

1 of 1 DOCUMENT

Copyright (c) 1984 Emory University School of Law.
Emory Law Journal

SUMMER, 1984

33 Emory L.J. 631

LENGTH: 6765 words

ARTICLE: **ARGUING ABOUT RIGHTS** *

* This paper, apart from the passage in square brackets which was added afterwards, was originally delivered at the Interamerican Congress of Philosophy at Tallahassee, Florida in 1981, publication of whose proceedings has been unavoidably delayed. I am grateful to their editor for permitting this advance publication. My fellow-symposiasts were Richard Flathman and Richard Brandt.

NAME: R. M. Hare **

BIO:

** White's Professor of Moral Philosophy, Emeritus, in the University of Oxford, and Research Professor of Philosophy at the University of Florida.

LEXISNEXIS SUMMARY:

... I have just published a book about moral thinking, in which I do my best to provide a way of arguing about moral questions rationally; and it contains a chapter on rights and justice in particular. ... The prejudice against utilitarianism which seems to have affected most of the philosophical world has a number of causes, which I shall not be able to go into; but it can be quite easily dispelled if we realize that once the two levels of moral thinking are distinguished (that at which we adjudicate particular cases in accordance with principles which we have learnt, and that at which we ask whether the principles themselves are the right ones to hold) a place can be given to the intuitions, moral convictions, and even prejudices on which many famous anti-utilitarian arguments are based; and in spite of that utilitarianism, as a way of selecting moral principles, can be left unscathed. ...

TEXT:

[*631] The word 'argue' is used in at least two senses. When parents say to their children 'Don't argue', they mean 'Don't dispute what I say'. In this sense there are plenty of arguments (i.e. disputes) about rights going on all the time, some of them violent and most of them confused. That is not the sense in which I shall be using the word, but rather that in which it means 'reason'. This is more like its primitive sense; it comes from a Latin word meaning 'prove' or 'try to prove'. Since few of the arguments about rights in the first sense contain much by way of attempts by the disputants to reason with each other, I think it would be useful if philosophers asked, more than many of them do, how such reasoning is to be done.

Some of the worst offenders, indeed, are philosophers. It has come to be accepted in many philosophical circles that one does not reason about rights; one appeals instead to one's own or one's readers' intuitions either about particular cases, or about the principles involved. It is not surprising, therefore, that philosophers of this sort have not helped very

much in resolving the disputes about rights which rack the world, since they are only following a method which is already being employed by the disputants. Thus John Rawls appeals to one lot of intuitions in order to support a system of justice and rights which, ⁿ¹ we have been told by Sir Stuart [*632] Hampshire, ⁿ² is to be commended for expressing so well the ideals of the British Labour Party; and Robert Nozick appeals to another set of intuitions in order to support a wildly different set of political attitudes, ⁿ³ which I suppose would be more congenial to Mrs. Thatcher or Mr. Reagan. Nowhere in either of their two books can one find any convincing answer to the question: 'If your intuitions conflict, how are you going to set about settling the conflict in a rational way'? When even philosophers carry on like this, what hope is there that ordinary politicians and statesmen will learn to settle their disputes without violence?

Professor Brandt has amply shown the futility of such a procedure. ⁿ⁴ I have just published a book about moral thinking, ⁿ⁵ in which I do my best to provide a way of arguing about moral questions rationally; and it contains a chapter on rights and justice in particular. I will not rehearse in detail what I say in the book; but I shall at least indicate how I would meet the challenge which I say these other philosophers fail to meet.

I shall not spend time stressing the importance of the distinction between moral rights and legal rights, ⁿ⁶ nor of that, made current by Wesley Hohfeld, ⁿ⁷ of the various kinds of rights (liberties, claim-rights, etc.) which people still mix up. Nearly all of what I shall say will apply to rights in all of these senses. In spite of my disagreements with Rawls, there is one point at which I think he shows a marked superiority over Nozick. He has got hold of an important truth, that we have to attack questions like these in two or more stages, or, as I prefer to put it, at two levels. ⁿ⁸ This is an old idea; it [*633] could be argued that it goes back to Plato. ⁿ⁹ If we are to settle, at the first of these levels, questions of what particular acts are just or, in general, right, or of what would be an infringement of somebody's rights -- or, in general, what rights people have -- then we have to have what Rawls calls 'principles of justice', ⁿ¹⁰ including principles determining people's rights. And the question of how these principles are to be selected is a further question, to be tackled at a different level of moral thinking. Rawls does it by supposing that we have a set of people in what he calls the original position, who select principles of justice and rights ignorant as to how their own personal interests will be affected by the choice. ⁿ¹¹ This extremely promising suggestion, however, does not produce in Rawls' own work a satisfactory answer to the challenge, for reasons which I have given elsewhere in detail and shall not repeat. ⁿ¹² The basic reason is that he is content at crucial points in his argument to rely on his own moral intuitions in order to save him from being a utilitarian -- a fate in his opinion worse than death. His method, if consistently carried through without appeals to moral intuitions, would yield utilitarian conclusions. ⁿ¹³

