13: Justice and the Ethical Foundations of Jurisprudence

A. Introductory Remarks

Throughout our treatment of jurisprudential questions in chapters three through ten we assumed as sound the view of government articulated in chapter two. In other words, we assumed that a jurisprudence which bases laws upon commonly accepted principles of liberty and justice is ethically defensible. Many readers might hold on ethical grounds that a less libertarian conception of government would be preferable.

Some will maintain that the basic personal good of human life should be accepted as a substantive purpose of political society, so that the sanctity of life will be protected in every instance—even, for example, against an individual who wishes to commit suicide. Others will maintain that a utilitarian jurisprudence ought to be accepted and that laws and public policies generally should be based upon quality-of-life considerations. In this final chapter we shall show that the ethical theory we explained in chapter eleven and applied in chapter twelve also can be used to defend the jurisprudence which we articulated in chapter two as the American proposition and which we assumed in chapters three through ten.

To show that this jurisprudence is ethically defensible, we shall argue that—assuming our theory of moral norms and human actions—a morally upright person *may* wholeheartedly accept this jurisprudence in practice and cooperate in a political society which bases its laws and policies upon it. We also shall show that a jurisprudence which would base laws directly upon the sanctity of human life does not comport well with our ethical theory but rather is inconsistent with it. As for a utilitarian jurisprudence, there is obviously no need to restate the criticism of its foundations made in chapter eleven, sections C and D. But a utilitarian jurisprudence *also* is incompatible with the philosophy of government which we outlined in chapter two.

This inconsistency between the jurisprudence of liberty and justice which we have assumed in this book and a utilitarian jurisprudence arises because utilitarian theory cannot permit liberty and justice to have the status they must have if they are to be the object of the sort of consent which gives moral legitimacy to government. One consequence of the inability of utilitarian theory to allow liberty and justice the required status is that utilitarian jurisprudence can offer no basis for law other than utilitarian morality itself. Thus utilitarianism, the philosophical foundation of most of the proposals we have argued against throughout this book, not only is bad ethics; it also is bad jurisprudence. This will become clear when utilitarian jurisprudence is examined in the light of the assumptions concerning liberty and justice which underlie the American conception of government and law—assumptions we shall show to be ethically defensible.

B. Utilitarianism and the American Proposition

The proponents of the legalization of killing on quality-of-life grounds, who are our main opponents in the euthanasia debate, are consequentialists in ethics; in legal theory they often owe much to the utilitarianism of Bentham and Mill. They often say—in fact, loudly and insistently proclaim—that law and morals must be separated. What they mean is that law must be separated from traditional morality to the extent that traditional morality is embodied in the laws of those nations which were shaped by Christian civilization. But they by no means object to legislating morality. They precisely want the law to permit and encourage what they consider morally acceptable and to establish as public policy what they consider morally required.

The coincidence between the legal and moral standards accepted by proponents of euthanasia is evidenced in many ways. In general they discuss law and morality at once and make no clear distinction between the two domains. Any reader of Glanville Williams, Joseph Fletcher, Marvin Kohl, and other proponents of euthanasia will notice this fact. Very often they argue for changes in the law by arguing against traditional moral positions, as though the falsity of the latter, if it were proved, would justify the former.

Suicide must not be a crime. Why not? Because, they say, it is not always immoral and is sometimes the best way out. Voluntary euthanasia must be permitted. Why? Because, they answer, objections against it are rooted in traditional morality, and many people today consider it a demand of dignity that a person be permitted to be killed by choice. Nonvoluntary euthanasia must be permitted, they argue, since it is beneficent to kill painlessly those who otherwise would live wretched lives of poor quality. These are ethical arguments for legal policies. These arguments are the very same ones a utili-

tarian would propose in an attempt to justify the choices of individuals in the same matters.

The coincidence between the legal and moral standards defended by our consequentialist opponents is no accident. Their whole approach compels them to merge into one the two domains which we carefully distinguish. We shall now explain why this is so.

To begin with, the consequentialist claims that the right thing to do is what will yield the greatest net good. It follows from this principle that if consequentialism were workable at all—which we have shown it is not—then in any given situation there would be only one right act which could be chosen from among all the alternatives. This would be the act which would maximize net benefits. (A utilitarian might maintain that in some cases two or more acts would have equal utility, superior to any alternative, and so any one of these two or more acts, taken at random, could be considered the morally right thing to do.) Corresponding to the right act would be the best state of affairs to be brought about by a given agent or set of agents. For this agent or set of agents it would be more or less seriously immoral to bring about any other state of affairs.

It follows that on any consequentialist theory the class of permissible but nonobligatory acts tends to be empty. The only such acts are those which are members of a set of alternatives equal in net utility, only one of which can be obligatory. Apart from this case the act promising maximum net benefit will be obligatory, and every other possible act will be morally forbidden. Considered as an ethics, a consequentialist theory—if it were workable at all—would be extremely strict; it would not leave morally upright persons any extensive set of morally permissible possibilities from which to choose and so would leave them almost no room for morally permissible maneuver.

When a consequentialist theory of morality becomes a utilitarian jurisprudence, this strictness remains, and it has antilibertarian implications. When utilitarians see something which seems to them good for society, they tend to want to set up a public program which will promote the good, regardless of the reluctance of many members of the society to have government engage in that particular sphere of action. Analogously, there is a strong tendency to remedy social evils by means of governmental methods of social control. However, for various reasons the antilibertarian implications of utilitarian jurisprudence are mitigated in practice, so that using it as a basis of law does not appear to be as incompatible with the American proposition as it really is.

