to any confident assertion of particular values as "natural."

C. *Liberalism Reconceived*

It is time to return to the critique of liberalism. Given that standards of judging are spontaneous and inevitable, we must be able to make two distinctions. The first is between knowledge about well-being and mere preferences. It is one thing for me to prefer the company of A; it is quite another to know that I am better off with A. It is one thing to prefer that others live in a certain way; it is another to know that they are better off if they live that way. The liberal theorists who share Dworkin's framework must assume that the distinction is empty and that there are only preferences. (This is simply a restatement of moral skepticism and the need for value neutrality.) A second, closely related distinction is between preferences and interests. What one prefers is not necessarily in one's interest.⁵¹ One's preferences about how others should live are not the same as a judgment about what is in their interest. While I do not deny that these distinctions are full of snares, I suggest only that the categories are intelligible and useful.

To make these distinctions is to claim that the perspective from which one uses such standards of judgment cannot be abandoned. The liberal theorist *qua* moral skeptic would have us move to a position of neutrality about the interests of others and the merits of life plans, but we cannot do so. This observation has distinctive implications from three points of view.

For one thing, the idea of personal freedom or liberty must be rethought. Liberty is not the liberty to determine, from a blank tablet, what one shall be and do and what values one shall have. It is rather the liberty to frame and

⁵¹ See Schwartz, *Human Welfare: What It Is Not*, in *THE LIMITS OF UTILITARIANISM* 195 (H. Miller & W. Williams eds. 1982).

carry out choices within the history and values that one discovers and reappropriates.⁵²

For the observer, neutrality is not available. This is not to say that the observer inevitably has a conception of the good life, of a particular mix of values and activities that mark the flourishing of human nature.⁵³ It is to say that he will inevitably be using and struggling with standards for judging, and will be trying to distinguish interests shared by mankind from interests that are personal and idiosyncratic. This will lead him to do what is incompatible with neutrality, to try to judge how well others know their own interests, and how close they are to satisfying them. Ideally, such judging will be done with discretion and care, and with respect for the freedom to experiment and err. Neutrality in action, expressed by the refusal to intervene except in exceptional circumstances, is not the same as neutrality in judgment; the latter is a mirage.

Finally, the point of view of the political or legal decisionmaker is a special instance of the point of view of the observer. Because of her special power to affect others, the decisionmaker must be especially respectful of idiosyncratic choices. She must also know that political institutions exist in part because wisdom about human affairs or knowledge about interest may not coincide with the popular will. If that is so, she cannot defer equally to all life plans. Moreover, *any* political decision resets the stage and adversely affects *someone's* life plan.

IV. POLITICAL NEUTRALITY AND EQUALITY

A. *The Argument for Neutrality as Equal Respect*

To this point I have interpreted modern liberal theory as (1) advocating political neutrality, (2) based on moral neutrality regarding ways of living, and (3) mandated by moral skepticism. I also considered the possibility of justifying political neutrality on the basis of political rather than moral skepticism. However, the severance of political neutrality from moral skepticism requires further examination.

In his recent writings Dworkin has explicitly denied that he is a moral skeptic.⁵⁴ His arguments are initially appealing. He says he rejects the idea

⁵² Analogies to the psychoanalytic model of human nature are relevant. See G. KLEIN, *PSYCHOANALYTIC THEORY, AN EXPLORATION OF ESSENTIALS* 275-79 (1979) (pointing out that human activity combines mere motor activity with a subjective self-conception).

⁵³ This is a centuries-old criticism of natural law theories. It would be interesting to trace the historical roots of Dworkin's disclaimers of a theory of the good life and his claims that there is a "right answer" to judicial questions. See R. DWORKIN, *RIGHTS*, *supra* note 1, at 279-90 (chapter 13).

