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### The Principles of Justice

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Thus, even when the two theories yield the same result, the process of utilitarian reasoning makes its outcome suspect; deontological reasoning, on the other hand, yields outcomes with less opportunity for self-deception. Consequently, in this Author's opinion, deontology offers a more sound foundation for reasoned ethical deliberation than does the utilitarian philosophy.

## **The Principles of Justice** **75 Notre Dame L. Rev. 1859 (2000)**

**Richard W. Wright**

### Introduction

...

There are significant differences of opinion as to the extent of the actual relationship between morality and law in different societies. Yet most people agree that the law should be morally sound, that moral principles often do underlie the law, and that the moral principles that do underlie the law should be used by judges to interpret and apply the law, at least in difficult cases. Moreover, it generally has been assumed that the moral principles that do, or should, underlie the law are principles of justice. Indeed, it has often been stated that the sole purpose of law is, or should be, the implementation of justice.

What are the principles of justice? Although there are many references to justice in court opinions, few provide any detailed elaboration of the concept, and many seem conclusory in nature. Noting this, some claim that justice is a question-begging concept which, beyond the formal justice notion of treating like cases alike, has no inherent substantive content and thus provides little or no guidance to legislators, judges, jurors, or ordinary citizens. This claim is incorrect. In both theory and everyday practice, the concept of justice has long been thought to encompass not merely a formal equality (treating like cases alike), but also a substantive equality which requires giving each person his or her "due" - what is his or hers as a matter of right - a requirement that is usually understood to be in direct conflict with the basic principles of aggregate social welfare theories such as utilitarianism or its modern variant, economic efficiency.

...

### I. The Basic Moral Premise: The Equal Dignity of Persons

Natural law theory is based on rational reflection on the nature, conditions, and experience of being a human being in a world with other such beings...

Every individual member of the human species, as a rational being, has the "dignity of being a person." This dignity flows from the consciousness of one's choosing and acting self as a self-determining being, the "experience of the unity (including continuity) of [one's] being."...

The fundamental moral significance of persons' status as free and equal individuals, each with his or her own life to shape and live, is also emphasized by Immanuel Kant. The foundation of Kant's moral philosophy is the idea of free will or freedom, by which he did not mean unrestricted pursuit of one's desires, but rather the opposite - fully realizing one's humanity by subjecting one's actions to the universal moral law in order to free oneself from animal inclinations in opposition to that moral law. According to Kant, freedom, as well as the moral personality constituted by its possession, is an inherent defining characteristic of each rational being. The possession of free will or freedom is what gives each rational being moral worth - an absolute moral worth that is equal for all rational beings.

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Man regarded as a person [rather than a mere animal], that is, as the subject of a morally practical reason, is exalted above any price; for as a person (*homo noumenon*) he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world. He can measure himself with every other being of this kind and value himself on a footing of equality with them.

...

The ultimate good for any person is thus not mere pleasure "or any other real or imagined internal feeling," including happiness "in the common, casual sense of that word." It rather is "beatitudo or felicitas, happiness in the sense of fulfillment," which is "a kind of synthesis of [the basic human goods]: satisfaction of all intelligent desires and participation in all the basic human goods (whatever they are), and thus a fulfillment which is complete and integral (integrating all its elements and participants)."

...

## II. The Common Good and the Supreme Principle of Morality

References to the "common good" or "common advantage" by Aristotle or Aquinas are sometimes misinterpreted as referring to some aggregative (for example utilitarian) or organic (for example communitarian) conception of an overall social good. {These phrases do not refer to any such aggregative or organic social good, but rather to the concurrent, interdependent, and harmonious flourishing or fulfillment of each individual in the community, which can only be attained (given the nature and conditions of human existence) through cooperation and coordination in communities.

...

[A] state is a community of families and aggregations of families in well-being, for the sake of the perfect and self-sufficing life. Such a community can only be established among those who live in the same place and intermarry. Hence there arise in cities family connexions, brotherhoods, common sacrifices, amusements which draw men together. But these are created by friendship, for to choose to live together is friendship. The end of the state is the good life, and these are the means towards it. And the state is the union of families and villages in a perfect and self-sufficing life, by which we mean a happy and honorable life.

A person alone cannot be self-sufficient, not only because of individual needs and common interests, but also because "man is by nature a political [social] animal." It is only in the limited sense of the necessity of the state for the complete or self-sufficing life of each of its citizens that the state is "prior to the individual." The attainment of each person's well-being (self-sufficiency) through community is "certainly the chief end, both of individuals and of states."