In the first place, the utilitarian will take into account the costs of the government's intervention. When government undertakes to promote a good by a public program or to remedy an evil by some official method of social control, the government's activity itself has consequences. Although the utilitarian policy maker might consider intervention desirable almost everywhere

if its costs were ignored, costs cannot be left out of account. In many cases it will be felt that the consequences of intervention will be mostly harmful; this will most likely be so when there is widespread public opposition to government involvement in a certain area. Hence, the utilitarian policy maker often urges that the government *not* undertake to promote some social good or to control some evil. In practice much seems best left to private initiative and to informal methods of restraint. With respect to such matters utilitarians can then present themselves as libertarians.

We are not suggesting that utilitarians are insincere in claiming to be libertarians. They can like liberty as much as anyone and regard it as a very useful good. Liberty can be seen as a necessary means to individual self-fulfillment. As such, restrictions upon liberty can be considered in general undesirable, a factor of disutility which must be taken into account whenever possible public policies are weighed. When this appraisal of the usefulness of liberty plays an important part in the utilitarian's judgment that a matter would be best left to private initiative and informal methods of control, the utilitarian can quite sincerely consider this judgment truly libertarian.

In the second place, utilitarians are limited in legislating morality according to their own views by the very generality of law. When individual acts are under consideration, all of the circumstances can be taken into account, and so, for example, a utilitarian might decide that in some cases infants afflicted with spina bifida should be killed and in others not. But when public policies are framed, they must be formulated in general terms which cannot take account of all the diverse circumstances present in the various situations to which the policies must apply. Thus, the utilitarian who thinks that some defective infants ought to be killed might advocate permissive legislation and yet not insist on a public program of nonvoluntary euthanasia, since it is hard to write such a program into a statute or even into a set of administrative regulations.

Again, because of this limit utilitarians can present themselves as libertarians who favor permissive legislation rather than public intervention. Such restraint certainly can include some regard for liberty. But this is not the essential factor. What is essential is that the enterprise of making and executing public policy has its own built-in constraints, which a utilitarian jurisprudence, as much as any other, must respect. The result is that utilitarians accept another limit upon their tendency to legislate their morality.

The two limits upon utilitarian jurisprudence which we have described might not be the only ones. There could be others like them. But whatever the limits, they will restrict the public domain and leave certain matters to private discretion only to the extent that utilitarian calculations demand that these limits be recognized and respected. This fact has several implications.

First, the private domain has no secure boundaries. The boundaries are set

by the disutility of public intervention, the limits of administrative practicability, or the like. These factors can change. For example, although public opposition might rule out compulsory abortion at present, the costs of intervention might be judged less than the disutility of forgoing such a program if more welfare recipients resist the urging of welfare workers and agencies that they voluntarily terminate their pregnancies. Similarly, although it might be practically impossible to write the handbook of administrative regulations for a program of nonvoluntary euthanasia for defective infants, such a program might be legislated and the bureaucrats given the impossible task of administering it fairly if socialized medicine is adopted more widely and the medical costs for certain classes of infants becomes a target in a cost-cutting drive.

Second, although utilitarians might appeal to liberty as a value weighing in favor of public restraint, they regard it as only one value among many. No consequentialist ethics can treat liberty as if it were an absolute which could exclude the application of cost-benefit analysis to any problem. Liberty might be a benefit to be taken into account, and its infringement a cost to count on the debit side when a public policy would restrict liberty. But the benefit of liberty is only one good among others and its infringement only one cost among others. Liberty always can be outweighed. Liberty has a certain value, perhaps even a considerable value. But it is not a blessing to be held sacrosanct.

This abstract argument showing the incompatibility between the American proposition—in which it is one of the ends of government to preserve the *blessings* of liberty—and a utilitarian jurisprudence helps to clarify several features, which we have noted previously, of the movement for euthanasia.

For example, it helps to clarify why consequentialists argue directly from their moral views to their legislative proposals without the slightest hesitation over whether there might be something intolerant in taking this direct step. Faced with opponents who insist upon the sanctity of life, utilitarians might tolerate what seems to them this irrational position. But they will not tolerate it because the liberty to hold it and to advocate its implementation is a basic principle of American society; rather, they will tolerate such opposition because this residue of traditional religious morality, although irrational, cannot easily be removed. (As we shall point out in section D, we ourselves question the justice of attempting to base public policy directly upon a morality of the sanctity of life, but we have no reservations about the right of those who hold either traditional morality or a utilitarian quality-of-life morality both to hold their positions *and to advocate* their implementation.)

The preceding argument also helps to explain why public officials who accept a utilitarian ethics can hardly limit the full impact of their own personal moral opinions and hierarchies of value when they undertake their official tasks of making laws, executing laws, and reaching judicial decisions. Put into positions where they have more options than most people,

such officials will have to do what seems to them best under the circumstances, all things considered; to do less would seem to them immoral. Thus their personal values will become principles of legality to the extent that they can get these values established—that is, to the extent that they have political power. Supreme Court justices, thinking of themselves in this way, will see what has to be done—"has to be done" in the light of their own values—and will do it.

The consequentialist approach does not necessarily lead to totalitarianism. As we have explained, it often will be decided that the greatest good for the greatest number will be achieved by letting people do as they please; sometimes it will be decided that public action is undesirable because the good it could accomplish is outweighed by the costs it will impose. Still, the fact that everything is subject to weighing and balancing and that any consideration in favor of governmental restraint can be outweighed will tend to make prevalent moral views and legal requirements coincide. Minority moral views will influence law significantly only when the minority is powerful enough or determined enough to make it too costly for the majority to legislate its own morality, execute what it legislates, and call the result "justice."