⁵⁴ See Dworkin, *What Liberalism Isn't*, *supra* note 5, at 47.

that neutrality is justified by moral skepticism in favor of the idea that neutrality is based on a commitment to equality. Institutional neutrality is mandated by equality because neutrality is a way of showing respect for persons as equals, and any institutional preference for one way of living over another discriminates invidiously among persons. Since this argument, in one form or another, is one with which most liberals are familiar and to which many are sympathetic, it is important to see whether neutrality based on equality is a camouflaged form of moral skepticism or a genuine alternative to it.

Consider how Dworkin tries to demonstrate that he is not a moral skeptic. He argues that even if liberalism is neutral about ways of living, it need not be neutral about "what would count as a good society":

Liberals can (and do) believe that politics should aim at a society of people who are happy rather than miserable, who respect rather than condemn one another, and who have an imaginative rather than a conformist approach to the question of what kinds of lives they should lead. Still less does it mean that politics must be neutral among principles of justice.⁵⁵

But can politics aim at these goals and, at the same time, be neutral with regard to ways of living? Consider three responses that might show how this can be so, thus saving Dworkin's view from inconsistency.

First, one might hold that *all* ways of living lead equally well to happiness rather than misery, to mutual respect rather than condemnation. Clearly this is implausible. Obsessive lives with unattainable goals lead to misery rather than happiness; lives grounded in bigotry and self-righteousness are appropriately condemned. The project of respecting all life patterns equally will tend to undermine the "good society."

A second response is that *any* conscientious effort by the government to differentiate among ways of living will cause more unhappiness, more disrespect, and more conformity than a strict policy of maintaining neutrality. This too is hardly persuasive. A sincere and well-grounded policy of fostering open-minded and imaginative living is not certain to backfire. Some such policies will work better than others, but it is hard to see why the principle is misconceived *ab initio*.

Clearly, Dworkin has a third and more subtle response in mind. He is prepared to concede that some policies of fostering open-mindedness and encouraging mutual respect are properly part of a liberal program. Yet, in Dworkin's view, such policies do not breach the requirement of neutrality. It is hard to see how this can be so, although it is easy to see what examples Dworkin would cite to support his thesis. A proper policy of neutrality, by his lights, is one in which no particular religious preference is favored by government, or one in which persons with different kinds of sexual prefer-

⁵⁵ *Id.*

ence are equally protected by the law.⁵⁶ His policy of neutrality is one in which the government does not approve of some cultural activities and proscribe others. In these ways, official neutrality is likely to foster happiness, diversity, and mutual respect.

Dworkin's response is nonetheless weak. It resolves the apparent inconsistency in liberalism only by assuming that all kinds of religious practices, styles of living, and cultural practices are equally conducive to happiness and respect both for practitioners and for society at large. Homosexuals can be as happy (or unhappy) as heterosexuals. Lovers of punk rock can find as much enjoyment in their preferences as lovers of Bach. This may well be the case, but it is a stream of argument that rapidly runs dry when considerations other than potential happiness are at issue. Certainly not all kinds of religious practice and belief are equally conducive to a secular or political context of toleration and mutual respect. Not all styles of familial organization are likely to foster lives of imagination rather than conformity.

Thus, Dworkin's notion of neutrality is doubly vulnerable. First, it confuses respect for persons with blindness toward the perhaps destructive effects of the ways they may choose to live. Although this kind of liberal would like to think that all choices of sexual preference, cultural practice, and religious belief are equally congenial to a regime of mutual respect, it is not obvious that this is correct.⁵⁷ Even if it is, there is a second problem. The resolution cannot go as far as the liberal wants it to go, to toleration of the intolerant. It follows that the liberal must choose between neutrality on one hand and a political disposition that aims "at a society of people who are happy rather than miserable, who respect rather than condemn one another,"⁵⁸ on the other.

B. *Freeing Choosers and Determining Choices*

Dworkin has available one final argument, an argument which draws in a different way on the claim that political neutrality is based on equality. This

⁵⁶ See, e.g., R. DWORKIN, *RIGHTS*, *supra* note 1, at 240-48 (discussing Lord Devlin's controversial position on law and morality).