...

Whether understood as "love of neighbor as oneself," the golden rule, or Kant's categorical imperative, the supreme principle of morality in natural law theory, in both its conception of human good and its conception of the equality of persons, stands in direct opposition to the supreme principle of morality in utilitarianism, which was given its most explicit expression by Jeremy Bentham.

Bentham's principle of utility, or "greatest happiness," mandates actions which produce the greatest total utility (happiness understood as pleasure or preference-satisfaction) for the citizenry in the aggregate. The principle was first suggested to him when he read the slogan, "the greatest

happiness of the greatest number," a slogan which was sometimes used by him and is still sometimes used by others to describe the principle of utility. However, the principle of utility focuses solely on "the greatest happiness" - maximizing the total utility for the citizenry in the aggregate - rather than focusing also or instead on maximizing the distribution of that utility to "the greatest number." Indeed, simultaneously maximizing both the total sum and the distribution of utility is logically impossible. There is no independent weight given in the utilitarian theory to the distribution of happiness (or wealth or power) or to the promotion of individuals' equal freedom. On the contrary, each individual's freedom and interests are subordinated to the maximization of the total utility of the citizenry in the aggregate.

As Bentham's successor in the utilitarian school, John Stuart Mill, emphasized, "The happiness which forms the utilitarian standard of what is right in conduct, is not the agent's own happiness, but that of all concerned. As between his own happiness and that of others, utilitarianism requires him to be as strictly impartial as a disinterested and benevolent spectator." In the sentences which immediately follow this passage, Mill asserts, "In the golden rule of Jesus of Nazareth, we read the complete spirit of the ethics of utility. 'To do as you would be done by,' and 'to love your neighbor as yourself,' constitute the ideal perfection of utilitarian morality." This assertion is based on the erroneous assumption that to love your neighbor as yourself, or to do unto others as you would have them do unto you, would require you in everything you think or do to weigh the interests of each and every other person equally with one's own interests or the interests of one's family, friends, or groups. However, as Finnis and Kant note, thought and action guided by such complete impartiality of interest would lead to complete self-abnegation and to the destruction of personhood, rather than to its complete fulfillment, and thus is not a principle that any rational person would adopt as the supreme principle of morality. It is an implausible interpretation of the golden rule.

The conception of equality in utilitarianism is quite different from the equal freedom norm that underlies natural law theory. In utilitarianism, each individual counts equally methodologically only, as an equal and fungible addend in the calculation of the aggregate sum. Any individual's freedom or interests can and should be sacrificed whenever doing so would produce a greater total of aggregate happiness for society as a whole. It is not permissible to prefer one's own interests or projects, or those of one's family members or friends, over those of any other person except to the extent that doing so would produce a greater total happiness for the citizenry in the aggregate. Utilitarians thus reject the idea of individual autonomy or rights, at least insofar as those rights are understood (as they usually are) as being independent of or in conflict with the principle of utility. Bentham was quite dismissive of the idea of rights, especially alleged natural rights. Mill, however, recognized the powerful appeal of the related concepts of justice and right and attempted to integrate them into the utilitarian theory.

...

Utilitarians since Mill have made similar "rule-utilitarian" arguments in an attempt to reconcile utilitarianism with the natural law principles of equal dignity, equal freedom, rights, and justice. They argue that the net benefits of any particular intrusion on individuals' autonomy or rights considered in isolation, taking into account the happiness or interests only of the parties directly affected, would be outweighed by the widespread social insecurity and anxiety that would result if such intrusions were generally permitted, and thus would be contrary to the principle of utility. However, these arguments give the principles of autonomy, freedom, right, and justice a contingent and derivative status which fails to convey their true sense or force. Moreover, under these arguments, the "autonomy" and "rights" of individuals still may be sacrificed if the total

benefits exceed the total disutility - for example, if the intrusions on autonomy and rights (such as slavery or racial discrimination) are limited to an easily identifiable minority (such as blacks), so that the majority which benefits from such intrusions need not worry about also being subjected to such treatment.

In sum, utilitarianism (and its modern variant, economic efficiency theory) is completely at odds with the moral premises, principles, and implications of natural law theory. The moral good in natural law theory is the full realization of one's humanity as a free and equal being, while the moral good in utilitarianism is pleasure or preference-satisfaction, and the moral good in the economic-efficiency theory is resource wealth as measured by one's willingness and ability to pay for those resources.