I do not see anything to complain of in that. The prejudice against utilitarianism which seems to have affected most of the philosophical world has a number of causes, which I shall not be able to go into; but it can be quite easily dispelled if we realize that once the two levels of moral thinking are distinguished (that at which we adjudicate particular cases in accordance with principles which we have learnt, and that at which we ask whether the principles themselves are the right ones to hold) a place can be given to the intuitions, moral convictions, and even prejudices on which many famous anti-utilitarian arguments are based; ⁿ¹⁴ and in spite of [*634] that utilitarianism, as a way of selecting moral principles, can be left unscathed.

This is how it is done. At what I shall call the intuitive level of moral thinking, we are allowed to use our moral intuitions (and indeed our deeply ingrained moral and other feelings, if intuitions are different from those) in just the way that intuitionists say. They give what is for most purposes an adequate account of this level of thinking, and utilitarians do not need to quarrel with it, at that level. However, even at that level, questions will arise which cannot be answered by appeal to moral intuitions. They arise principally in two kinds of cases. The first is when two of our intuitive convictions, sometimes deeply held, conflict in a particular case, i.e. cannot both be acted on. The second is when we ask whether the intuitive principles which we have ourselves acquired through our upbringing are the ones which we ought to pass on to our children.

Either of these kinds of cases makes us call in question our intuitive principles themselves; and since most of the really agonizing moral problems are of one of these two kinds, it is no accident that all moral philosophers who can see

even a little below the surface of their subject have been occupied in the main with such cases, and have sought, whether or not they distinguish the two levels of moral thinking, to say how questions at the second or, as I shall call it, the critical level are to be answered. How, since we are supposed to be talking about human rights, are we to decide what are the 'Rights of Man'? A clearer way of putting this question is, What rational way is there of deciding what intuitive principles about rights we ought to teach to our children (and ourselves) and, in general cleave to with the kind of ingrained conviction that is appropriate to moral principles?

In a moment I will give my answer to this question; but first I ask you just to assume for the sake of argument that there is such [*635] a way. By choosing moral principles, and in particular principles which determine rights, in accordance with it, we shall equip ourselves with a set of principles which we can cultivate, so that they become second nature and have for us the force of intuitions. In the sphere of rights, there will be certain rights which we are sure that we and other people have, and we shall treat these rights, in Ronald Dworkin's word, ⁿ¹⁵ as 'trumps'; have, in Sir Stuart Hampshire's words, ⁿ¹⁶ feelings of 'outrage or shock' when we see them infringed; and in general behave at this intuitive level just as intuitionists say we behave. So nothing I am going to say is in the least inconsistent with this part of the intuitionist position, and therefore any complaints against what I say based on these phenomena of the moral life will entirely miss the target. However, we do need to question the assumption, made by all such thinkers, that the particular set of principles or rights to which they appeal is self-evidently correct. It cannot be, because the principles appealed to by different intuitionists are in conflict with one another. Each needs to be argued for. It is no use appealing to the intuitions themselves, as they all do, to justify those intuitions.

A related difficulty arises even if we confine ourselves to our own moral convictions, and disregard those of people who think differently. Since the principles which are enshrined in our intuitions are, and have to be, rather general, there will inevitably be cases in which they conflict -- in which, for example, we cannot preserve one person's well established right without contravening some well established right of another person. And what are we going to do then? If the child in the womb has a right to life, and the mother has the right to dispose of her own body, what are we going to say? Both of these rights may seem very important ones in general. Such conflicts can be resolved only by ascending to the critical level and asking what principles about rights we ought to have, and which of them ought to override the other in this particular case. So let me now give my account of this level of moral thinking.