⁵⁷ It is important to distinguish several points. First, I am certainly not denying that one may plausibly hold that religion A and religion B, or sexual preference A and sexual preference B, are equally conducive to happiness or successful living. I am merely suggesting that this type of argument is weak because it involves generalizations about heterogeneous classes and their unmeasurable features. Second, the liberal's best argument is to concede that the possibility of happiness in these cases is indeterminable, and to argue for the desirability of free choice on that basis. Third, this point does not mean that all information is irrelevant to such choices. One can argue that, in the choice between a life of addiction to drugs and a drug-free life, the advantages of the latter are so clear as to permit government interventions. Cases must be decided on their individual merits; no general rule of neutrality seems to be supported by general intuitions.

⁵⁸ Dworkin, *What Liberalism Isn't*, *supra* note 5, at 47.

is to deny that equal respect means equal respect for one's *choices*, and to concede that a liberal cannot respect the choice of religious intolerance or personal bigotry.⁵⁹ Rather, equal respect means respect for persons as *choosers*. It involves separating the chooser from the choice, respecting the autonomy of the individual as a chooser but not necessarily respecting what the individual becomes if he chooses to be a bigot, fanatic, or conformist. Accordingly, neutrality and respect mandate policies that free the avenues of choice.

This gets us back to liberal theory's flawed characterization of the relationship between persons and life plans.⁶⁰ Dworkin's last point assumes that we can isolate judgments about conditions that prevent one from being a free chooser from judgments about the choices that are actually made. It assumes that government can intervene only to overcome conditions of the first kind. In this view, government can provide subsistence and education because these conditions set the background for choice and involve no breach of neutrality. Government thus does not delimit choice but leaves the individual free to "make" herself at the moment of choice into a homosexual, a zealot, or a devotee of the Rolling Stones.

The difficulty with this argument is that there is no way to distinguish those permissible interventions that raise a person to the plateau of becoming a free chooser from those impermissible interventions that violate neutrality by conditioning and shaping the choice. Of course, some interventions are easy to classify. Requiring early education in communication skills *does* contribute to making one a self-aware chooser. Outlawing homosexual acts *does* limit the range of choices. But most interventions defy classification because the values of open-mindedness, self-control, tolerance, and rational thinking are both preconditions of choice and desired values. Setting the conditions for achieving such virtues involves a clear violation of neutrality. Either we can try to secure the conditions of mutual respect or we can be neutral, but we cannot be both.

Dworkin says that the ideal of neutrality is preserved when "it cannot count, as a justification for any decision about the political . . . structure of our society, that either of us is inherently superior to the other, or that either's idea of a valuable life is superior."⁶¹ But the liberal cannot preserve that ideal. The conclusion that he cannot do so can be expressed in two ways, as we have seen. First, one can say that the liberal must be committed, on pain of contradiction, to regarding as superior that idea of a valuable life that best comports with autonomous choice and mutual respect. Second, and more radically, one can say that the determination of when one is so

⁵⁹ R. DWORKIN, *RIGHTS*, *supra* note 1, at 275-78.

⁶⁰ See *supra* Parts I and II. I reject the notion of individuals as simple and autonomous choosers of life plans. The process of growth and development is a mixture of interdependent internal and external forces and opportunities.

⁶¹ Dworkin, *What Liberalism Isn't*, *supra* note 5, at 48.

situated that one can frame the "idea of a valuable life" freely is conditioned by determinations about what sorts of lives are superior to others. In either case, the ideal is unattainable.

It follows that political neutrality remains undefended as a tenet of liberal theory. On one hand, it cannot be supported by moral skepticism if moral skepticism is itself indefensible, resting on a false picture of experience and judgment. On the other hand, it cannot be supported by the requirement of equal respect. The creation and maintenance of a political structure in which respect is sustained requires that genuine self-reflection and autonomy be fostered. If respect is taken seriously, government can be neutral only among those choices that are genuine avenues of such self-realization.