The equal freedom theory focuses on the promotion of each person's equal freedom to pursue a morally meaningful life. It thus places primary emphasis on the equal distribution of the good. The utilitarian efficiency theories, on the other hand, focus solely on maximizing the total sum of the good (pleasure, preference-satisfaction, or wealth). There is no independent concern with how that total sum is distributed among individuals.

### III. Justice and Law

As noted above, under natural law theory the sole purpose of the state, and thus of politics and law, is the attainment of the common good - the human flourishing or fulfillment of each person in the community. The conditions which are properly specifiable by law for the attainment of this common good are the principles of justice.

From Aristotle to the present time, the concept of justice has generally been understood, in its central or focal sense, as consisting of (a) equality or fairness (b) in interpersonal relations (c) that are properly subject to regulation through legal rights and duties. Aristotle emphasizes that justice pertains to our relations with others. He distinguishes and then conjoins the other two elements - equality and (rightful) law - that are encompassed by the concept of justice.

...

Later natural law theorists recognize that treating virtue - one's internal disposition to choose morally proper ends - as subject to legal regulation or enforcement is inconsistent with the foundational premise of each person's basic dignity as a free and equal, self-determining, rational being...

Kant is much more explicit, emphatic, and consistent on this fundamental point. In the elaboration of his moral philosophy, he distinguishes between a doctrine of virtue (ethics) and a doctrine of Right (justice). The doctrine of virtue focuses on the internal aspect of the exercise of freedom - one's shaping and living one's life by choosing and acting in accordance with the proper ends. The doctrine of Right, on the other hand, focuses on the external aspect of the exercise of freedom - the constraints on action required for persons' mutual practical exercise of their freedom in the external world. It specifies which moral obligations are also legal obligations, enforceable through coercion by others...

Each person has the right, indeed the ethical duty, to assert her moral worth in interactions with others by, among other things, resisting nonrightful coercion by those others. This right is the only innate right that each person originally has due to her equal dignity as a rational being: "Freedom (independence from being constrained by another's choice)." Inherent in this innate right is the authorization to use coercion against another to resist or prevent nonrightful aggression by that other against one's person or property. Yet this right exists only if one's protective conduct is "intrinsically right in terms of its form" - that is, only if one has subjectively determined that one's

use of coercion conforms with the principle of Right. If one's actions will affect other persons' external exercise of their freedom, those actions must conform to those others' rights - that is, they must be consistent in their external effects with the equal absolute moral worth of those others as free rational beings. Hence the supreme principle of Right: "So act externally that the free use of your choice can coexist with the freedom of everyone in accordance with a universal law."

...

The distinction between the objective nature of justice or Right and the subjective nature of virtue is emphasized repeatedly by Kant. The external exercise of freedom, which is the focus of the doctrine of Right (justice), depends on sufficient access to instrumental goods and sufficient security against interferences by others with one's instrumental goods and one's bodily security. The security of one's person and property would be ephemeral if they were only protected against those who act with a vicious (grasping) motivation or disposition. Assessments of virtue or vice (moral blame or merit) take into account a person's subjective capacity and effort in attempting to ascertain and satisfy the objective moral duties that are derived from the supreme principle of morality (the categorical imperative). If one's rights in one's person and property turn on the subjective physical and mental capacities of others with whom one (usually unpredictably) interacts, those "rights" are nominal and worthless. Rather, one must be secured not merely against vicious conduct by others, but also against objectively specifiable conduct by others which, if generally allowed to occur without any recourse by those adversely affected, would (contrary to the supreme principle of Right) reduce rather than enlarge everyone's equal external freedom. Thus, as Kant repeatedly emphasizes, an action's legality (moral Rightness) is judged by its external conformity with the objective requirements of the relevant moral duty, while its morality (virtuous or vicious character) is judged by the actor's internal subjective capacity and efforts to ascertain and conform her conduct to those objective requirements.

So justice in its central sense is neither complete virtue ("general justice") nor the specific ("particular") virtue of acting with an "equal" (non-grasping) disposition in one's relations with others that involve those others' instrumental goods. It continues to be describable as (a) equality (b) in interpersonal relations (c) that are properly subject to regulation through legal rights and duties. However, we can now add two important details to this description. First, the only interpersonal relations that are properly subject to regulation through law are those that are the focus of Aristotle's "particular" justice: those relations with others that affect those others' external exercise of their equal freedom, by affecting their access to instrumental goods and the security of their instrumental goods and their person. Second, the relevant notion of equality is not a virtuous "equal" (non-grasping) disposition in one's actions, but rather conformity with some objective criterion of equality, yet to be specified, that implements each person's right to equal external freedom...