The preceding considerations make clear why a utilitarian jurisprudence based upon a consequentialist method in ethics has implications which are incompatible with the high regard for liberty—a regard which amounts almost to reverence—characteristic of the American proposition. We shall now show that a utilitarian jurisprudence not only is inconsistent with a just respect for liberty but also is inconsistent with other demands of justice.

As we mentioned in chapter eleven, section C, many critics of consequentialism have attacked this method of moral judgment because there often are cases in which most people's intuitions are that justice would require one sort of action while it seems clear that the results of a consequentialist calculation would demand another. If the greatest good for the greatest number is to be attained, then it seems individuals might rightly be considered expendable in the common interest. If individuals have any unalienable rights whatsoever, then there are some absolutes which may not be violated regardless of consequences.

Justice generally is admitted by utilitarians to be a necessary means to promoting other aspects of well-being. The consequentialist points out, for example, that inequality or inequity creates envy and perpetuates misery. Thus consequentialist theories set up an ideal of equality as an almost absolute condition for achieving peace among members of a society and the greatest happiness of the greatest number.

In an attempt to make plausible the claims of justice when consequentialist considerations would seem to require injustice in particular, exceptional cases, many consequentialists have argued in favor of rule consequentialism.

On this view rules are justified by the fact that they would conduce to better consequences than alternative rules, and acts are judged by their conformity to rules.

If the distinction between rule and act consequentialism could be maintained, it would permit utilitarians to make a more serious distinction than they actually can between just law and morally right action for individuals. But the distinction cannot stand up, since on a consequentialist theory all the consequences of an act are equally relevant. Thus, the particular act of making a rule is only one act among others; the rule cannot be made broader and more unexceptionable than will conduce to the best consequences. At the same time, as we already have explained more fully in chapter eleven, section C, any particular moral judgment will express a rational determination which will stand as the only reasonable rule for cases of precisely the same sort. Thus, rules of law and ad hoc decisions will tend to merge into one another.

When people who have adopted consequentialism think that they should do something, they quite naturally think—in accord with their theory—that their judgment reflects what is objectively the socially right thing, the greatest good for the greatest number. When a majority thinks it should do something, it quite naturally thinks that the minority who disagree are benighted or selfish or both. Only the stupid could miss seeing what is the greatest good, since it is a simple matter of calculation to determine it, and only the selfish could resist so beneficent a plan, which alone promises the greatest good for the greatest number.

The majority sharing and reinforcing one another in such convictions will work its will if it can, thus to tend to tyranny. This tendency will be concealed, however, by loud and persistent appeals to the democratic rights of the majority to pursue the common welfare as they see fit. Objections from any minority can be dismissed as obstructionist and self-serving. To oppose the tyranny of the majority—or even of a minority in power and convinced by consequentialist rationalizations that it is in the right—will be derided as morally absolutist and condemned as an attempt to impose a nonconsequentialist morality upon the society as a whole.

The legalization of abortion is a case in point. Opponents appealed to justice, which would require the equal protection by law of the lives of the unborn. Proponents appealed to the good consequences to be achieved by legalization—fewer back-alley abortions, reduced costs for welfare programs, and every mother a willing mother with a wanted child. The proponents of legalized abortion also used the language of liberty and justice yet showed in practice that they used this language to express social policies they preferred on other grounds.

Liberty for women was demanded, but liberty for the public to stand aloof from abortion is still very widely attacked. Justice for the poor is demanded,

but not more justice than would be needed to eliminate poverty by killing the children of poverty. Opponents of abortion are attacked on the basis that they are trying to impose an outdated, religious morality of sanctity of life upon a secular society innocent of the obscurantism of those who think legalized abortion is slaughter of the innocent. But proponents of abortion who control powerful media of communication refuse to treat their opponents fairly either in reporting news or in contending for influence on public opinion.

C. The Correct Relationship between Morality and Law

By contrast to this utilitarian jurisprudence we have in this book carefully avoided mingling moral and jurisprudential considerations. In considering what the laws should be with respect to euthanasia and related questions, we have not argued from our ethical theory to justify jurisprudential positions. Rather, we carefully began with a clarification of the American proposition, extracted common principles of liberty and justice from it, and argued on the basis of and within the limits of these principles. To make this point clear, it is worthwhile reviewing the difference between our legal proposals and our moral prescriptions.

In chapter four we argued that a legally competent person should be at liberty to refuse medical treatment and that this liberty should be subject to very few restrictions. The permissible restrictions would be for the sake of the public health, welfare, and safety, for the protection of dependents, and for the protection of persons at least temporarily noncompetent. We also suggested means by which the law could—and we argued for the sake of liberty should—facilitate every competent person's wishes with respect to his or her own care during a future time of noncompetence.

The minimal limits built into our proposal would allow competent persons to choose policies for themselves inconsistent with what we argued in chapter twelve is the morally required respect for the good of their own lives. For example, an individual could make certain that a guardian would be appointed who would under agreed upon conditions decide that life was no longer worth living—that the person would be better off dead—and order treatment discontinued on this basis. In this case the refusal of treatment would be intended to bring about death; it would thus be killing in the strict sense and so, according to our view, inevitably immoral. Even without directing that treatment be discontinued precisely to bring about death, a person would be at liberty to arrange for the discontinuation of treatment in morally irresponsible ways which a person with due regard for the good of life would carefully avoid. For example, an individual could appoint as guardian a relative or friend who lacked practical wisdom.

In chapter five we argued that suicide and attempted suicide ought not to be considered crimes, and that although the law should not facilitate such acts, it should take care to avoid interfering with competent adults who freely choose to kill themselves. For example, people who choose to commit suicide by refusing to eat should not be force-fed provided that they are found to be competent. Clearly, just such suicides as the law in our judgment should not interfere with will be instances of killing in the strict sense and so, as we have argued, inevitably immoral.