There is one purely formal right which it must be agreed everybody [*636] has, and that is what has been called the right to equal concern and respect. ⁿ¹⁷ I say 'purely formal' for two reasons. The first is that this right to equal concern and respect does, by itself, nothing to determine what, in particular, anybody has a right to do or to have. We must not commit the common mistake of supposing that this formal right will take us further in argument than it actually will, establishing, for example, some kind of substantial right of equality in wealth or power or status or whatever. All it does is to establish that the equal interests of different individuals (including ourselves) are to have equal weight in our moral thinking. The merely numerical ⁿ¹⁸ difference between individuals is not to count as morally relevant. It is important to notice that this formal equality between individuals does not, by itself, do more than forbid us to discriminate morally between Tom, Dick and Harry on the ground that Tom is Tom, Dick Dick, and Harry Harry. It does not, by itself, forbid us to discriminate on the ground that Tom is black, Harry yellow and Dick pink. That requires a further move, which I shall make in a moment.

The second reason why I call this right to equal concern formal is that it can be established on the basis of the formal properties of the moral concepts. If it be granted (and I shall not have time to argue this) that moral judgments are universal or universalizable prescriptions, then in prescribing that such and such ought to be done to someone (say Tom) I am implicitly prescribing that the same be done to any other individual (me for example) in any precisely similar situation, and vice versa. By 'precisely similar' I mean to include the personal characteristics of the participants (I have to imagine that I become black, and react in the same way as Tom does). So it cannot make any difference to my moral thinking whether it is Tom in the situation or myself; and this forces me to treat Tom's interests, in that situation, as if they were my own. And this, in consequence, makes me treat the equal interests of all individuals, qua those individuals, as of equal weight. That, in [*637] passing, is why I cannot, if I think it through, discriminate morally on grounds of colour (for example denying to blacks rights which I accord to pinks); for to do so would involve prescribing

that were I to change color I should be denied the right too, and this I shall not be prepared to do.

However, this kind of argumentation will not take us all the way. The 'right to equal concern and respect', which, I say, can be established on the basis of the formal properties of the moral concepts, has a much more powerful employment than this. Suppose that we accept that in our moral thinking equal interests are to be given equal weight, no matter whose interests they are. Then, since these interests include our own interests, the weight accorded to them will be positive, as well as equal. It follows that in my moral thinking I shall be equally trying to secure the satisfaction of everybody's equal interests. By a similar argument, it will follow that where interests are not of equal weight, I shall prefer the satisfaction of the greater interest to that of the less, whosever interests they are; for this is what I would do, were both interests my own, and universality forbids me to treat other people's interests in any different way from my own. Thus I shall accord weight to all the interests, whosever they are, in proportion merely to the strength of the interests. And since, as we have seen, the weight will be positive, my moral thinking, if done in the light of all this, will lead me to prescribe whatever actions, etc., will maximize the expectation of satisfactions of the interests of all individuals, treated impartially. I have abbreviated the argument and jumped several steps; but in my book you will find it set out in full. ⁿ¹⁹

What we have arrived at is, of course, one kind of utilitarianism; but let us not call it that, because there are a lot of different kinds, and in any case the philosophical world is so prejudiced against utilitarianism that, if I so much as use the word, people will shut their minds and fail to see that the position I am maintaining actually follows from the 'right to equal concern and respect' of which anti-utilitarians like Dworkin have made so much, ⁿ²⁰ once one [*638] thinks at all deeply about what such a right involves. Let us call it instead 'interest-egalitarianism' or some other such inoffensive name. If you like, call it plain Kantianism; for it has a certain affinity with several of Kant's formulations of his categorical imperative. ⁿ²¹

That, then, is an outline of the method. How, when we are talking about human rights, are we going to use it? As I said, principles about rights are one kind of moral principles; so it will do if I say how this method is to be used in selecting moral principles for cultivating ourselves and teaching to our children. Acts of cultivating or teaching have, then, to be judged just like any other acts. When we ask what moral principles to cultivate, we have to decide this on the basis of what principles, if cultivated, will maximally satisfy the interests of all those people whom we are treating with equal concern. And this enables us to confront and settle particular questions about rights. Shall we cultivate respect for a right of everybody who feels so inclined to punch anyone else on the nose? No, because we can be sure that the cultivating of respect for such a right will be very far from maximizing the satisfaction of the interests of all, weighed impartially.