C. *Political Skepticism Reconsidered*

Consider again political skepticism.⁶² This view concedes that we can choose among ways of living, and that we know which ways are more likely to be successful, happy, and worthy of respect. But the political skeptic holds that governments are likely to botch the job. Neutrality is offered as a prophylactic policy. While political skepticism is a coherent and persuasive argument, it is hard to accept as a general and uniform truth. A government that should not be trusted to endow and favor particular forms of cultural expression might well be trusted to provide the conditions for mental and physical health. While governments can certainly abuse the mandate to secure, for example, conditions of mental and physical health, the likelihood of such abuse cannot be determined as a matter of principle. Some judgments about health needs are more controversial than others. Some interventions are more disruptive than others, and some are more likely to be freely accepted by the beneficiary. Certainly, governments that would intervene bear a heavy moral burden of proof. But that is a far cry from moral skepticism, from saying that we cannot in principle know what conditions are better or worse, or that we must advocate political neutrality because that is how we secure the conditions of mutual respect. It is also a far cry from saying that even the wisest and most benign government will inevitably guess wrong.

V. NEGATIVE AND POSITIVE FREEDOM

A. *The Relationship Between Negative and Positive Freedom*

The debate among political theorists about "two concepts of freedom," stirred if not initiated by Isaiah Berlin,⁶³ provides an opportunity to clarify my critique of the neutrality of liberal theory. First, consider Gerald MacCal-

⁶² See *supra* Part II.

⁶³ Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969).

lum's convincing argument that freedom (or liberty)⁶⁴ always posits a triadic set of relations such that A (an actor) is free from B (some constraint) to do C (an act, a range of actions, etc.).⁶⁵ Negative and positive freedom, therefore, are not two distinct concepts so much as they are different aspects of the single notion of constraint. The proponent of negative freedom holds that one is free to the extent one is not prevented by law or other governmental intervention from doing what one chooses to do. The proponent of positive freedom maintains that freedom is only enjoyed by the person who, in addition, is free of internal constraint. This implies that she possesses the conditions of self-realization. Charles Taylor lists these conditions as self-awareness, self-understanding, moral discrimination, and self-control.⁶⁶

Negative freedom is not necessarily the absence of rules. It follows from the strict definition of negative freedom that persons have more freedom in a state of nature than in a civil society with, for example, criminal prohibitions. One can kill or steal only in a state of nature. But those who would kill and steal exercise their freedom by undercutting the freedom of their victims. Thus the proponent of negative freedom must choose between anarchy and civil society with its prohibitions on the freedom to prey on others. Choosing the latter maximizes only *significant* exercises of freedom, not indiscriminate or licentious exercises of freedom.

B. *Semantic Issues*

Before exploring the implications of the two concepts let us clarify some semantic issues. Consider first the different nuances of liberty and freedom. Liberty seems to be a political virtue. Liberties are conceded to citizens by the state (in a bill of rights, for example) and safeguarded by the state. Liberty in the state of nature is a self-contradictory notion. Freedom, on the other hand, is more general, and liberty seems to be a special kind of freedom. One can talk about freedom and constraint in the state of nature as well as in civil society. In this section, I have chosen to consider freedom rather than liberty because it is the more comprehensive notion.

A second issue is that the term "freedom" is obviously used in mutually incompatible ways, ways that support both negative and positive theories of freedom. On one hand we say that a person must be free to make mistakes, free to be self-deluded or ignorant. On the other hand, we espouse positive freedom when we say that one is not really free if she lacks relevant information or suffers from self-delusion. We speak of freeing someone from ignorance. Usage, therefore, will not resolve the debate.

⁶⁴ MacCallum, *Negative and Positive Freedom*, in PHILOSOPHY, POLITICS AND SOCIETY 174 (4th Series, P. Laslett, W. Runciman, & Q. Skinner eds. 1972).