In chapter six we argued against the legalization of voluntary euthanasia, as previously we argued against the legalization of assisted suicide in general. But these arguments were not based upon an assumption of the sanctity of life. Rather, they were based upon the interests of others than those who would be killed: their interests in safety on the one hand or, on the other, in standing aloof from activities they abhor. Morally speaking, we found both the person who volunteers to be killed and the one who does the killing to be engaging, ordinarily, in moral acts of killing in the strict sense, which can never be right, regardless of considerations about the interests of anyone else.

In chapter seven we argued that under certain conditions killing in self-defense and in war can be justly considered legal, particularly because under appropriate conditions the killing defends the legal order itself and prevents it from being overridden by brute force. But from a moral point of view much such killing probably will be done by way of executing a proposal that an aggressor be destroyed, and such killing will morally be excluded on the ethical theory we defend, although not on most traditional theories of justifiable killing.

As to capital punishment, we consider it an immoral violation of the good of human life. But we did not argue against it in chapter seven on this ground. Rather, we pointed out that such killing need not be regarded as unjust but is objectionable jurisprudentially on the basis of the violation it involves of the liberty to stand aloof of all the members of the society who find this practice abhorrent, regardless of the moral ground on which they find it so.

We also argued for an equitable rule permitting killing when necessary to maximize the probability of the survival of some persons when two or more are subject to a common peril. In many cases killings permitted by such a rule would be morally justified as well. But it is clear that as a rule permitting abortion to save the mother's life, a statute along the lines we defended in chapter seven, section G, would in practice permit abortion in any case in which it would be impossible to prove beyond reasonable doubt that the abortion was not done for this purpose. And so this legal rule, even if just, would permit many abortions precisely aimed at killing an unwanted child and other abortions which we are convinced a morally responsible person would

not approve—for example, on the ground that a pregnant woman should be willing to run a serious risk to protect her unborn child.

In chapter eight we argued against the legalization of killing in nonvoluntary euthanasia. Here our absolute exclusion of the permissibility of legalizing such killing coincides in result with the moral judgment that such killing cannot be chosen without violation of the good of life. But the jurisprudential argument, once more, was not framed in terms of the sanctity of life. Rather, the basis of the jurisprudential argument was equal protection of the laws. To kill the noncompetent on the judgment that they will be better off dead or that they are nonpersons is to discriminate against them and arrogantly to usurp a prerogative for making value judgments on their behalf on principles they need not accept if they were competent.

In chapter nine we argued for legal safeguards for the rights of noncompetent persons to medical treatment. These safeguards are such that they would never require anyone to make an immoral choice in this matter. But they are not by any means adequate to preclude immoral choices, including some which would be the adoption of proposals to bring about death. The legal safeguards we outlined would embody presumptions about the justice of decisions under certain conditions. For example, a dying, noncompetent person whose physician and next of kin agree that treatment be discontinued would be presumed to consent to the discontinuance. In many cases such a presumption would be correct, but in some it would not, and in some it would be used by those legally permitted to decide as a legal shelter for disposing quickly of dying persons, such as the severely retarded or the demented, who with care might enjoy several months of life as good as any they were ever capable of. The problem is that when omissions are consistent with justice, the law should not try to enforce actions which moral uprightness would certainly demand.

Throughout our treatment of various questions we tried to make certain that the prerogatives of the medical profession would be safeguarded. For example, nothing in our legal treatment of the issues demands that a physician accept a patient who needs care or that a physician continue to treat a patient who exercises the liberty to refuse consent. In many cases physicians can and do abuse these prerogatives by failing to give the service which true dedication to the goods of life and health would demand, refusing to care for patients who choose to exercise their right to make decisions limiting their own treatment.

Thus it is clear that the jurisprudential arguments we have developed in chapters three through ten do not proceed directly from the ethical theory we presented in chapter eleven. The basis for our jurisprudential arguments is in the common principles of liberty and justice which we call the "American proposition"—principles located in the American consensus and articulated

in chapter two. This basis for jurisprudential judgments has a normative status for Americans who engage in civil debate of public policy issues.

The principles of liberty and justice cannot easily be set aside by anyone who wishes to participate in such civil debate. Certainly they cannot be set aside as if they constituted a sectarian morality, insistence on which in the formation of public policy would constitute an unjust imposition of morality. Indeed, the charge that one or another party is seeking to impose morality has force only because all Americans regard tolerance and pluralism as important. These values in turn are considered important because liberty is accepted as normative, and any sign of its infringement by the establishment of any one set of deeply held conscientious views is universally regarded as a most serious threat to justice.

At the same time, the common principles of liberty and justice can be explained and defended within various ethical frameworks. To offer such an explanation and defense does not transform the American proposition into the particular ethics which someone uses to explain and defend it. But to offer such an explanation and defense does provide an ultimate moral foundation upon which those who accept the ethics which is used can take part in building the common structure of political society. Hence, we offer our explanation and defense of the common principles of liberty and justice by using the ethics articulated in chapter eleven, without hereby conceding the non-neutrality of the principles upon which the jurisprudential arguments in chapters three through ten are based.

We do not accept the common principles of liberty and justice as sufficient principles for jurisprudence for mere strategic or rhetorical purposes. So far as we are concerned, the positions for which we have argued in chapters three through ten in no way represent a compromise between our moral principles and the hard realities of the euthanasia debate. Rather, we believe that morally upright citizens ought to be satisfied if public policies are shaped by considerations of liberty and justice alone. Our defense of this jurisprudence is as follows.