I am coming to more contentious examples in a moment; but this simple one will do to illustrate how, according to this rational method, we decide what rights we ought to cultivate and accept. We ought to accept those which we can accept when we give equal weight, impartially, to the equal interests of all those affected by their acceptance. This means that rights are to be selected in accordance with their acceptance-utility (I ought to have said, 'on interest-egalitarian grounds').

It is important for me, in what follows, since time is limited, to choose examples which will most clearly illustrate the method I am recommending for thinking about rights. Some examples are too simple, like the one I just used. They are simple, because we are all going to agree at once what rights should be preserved and what denied. Other examples will be unhelpful for the opposite reason; [*639] they bring up questions about rights which are so complicated or so bitterly debated, or both, that there is no hope in the course of a short paper of even beginning to indicate how one would use the method to settle the questions. It is indeed such questions that I really want to handle by means of the method; but I shall not, for the reason I have given, attempt to do so in this paper. I have written other full-length papers about some of them. ⁿ²² So let nobody accuse me of neglecting all the human rights that people get so stirred up about on this and other continents. I too feel deeply about most of these conflicts, on one side or the other, and am fairly well acquainted with some instances of denial of human rights (for example in Czechoslovakia); only I want to find a way of telling which rights ought to arouse these feelings, and the actions which they inspire.

Since principles about rights, like other intuitive moral principles, have to be couched in rather general terms, they will inevitably conflict in some unusual cases. Then, as I think Aristotle saw, ⁿ²³ it will be necessary to employ critical thinking to resolve the particular case. But, if we are reasonably confident that our intuitive principles are sound ones, it is usually unwise, unless we are forced to do so by a conflict, to question them when under stress in a particular case; the probability of getting by this means an answer that would stand up to critical reflection when we next have the chance to do it is less than that of our indulging in special pleading, helped out by lack of full information about the case. How easy it is to convince oneself that to tell a lie is, in these awkward circumstances, for the best!

And let me warn you against a manoeuvre often used by anti-utilitarians: that of producing unusual or even cooked-up cases in which the solution which critical thinking would yield runs counter to some of our cherished intuitive principles. ⁿ²⁴ Since intuitive principles are and should be chosen to cater for the general run of cases, it does nothing to impugn either them, or critical thinking, if [*640] in these bizarre cases the two conflict. There is a lot about this in my book, ⁿ²⁵ but I must be content with that brief warning.

Let me now start with an example which some of you will think silly, but which has given trouble to legislators and courts. ⁿ²⁶ One section of the population, appealing to a right of freedom of the individual, thinks it has a right to go on the beach without any clothes on. Another section thinks it has a right to go on the beach without having to look at the genitals of the first lot.

If what I have said is accepted, the way to settle this question is to ask what rights we ought to teach our children and ourselves to respect; and this second question is to be answered by asking a third, namely what rights are such that acts of teaching people to respect them will do the best, all in all, for the interests of all those affected, treated impartially. So what is the answer to this third question?

It requires more investigation into the facts than I have time for; but I will base my opinion on what I think to be the facts. They are, first of all, that many people who want to go on the beach undoubtedly are shocked by the sight of other people's genitals, and it is therefore a harm to their interest if nudity is allowed. Secondly, there are undoubtedly some people who like disporting themselves with nothing on, and seeing other people do the same. These facts are undoubted; the rest are more tentative. It may be said that the first lot (call them the pruders) would fairly soon get over their feelings of shock if it came to be generally acceptable to wear no clothes on the beach; so, although there would be a transitional period during which shock would be experienced, the result in the end would be that the nudes would get their pleasure without causing any distress to the ex-pruders. This would be an argument for giving the right of the nudes priority over that of the pruders in our moral education.

[*641] On the other hand, it might be said that the pleasure to be had by wearing nothing on the beach is very little more than that to be had by wearing at least something, and that therefore the transitional distress is not adequately counterbalanced by the additional pleasure. The decision between these two views would have to be made by finding out how strong were the preferences of the two parties, and how rapidly they might change as a result of new ideas on the subject becoming current -- and of course also on how numerous the two parties were, and how their numbers would change given certain policies on the part of educationists and legislators. This question is currently being sorted out, both in America and in Europe, by amateur but nonetheless quite convincing experimental sociology, i.e. by seeing how people feel when the old rules are relaxed on certain beaches or in general. It is not my purpose in this paper to speculate on the result, but my guess is that the nudes will win the argument, for the same sort of reason that in England it is no longer forbidden, as it was in many places when I was young, for men to go on the beach without their chests covered or in the company of their wives.