⁶⁵ *Id.* at 176.

⁶⁶ Taylor, *What's Wrong with Negative Liberty?*, in THE IDEA OF FREEDOM 179 (A. Ryan ed. 1979).

A third point about the use of these concepts is that, contrary to MacCallum's suggestion, the debate is not a question of value disguised as a question of fact. He argues that questions about when persons are free and what is to count as an interference with freedom are confused with questions about when persons are best left to act freely and what is a legitimate interference with freedom.⁶⁷ He concludes that proponents in the debate can agree on answers to the factual questions and can agree to disagree about the values, about what is best and what is legitimate. This, for MacCallum, is the real underlying debate.

MacCallum is wrong insofar as theorists of negative freedom often claim to make factual points when they deny the existence of inner constraints. They claim to believe that the existence of inner constraints has nothing to do with freedom. They assume that inner constraints are so speculative that any attempt to deal with them is tantamount to imposing (what Dworkin calls) an external preference on another. The response to MacCallum is that it is far from clear that we can distinguish questions of fact from questions of value in this area, and that it may be senseless to try to do so.

This point can be clarified by linking it to moral skepticism since, as we have seen, the strategy of separating fact from value is a cherished strategy of the moral skeptic.⁶⁸ Applying this strategy to the problem of negative and positive freedom, the skeptic might conclude with MacCallum that the debate is about values, about the range of the three variables discussed above. The disagreement would be about what interventions are legitimate, and about when persons are best left alone. The moral skeptic concludes that these determinations are expressions of personal preference and that freedom truly exists when we decline to apply our personal preferences to others.

The response to the moral skeptic is that the existence and nature of inner constraints is a factual matter, and only the theorist of positive freedom is willing to consider inner constraints. The skeptic's (and MacCallum's) distinction between questions of fact and questions of value is unhelpful and untenable. In particular, it cannot be used by the proponent of negative freedom to defend his view that all attempts to affect inner constraints are illegitimate applications of preferences.

I addressed this strategy of labeling facts as mere value preferences above when I defended the distinction between knowledge and external preference and between interest and personal preference.⁶⁹ Just as we know that it is not in the interest of persons to be enslaved or to be told how they must use their property or their leisure, we know that it is not in their interest to be ignorant; lack self-awareness, or be without self-control. We do not merely *prefer* that they be self-aware. (We may, in fact, prefer that those

⁶⁷ MacCallum, *supra* note 64, at 192.

⁶⁸ See *supra* text accompanying notes 33-35.

⁶⁹ See *supra* text accompanying notes 18-20.

whom we would exploit not be self-aware.) Our justifiable actions affecting others are based on our *knowledge* about their own interests and their well-being, not on our mere external preferences. Sometimes we are more clearly aware of the interests of others than they are themselves.⁷⁰ Freedom, as the notion of positive freedom demonstrates, is best realized when the actor's preferences and interests coincide. The proponent of negative freedom, like the liberal theorist who stresses neutrality, claims not to have a theory of human nature. Yet if my analysis is correct, he is committed to one that makes tacit normative judgments about external constraints, a theory that is implausible because it denies that internal constraints can alienate a person's actions from her interests.⁷¹

C. *Neutrality and Positive Freedom*

I have said nothing yet about neutrality or the particular role of government in the realization of freedom. The liberal neutralist may concede that there are external constraints and still argue that, to maximize freedom, government could abandon neutrality with regard to the external, but not the internal, constraints of the governed. There are three arguments for this position, and each can be refuted.

The first is that each individual's choice is an expression of that person's values, and that no critical standpoint exists for judging these choices except from the critic's own arbitrary preferences. This is the position of the moral skeptic, and I have shown why this is inadequate.⁷²

The second argument draws on the notion of equal respect. It says that, whether or not there exists a moral standpoint for criticizing the choices of others, equal respect mandates treating the governed as equally competent choosers once the government has provided a plateau of opportunity. From this plateau choices made are without external constraint.