The ethical theory articulated in chapter eleven entails that actions of certain kinds are always wrong. Whether these actions are done by private individuals or by persons associated in communities, including political societies, does not alter this general point of normative ethics. The kinds of actions which are always wrong are those which include a proposal to violate some basic human good. Justice is one of the basic human goods. Actions which violate it, including public policies which violate it, are always wrong.

Of course, it is not always easy to discern what constitutes justice and what acts would violate it. But when this is determined, a political society ought never to violate it and ought never to perpetuate injustice in its laws, policies, and structures. Justice demands that due respect be given to liberty and that

the range of liberty be very wide. Only justice itself, and no mere pragmatic considerations about what could usefully promote the common good, can limit the claims of liberty.

To understand why liberty is so important and why it is so firmly protected by justice, we offer a brief account of how liberty can be understood in terms of our ethical theory.

Liberty means the absence of imposed constraints to pursuing one's own purposes in one's own way. Persons are constrained whenever they must do or refrain from doing something for the sake of purposes which they do not share. A boy playing as he wishes is at liberty; his liberty is restricted if he is required to do chores before he is permitted to play and if he considers the chores as no more than an imposed service to his parents. A girl is at liberty if she is studying courses which interest and appeal to her, so that she finds satisfaction in them and is happy to work at them; her liberty is restricted if she must take required courses which she would not otherwise take in order to obtain a diploma, necessary for a job or other purpose she desires.

Slavery is an extreme infringement of liberty, because slaves must work constantly to achieve purposes with which they are not in the least identified. The purposes are those of the master. The slave's labor is alienated to the master's use. The slave only suffers this situation for the sake of survival and what security in the necessities of life being owned by another offers.

The maximum of liberty in a social situation exists where a group of persons voluntarily cooperate together in working for an objective dear to all of them, a purpose in which all share and find their own identities and fulfillment. One might think of children playing together simply for the joy of the game and one another's companionship as a model case of liberty. No one is making them do anything.

One must contrast with liberty as we have just defined it a false concept which is rather widely held. According to this false concept the essence of liberty is individualism. One way in which this concept arises is by starting to think of social relationships from an essentially negative point of view. If one assumes that human persons are naturally selfish and tend to be wicked, one might suppose that government is primarily a constraint upon individual excesses. Ideally, on this assumption, there would be no law, no authority, no one ever giving direction to another. But, sadly, wickedness must be limited by force, and so laws must be made, the rule of law enforced, and those too blind or too selfish to pursue the greater good compelled to do so. Since on this theory government is no more than a necessary evil, the limitation upon government, which is liberty, is regarded as a good. Liberty is the residue of individuality which survives social control.

On our definition the children playing together are not less at liberty than they would be engaged in some solitary activities. In order to play they must

recognize and respect some minimum of rules, but they see these rules, not as impositions upon their spontaneity, but as a plan for doing together what they wish to do. Captains might be elected and their judgments accepted if the game calls for this; submission is not a restriction upon liberty but a way of participating in the common activity which one wishes to engage in. Similarly, on our view people can exercise their liberty in forming a political society. They can be seeking not simply to repress evils but to cooperate in pursuing a good—justice.

Since there are many human goods and many possible morally good courses of action in most situations, even the most upright people must in their own individual lives make many choices among good possibilities. One might enter this profession or that and cannot in fact do both. Usually the need for choice is dictated, not by the immorality or the lesser goodness of one or the other alternative, but by factual limitations. Likewise, many people who attempt to live together will wish to pursue many good purposes. Even if there were no moral failings at all, their upright acts in many cases would conflict in practice—two groups of children cannot play in the same area at the same time.

If all who live together are to have peace, if their pursuit of goods is to be carried on as smoothly as possible, these factual conflicts must be resolved. Such harmonization of activities would make laws necessary even in a community of perfect saints. And those who made laws—whether the whole people assembled or some few chosen for their special talent in this particular work—would have governmental authority. The difference between this ideal community and the actual one is not that there would be no laws, but that people would not willingly violate the laws, since they would see in them a plan for living together in peace, in mutual respect, in cooperation fulfilling to all.

Thus, we hold that liberty is not essentially individualistic. It is not necessarily contrasted with the directions of law; these need not be felt as constraints at odds with one's own purposes. Precisely in willingly forming or participating in a society committed to a purpose with which one identifies a person exercises liberty, not accepts constraint.

But it follows that if people accept a social order for the sake of goods to which they are committed, and the society then uses its methods of control—especially the coercive methods of political society—to compel people to act for other goods to which they are not in fact committed, then the process of government does infringe liberty. Not finding their identity and fulfillment in the ends to which the laws compel them, people are alienated from the law and regard authority behind the law as a mere power which one has to submit to, attempt to evade, or defy at a very high personal price. Even committed members of such a society are compelled to accept constraints; they go where they do not wish and are forbidden to go where they would.

We do not regard liberty as a basic human good. Liberty, however, is

closely related to the realization of all of the basic human goods. It is an aspect of one's actions insofar as they are one's own. Unfortunately, liberty is not always justly used. In such a case, because liberty is not an absolute moral principle, it can be limited without immorality.

Sometimes people who are blind or selfish will set themselves to pursue their own purposes with total disregard of the harm they inflict upon others. The bully will demand to be captain despite his ineptness for the role. In cases like this the society cannot help infringing upon someone's liberty. Either the other children will play under conditions they only reluctantly accept, conditions which substantially damage the goods of play and companionship to which they are committed, and thus their liberty is infringed; or the bully is excluded from the game or refused the role of captain which he covets, and so he does not play as he would like, and his liberty is infringed. If people whose initial desires are incompatible are not pleased to please one another and so accommodate one another, then someone's liberty must be infringed, for some cannot do as they please.