⁷⁰ This point can be easily abused. A fuller treatment is given in Taylor, *supra* note 66, at 187-89.

⁷¹ To be sure, we describe the effects of the two kinds of constraint in different ways. When the constraint is external, we tend to say that the person is unable to act on her interest, but also unable to realize her preference. When the constraint is internal, we tend to say she acts on her preference, and that it is adverse to her interest. But there are exceptions even to these conventions of usage. An external constraint that is not physical, but economic or psychological, can affect preferences so that the actor prefers to remain constrained. The exploited employee can come to prefer the system of exploitation to destitution while unemployed. Similarly, an internal constraint may not necessarily work by affecting preferences. Lack of self-control may lead the actor to do neither what is in her interest nor what she prefers. In any case, the most helpful insight in all these examples is the identification of freedom with the capacity to recognize and pursue one's interests. The theorist of positive freedom is better able to represent these several dimensions of freedom.

⁷² See *supra* Part III.

For reasons given in Part IV, it is unclear how this notion of respect is to be interpreted and why it should be compelling. One of the undisputed grounds of the argument is that some external conditions, such as compulsory education and mandatory treatment for the severely self-destructive, provide the necessary plateau for unconstrained choice. Yet this concedes my basic point; external conditions *necessarily* reshape one's internal preferences and the characterization of one's available personal choices. If basic interventions in the areas of education and health are justified, where is the line to be drawn? Certainly many other types of well-intentioned interventions, likely to put persons in touch with their own interests, could also be justified as a manifestation of respect. There is no clear distinction between setting the conditions for identifying one's interests and setting the conditions that predetermine which interests will seem most compelling. The internal constraints of self-awareness and self-control are not merely conditions of choice. The attempt to secure them as conditions will also shape the choices that are made. Thus, respect for individuals should not be identified solely with neutrality; rather, it should be identified with the maintenance of conditions that foster self-awareness and self-control, both as conditions of choice *and* as aspects of the very choices that are made.

The third argument is the argument of the political skeptic. In this view the institutions of the state are suited to securing protection from external but not internal constraint. David Cooper, writing on positive and negative freedom, says that the genuinely free man "will think that it is through education, culture, and most of all personal endeavor—rather than through legal and political arrangements—that his freedom will be won."⁷³ The distinction is useful but in part artificial. Political institutions determine the character of education and culture. The question is not whether, but how, education and culture are affected by political policies. No government, under the guise of respect for neutrality, can disclaim responsibility for how education and cultural opportunities appear to its citizens.

Nonetheless, Cooper's distinction between education and culture on one hand and political arrangements on the other is helpful. We have seen that in dealing with external constraint, political institutions alleviate constraint by constraining. This is not a paradox. Laws constrain persons, either officials or private individuals, from constraining others. Thus, governments are constrained from interfering with free expression. Internal constraints, on the other hand, are not typically removed by political external constraint. External constraints involve two agents, she who would interfere and she who would be the victim of interference. The first is constrained so that the second is free. With internal constraints, there is only one agent, and it seems paradoxical to think that one can be forced to be free. The notion, to be sure, is not incoherent and has clearest application in the compulsory treatment of those who, through temporary derangement, would do violence

⁷³ Cooper, *The Free Man*, in *OF LIBERTY* 134 (A. Griffith ed. 1983).

to themselves. It is also arguably appropriate as a characterization of compulsory education. But the notion will not go very far. Self-awareness and self-control are dispositions that must be nurtured, not elicited by command. In this way, Cooper is correct that culture and education, not politics and law, are the appropriate arenas for such nurture.⁷⁴

VI. THEORY AND PRACTICE

I raised at the outset the question of how closely liberal practice is to be identified with the theory of neutrality. Given the scope of this article, I cannot do this question full justice. I shall look briefly at only two aspects of this question, first, whether liberal practice seems to presuppose the theory of neutrality, and second, whether the theory of neutrality seems to imply liberal practice.

(1) Dworkin lists some of the elements of liberal practice or policy when he says that liberals are generally thought to be "for greater economic equality, for internationalism, for freedom of speech and against censorship, for sharper separation of church and state, for greater procedural protection for accused criminals, for decriminalization of 'morals' offenses . . . and for an aggressive use of the central government power to achieve these goals."⁷⁵ Putting aside whether these goals are mutually compatible or whether they are still part of the liberal agenda, the question remains: are they best realized through the principle of governmental neutrality, or are they better seen as the embodiment of a particular recommended kind of life?

It is tempting to try to reconcile the two positions by saying that the program does embody a particular ideal, encouraged by government, and that the ideal is simply freedom of choice. This is ambiguous. The principle of neutrality is captured by this reformulation only if freedom is understood as radical freedom. Each element of the liberal program can then be seen as a way of making it more likely that persons are free to choose their values, to live without determination. But if the idea of radical freedom is a chimera, then the underlying conception of liberal practice seems to be that certain determinants of choice are properly seen as constraints and are to be minimized, while other determinants are to be seen as appropriate cultural preconditions of choice. The liberal thus claims to know that persons are

⁷⁴ Consider one last possible misunderstanding. The notion of freedom as positive freedom is not the same as the notion of radical or absolute freedom. Radical freedom couples the conclusion that there are internal as well as external constraints with the suggestion that to be truly free is to be free from the influence of others. We have already seen why this romantic notion is a chimera. See Taylor, *supra* note 66, at 180-81. Just as we must distinguish our preferences from interests, we must distinguish constraints from historical and personal determinants that have become part of our nature. It is helpful to recall that for the relativist, all life plans are of equal value. Similarly, for the proponent of radical freedom, all determinants are constraints.

⁷⁵ Dworkin, *Liberalism*, *supra* note 1, at 113.

best off when they are made aware of a plurality of nonofficial religions, when different kinds of cultural products clamor for their attention, when they are aware of themselves as choosers among such options and strive for self-knowledge and self-control. The liberal not only claims to know this about others; he also claims to know that it is valuable for the individual to know this about herself or himself. If liberals thus try to create institutions that fortify a particular conception of human nature, their theory is badly misrepresented by the ideal of neutrality.

(2) The second question is whether Rawls's and Dworkin's theory of neutrality implies anything like the elements of the liberal agenda. The discussion in Part IV suggests that it does not, and that the theory of neutrality is indeterminate with regard to political agenda.

One way of developing this idea further is to take seriously the concept, dear to the liberal neutralist, of a plateau of choice from which a life plan can be projected. The neutralist has the burden of saying which interventions are justifiable because they raise persons to that plateau, and which are not justifiable because they predetermine the choices that would be made once the plateau is reached. But it is quite arbitrary how a particular intervention is classified. From one point of view freedom of expression and economic redistribution make choice equally available. From another they mean that the loudest or most powerful voices will shape public opinion.

These remarks need three final qualifications. First, the distinction among politicians will not be between those who are for and those who are against freedom of expression or economic redistribution. It will be among those who would support different systems of free expression and redistribution. Second, I emphasize that I am in no way criticizing the liberal agenda or saying that it cannot be justified. My point is only that it must be defended by arguing from a completely articulated theory of human interests and experience on which it rests, not by denying that it rests on such a theory. Third, a resolution of the controversy among differing attitudes toward, for example, free expression, must begin by conceding that any system of free expression enhances awareness of alternative courses of action, *but also* shapes the world in which those courses exist, cutting off other imaginable courses of action and shaping the attitudes of the chooser. This is the truth that the relativist is concerned to convey. It is, as we have seen, a partial truth. The naturalist reminds us that, however self-critically we do so, we also inhabit a set of standards that allows us to judge just what realizations of freedom contribute to the fullest realization of human nature.

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