It is worth noticing that liberty does not seem in any ordinary sense to be a means to attaining other goods. One can be at liberty and can exercise liberty while damaging goods—for example, while committing suicide. And one can be at liberty yet do nothing to make use of the opportunity liberty offers for action. Liberty is only the absence of constraint. As such, it is entirely negative and effects nothing whatsoever.

Yet from a moral point of view liberty is very important. People constitute themselves by their own actions. If they have not liberty, then their actions are not in the fullest possible sense their own. Their lives are of necessity constituted otherwise than they wish; they are alienated from their very selves. Only with liberty can persons act in such a way that the selves which they constitute in action are the selves in whom they find their own fulfillment.

Of course, even with liberty an immoral person constitutes a self which cannot be in self-harmony, a self whose integration is a form of self-mutilation and disintegration. But without liberty even a morally upright person is barred from becoming the person he or she wishes to be, a person wholly at peace with himself or herself. The whole point of existing as a human person who lives in the moral domain is to constitute oneself.

Without liberty this process is blocked except to the extent that one becomes able to rise above the limits of one's condition and to make even slavery into a challenge joyfully accepted for the sake of some basic human good such as the nobility of the defiance of Sisyphus or the holiness of the obedience of Jesus—neither of which would be possible for a person whose liberty was not infringed. But not everyone is a Sisyphus or a Jesus. For most people liberty is vital, and for a person's active realization of a great many human goods in a morally upright way it is an indispensable condition.

Thus, on our view liberty must be respected by political society, almost as an absolute, limited only by the demands of justice. For the sake of liberty evil must be tolerated which could be prevented if only the attainment of good consequences were important, and if the constitution by their own acts of persons living their own lives were not important.

A political society does not infringe liberty at all if it makes its reasonably necessary demands upon its consenting members in order to promote their willing cooperation in the pursuit of the goods for which they constituted the society. And it does not infringe liberty wrongly if it makes similar demands upon those who resist them unjustly, who want the benefits of society without helping to bear its burdens, who want to enjoy rights and to evade duties. But a political society infringes liberty wrongly if it must coerce its upright members, for it will be unnecessary to do this unless the demands which are made either are not reasonably necessary for the goods to which they are committed together or are not directed to these goods at all, but rather to some private purpose which not all members of the society share or ought to share.

On our view there are spheres of life into which political society has in principle no business in intervening. Liberty of conscience and belief are of central importance, because they are so basic to the self-constitution of persons. Liberty of communication about matters of conscience and belief is equally vital, because this liberty is essential for persons to constitute themselves together into morally significant communities of love and friendship.

There is widespread agreement in societies with roots in the Christian tradition that these liberties ought to be accepted, although the nations which have adopted marxist ideals and consequentialist methods attack them. However, too many theorists in the liberal democratic nations can offer nothing stronger than considerations of practicability and expedience in terms of good consequences for respecting even these basic liberties.

We do not say it is expedient to respect liberty. We say, rather, that attempts to coerce conscience and fundamental world view are inherently wrong and can never be right. Conscience can be immoral and perverse, but even the immoral and perverse conscience must be respected by law. To attempt in this fundamental sense to enforce morality is simply wrong and could never be just, regardless of consequences.

Consequentialists might say that they cannot imagine any situation in which the infringement of such basic liberties could be justified by any conceivable benefits which could outweigh the harms such infringement would entail. But what a consequentialist cannot imagine today will become imaginable tomorrow, and by the day after tomorrow a once liberal society will despise the blessings of liberty as obstacles to progress toward a better-adjusted world of men and women whose behavior is better and more efficiently conditioned, a society beyond freedom and dignity.

If political society must respect liberty as nearly an absolute and avoid infringing upon certain fundamental liberties absolutely, it must be completely absolutist with respect to justice. For political society justice is not simply one value among others which are to be pursued; justice is a good which should never be put upon a scale and weighed against good consequences of any sort. Morally speaking, justice is one of the basic human goods. It is always wrong directly to act contrary to it. Harmony and friendship among people is the fuller good of which justice is a part. But justice is not only a means. It is an intrinsic condition, never surpassed, of peace and genuine friendship.

Justice means that the roles of people in relation to one another are determined by the possibilities and necessities of the goods to which they are jointly committed. It means that requirements that each member do certain things and forbear from doing certain things, claims that each member receive certain things and be immune from certain things, form a system which has its reason for being in a common purpose. And this system also must be reasonable in the sense that all members of the society who are truly committed to the common purpose can reflect upon it and honestly say that they would be willing to have someone for whom they had deep affection and sympathy fulfill any of the society's roles, being bound by its duties and satisfied with its rights.

This conception of justice is based upon the principle of universalizability or the golden rule. Universalizability does not assume or demand equality in some other sense. Rather, it defines a certain, very important moral sense of equality. Everyone is a person with duties to do and rights to fulfill. Everyone shares personal dignity and deserves the same respect. Everyone enjoys certain rights which truly are unalienable, such as the right to fundamental liberties. And so everyone is entitled to equal protection of the laws. There is no natural caste system, for differences in various valued qualities do not make one more or less a person or make one's life more or less worth living. Precisely as members of political society, as persons before the law, all are equal.

Consequentialists who do not and cannot understand this sense of equality try to define justice in terms of equality in some other sense, whereas we define the relevant sense of equality in terms of justice. What this equality can be and ought to be, consequentialists do not agree. In any case, it is only one good among others, always in danger of being outweighed.

We hold that justice is the basis of all good law, not only in the sense that the law ought to be just, but that it primarily should be for the sake of justice. Thus, for example, we hold that political society must have a law of homicide, not only because most people want their own lives protected but also because universalizable maxims which permit killing must be very closely limited, as we argued at length in chapters seven and eight. Given a law of

homicide, it is a matter of justice—equal protection of the laws—not to exclude from the protection it offers those whose lives are judged by others to be not worth living, those who are unwanted by others, those who are a burden to others.

Living justly together is not merely a means to some other good; it is an important aspect of the self-fulfillment as human persons of all those who are dedicated to it. Thus, for political society the demands of justice are sufficient to exclude most attacks upon human life. It is not essential for the state to be prolife. But it is essential and also sufficient for the state to be just, for it to protect life indiscriminately in the defective, the weak, the retarded, the insane, and the senile as well as in the normal, the strong, the bright, the well-balanced, and those in the prime of life.

In summary, justice is a basic human good. Justice requires due respect for liberty which, while not itself one of the basic human goods, is a necessary condition for the active, human realization of any of these goods. We believe, therefore, that morally upright persons may consent to a government based upon a jurisprudence in which liberty and justice are the sole overriding principles and in which the claims of liberty are restricted only by the demands of justice. Such consent is morally upright because this jurisprudence can be accepted and applied without the adoption of any immoral proposal.

No one who accepts such a jurisprudence is committed to doing anything incompatible with any basic human good. The very libertarianism of this jurisprudence offers protection against pressure to engage in any immoral act. A person who accepts this jurisprudence will foresee, of course, that respect for liberty will require toleration of a great deal of immorality, but the proposal to accept the jurisprudence need not include the proposal that any of this moral evil be done. The good of liberty, not its abuse, is what one proposes; the abuse is only accepted.

Finally, the acceptance of this jurisprudence does not require that one immorally absolutize the goods of liberty and justice, so as to deny the irreducible goodness of other basic human goods, such as life. Life and the other goods are not less good than liberty and justice; the latter can be accepted as the proper basis for political society without in the least denigrating the former. To commit oneself to some goods is not to violate others unless one turns against these other goods in making the commitment.

D. Respect for Life Not an Independent Principle

Many readers who agree with us in most of our substantive positions concerning euthanasia and the related issues will object that our refusal to accept any direct limitation upon liberty except justice does imply some disregard for

the other goods. If other basic human goods, such as human life, were recognized as direct elements of the constituting purpose of political society, they would justify certain constraints upon the abuse of liberty. From this point of view our refusal to put constraints upon liberty in favor of life will appear to betray a disregard for this good, since such constraints would justify the prevention of certain violations of this good.

We oppose this attempt to introduce the good of human life as a fundamental principle of political society. Moreover, our proposition is not based merely upon a conviction that this approach is bad strategy and bad rhetoric, which is likely to guarantee more victories for the consequentialist proponents of euthanasia than the political appeal of their positions would otherwise win for them. Rather, our opposition is principled. We do not believe that an ideal political society would allow reverence for life to directly constrain liberty. We have several reasons for taking this position.

In the first place, the view that human life is a constituting purpose of political society sometimes is held as part of a theory that all of the basic human goods are included in the constituting purpose of political society. This theory is plainly paternalistic and potentially totalitarian. It also seems to us morally indefensible.

A political society constituted according to this theory would necessarily order and rank the various basic human goods, since it is impossible to promote all of them at the same time and with the same level of commitment. Choices will have to be made and priorities set. These choices will establish one common, public style of life, which will inevitably conflict with the styles of life which otherwise would be chosen by various morally upright persons. The self-constitutions of such persons will be compromised; their liberty will be violated.

This violation of the liberty of citizens is a direct consequence of such a theory of the state. The common good on this conception is all-inclusive. The pursuit by citizens of their own goods in their own ways is necessarily subordinated to the common good. Such a view of the state might have seemed defensible to the Greeks. But to all who have understood that human dignity requires that each person establish his or her own disposition toward God (or whatever each person considers ultimate in reality) by a free and uncoerced choice, this classical view of the state is unacceptable. Personal dignity demands that the most important concerns of individuals transcend the state and be free of its political control and coercive sanctions. If the state claims control in these areas, it oversteps its proper bounds, and mortal conflict ensues.

Of course, one who holds that human life ought to be accepted as an element of the constituting purpose of political society need not hold the theory of the state just criticized. Such a person can hold that human life,

because of its special status—perhaps because it is a necessary condition for all the other human goods—must be promoted and protected by the state.

We think that not even this position can be sustained. If human life is an element of the constituting purpose of political society, it would follow that life should be promoted by the state's power. Programs to sustain life and promote health will have to take priority over other public programs—for example, in the field of education. The spending of public funds on the arts or on recreation, when they could be spent on preventive medicine, will be unjustifiable. The use of the resources and power of the state to promote human life will lead to conflicts with the personal preferences of even those citizens who would never violate human life, but who do not consider its promotion more vital than the pursuit of other basic human goods.

Morally upright citizens need not put life high in the hierarchy of goods in their own self-constitution, but if the state is committed to promoting life, they will be coerced into accepting this priority. Again, their liberty will be violated. Moreover, the liberty here violated is not the liberty of the potential suicide, but the liberty of the upright person who simply prefers to spend more on education than on health or who would like to engage in risky mountain climbing which a state committed to life might well outlaw. If life is a good to be promoted by the state, the legitimate exercise of the liberty of upright persons to make different choices will be compromised. This compromise would not necessarily be immoral in itself, but its imposition upon persons who are both morally upright and unwilling to accept it will be unjust.

Those who wish to limit the exercise of liberty by the good of human life might accept the foregoing criticism as valid and limit their thesis to the claim that although the state need not actively promote life, it must uniformly protect it. Such a position would avoid our criticism yet provide a strong enough basis on which to overturn the policy we have argued is jurisprudentially justified on certain matters, such as suicide and the nearly absolute liberty of competent persons to refuse medical treatment. It also would provide a basis for a much more direct argument against the legalization of voluntary euthanasia than the complex argument we constructed in chapter six.

However, if the state is not obliged to promote life, then why must it protect it absolutely, even when justice is at stake neither directly nor indirectly? If the good of human life is a principle of political society, then promotion of this good would be required. If it is not a principle, then a policy of extending absolute protection to human life does not seem to be required, and it is difficult to see how any such policy can be justified. Simply to stipulate that all killing, even killing of oneself, is to be held illegal would be arbitrary. Of course, the common law tradition did forbid all killing. It did so precisely because the common law tradition reflected the Christian morality

of the sanctity of life. But a just regard for liberty in a pluralistic society forbids any such appeal to Christian moral norms to justify public policies.

E. The Adequacy of Justice

A state which is as limited as one which can be justified on the jurisprudence we have defended might seem to be seriously impoverished. It might be a just society, but would it be a very good society?

In considering this question one ought to be careful not to identify the state with society, even with the society which is materially coextensive with—that is, which has the same individuals in it as—the state. If the state were minimal, this would not mean that society at various levels and by various associations would be barred from promoting and protecting any and all of the basic goods of persons. A society need not be irreligious because the state avoids establishing religion or preferring any religious or irreligious world view to any other. And if the society is irreligious, it is not clear that state action would help matters. The same thing, we suspect, is true of other human goods.

It should not be concluded that a state committed solely to justice as its proper good and concern will be the sort of state so-called rugged individualists wish for. In the first place, many who are called rugged individualists want all sorts of benefits from the state but do not wish to make proportionate contributions. In other words, they are people whose demands are unjust and who use libertarian language as a cloak for their disregard of the rights of others.

In the second place, rugged individualism often means a theory of property which we think could be shown to be incompatible with justice. Since this is not the place to begin an investigation of the question of what justice requires in the economic domain, we simply assert our view that much of what is wrong with the modern welfare state has developed because the radically social character of the just control of property has not been recognized and legally established by the state as it should be. If the state truly established justice, other societies at various levels would have broad scope for more adequate and more humanly satisfying ways of caring for the helpless, helping the poor, and doing the other things the welfare state rather feebly attempts to do.

Finally, we are convinced that many friends of life who are anxious that the state recognize the sanctity of life and treat life as a direct and independent good of political society really are concerned that on any other conception the state must adopt a policy allowing unjust violations of human life. Our entire argument in this book has tried, among other things, to allay this concern.

What is necessary and sufficient is that the state establish and protect justice, which includes respect for the just claims of liberty. If this is done, while immoral acts against human life will be permitted, the state will not itself engage in such acts and it will not stand by and permit the killing of the innocent in the name of beneficence. The wider conception of the purpose of the state, not the narrow one which restricts it to justice, is the enduring threat to all the basic human goods.

While to some extent the present involvement of various levels of political society in the welfare of private individuals and families—public social insurance and relief—can be defended in terms of the demands of justice, we think that the dynamics of the commitment of the state to welfare funding is a significant cause of the unfolding attack upon innocent human life. In earlier centuries such expenditures were largely a function of families for their own members, of voluntary associations, and of private charities. They became matters of public relief first on the local level; then gradually at the intermediate, state level of American political society, where criminal laws are made and enforced; and only finally at the national level where constitutional decisions are handed down.

The costs of social welfare programs are larger than anyone ever expected. Selfish members of society do not wish more and more to bear these costs. Thus what appeared originally to be a vast accomplishment of humanitarian idealism is becoming an important motive for mass killing. Already a major reason why abortion is legalized is to save the state the costs of caring for unwanted children as they carry on a tradition of dependency. We think it is clear that the poor would be safer if the state which has the power to authorize killing them did not also have the expense of supporting them.

Our conclusion, then, is that the state should protect human life, not because life is a basic human good, but because justice both is such a good and is the good to which the state is committed insofar as it is a genuine community. And justice requires very extensive protection for human life, as it also requires much else which the state does, more or less well, under other titles, such as promoting the general welfare.

No one ought to suppose that the analysis we have proposed in this chapter would separate legal from moral considerations. The noncoincidence between the standards of law and the standards of morality is not a sign of some sort of impossible divorce between the two. Rather it expresses the fact that legal standards only depend upon some few moral standards, not all of them. The moral standards expressed by law are the moral demands of a group of persons who form a good state, among other societies, upon themselves and one another as members of this state, and upon the state itself as their common way of pursuing together the good of justice.

The demands of justice are never surpassed in human relationships, not

even in intimate ones. Other relationships are established for the pursuit of other goods; they flesh out the skeleton of justice and make a full-bodied life. But the requirements of justice are not transcended. They remain always. If they are not visible in many relationships, if they are never felt to be present, this is not because they are absent or unnecessary. A person stands erect without protruding bones and aching joints. This person is well. The skeleton becomes visible and is felt only when there is injury or disease.

This will be true in all relationships other than the state itself. In the state, the common tent in which a people live, the skeleton of justice always is exposed. It is the indispensable framework over which is stretched the fabric which protects moral men and women from brute force. If this framework does not stand, the people are exposed to the natural forces of the struggle of all to survive, a struggle in which the fittest to survive are those who survive, but the fittest to live with human dignity are more than others likely to die.