At this point it may be said that I have left out a very important consideration, namely the general effect on public morals of a relaxation of standards in this particular. It will be said that if people make a habit of looking at other naked people of the opposite sex on beaches, then they will tend to become more lascivious or in general immoral. I do not believe it; but I shall not have time to discuss the question now. It comes up in a closely analogous form in my next, not quite so silly, example, to which this first example has been a kind of introduction. This is the example of the

suppression of pornography.

Bernard Williams, who is one of the cleverest and most prejudiced critics of utilitarianism, was asked a few years ago to be chairman of a committee set up by our British Home Office to prepare a report on Obscenity and Film Censorship. ⁿ²⁷ As you all know, there was a report a few years before that of a U.S. Commission [*642] on a similar subject, Obscenity and Pornography. ⁿ²⁸ Both are good reports (though owing to government inertia and timidity neither has resulted in much in the way of legislation). But I must say that in my view the Williams Report is incomparably better -- perhaps in part because the chairman, a philosopher, was able to sort out the issues in a peculiarly clear way. Much of it, one could suspect on stylistic grounds, was written by Williams himself, and it all bears the stamp of his genius. Though I have no wish to disparage his other writings, I think it is the best thing he has done in moral philosophy, because it is the most in touch with real-life issues.

The most striking thing to me about the report, however, was the contrast between Williams' actual practice, when it came to dealing with such real issues, and the philosophical arguments which he marshalls with equal skill against the utilitarians in his own published works. One would expect such a thinker to argue about such questions in terms of the right to freedom of expression; or, on the other side, of the right not to have to look at obscene matter or the right to have one's children's morals protected. 'Integrity' might also have had a mention, in the rather eccentric sense in which Williams uses it. ⁿ²⁹ But actually the Report is utilitarian through and through. The crucial chapter in it is called 'Harms?', and in it various arguments, all of a utilitarian sort, for or against suppressing or not suppressing different kinds of pornographic matter are set out and assessed on the basis of whether the alleged harms (or benefits) really are caused. It is, in fact, a prolonged and brilliantly executed cost-benefit analysis. That is how the Committee determined what rights ought to be protected.

May I be permitted a bit of autobiography? Some years before the appointment of the committee, Ronald Dworkin and I held a seminar on the same subject in Oxford which was addressed by, besides him and myself, a number of distinguished people in literature, the arts and the law. For this seminar I made a table of reasons [*643] for and against restricting the sale of pornography, all of a utilitarian sort (I could not think of any other relevant reasons). These were in fact the kinds of reason relied on by everybody in the seminar, including the arch-persecutor of utilitarians, Dworkin. They led us both, so far as I can remember, to very much the same conclusions on what ought actually to be done. Of course people differed about the magnitude of the various harms and benefits which would result from various proposed measures; but all talked in terms of harms and benefits -- even those who feared what they thought of as the greatest harm to society, the corruption of its moral standards.

It is hard after many years to be sure that I am correctly remembering what anybody said. But the hypothesis that Dworkin could found his view about pornography on basically utilitarian arguments is supported by a very recent paper of his which I had not read when I gave this talk at the Interamerican Congress. ⁿ³⁰ It is a critical notice of the Williams Report. Dworkin first claims that the Report's arguments, which he agrees with me in thinking essentially utilitarian in character, do not support all its liberal conclusions. He says that what is required in addition is the admission of a right, which he calls 'the right to moral independence'. ⁿ³¹ An appeal to this right, he says, will enable us to justify more liberal laws about pornography than a utilitarian cost-benefit analysis would support. This accords with Dworkin's favoured procedure of using extra-utilitarian rights to 'trump' utilitarian arguments. ⁿ³² I do not find this part of Dworkin's attack on Williams entirely persuasive; for whereas Williams sets out in careful detail the facts about our actual situation in that country and that culture which justify his cost-benefit analysis, Dworkin is often content to appeal to sketchy and sometimes contrived hypothetical counter-examples ⁿ³³ such as ought not to be admitted in this kind of reasoning about practical issues.

Be that as it may, Dworkin then goes on to ask how his 'right to [*644] moral independence' could be established. The remarkable thing is that his arguments are again basically utilitarian. Although he does not commit himself to accepting a utilitarian foundation for morality, or even for this part of legislative morality, he argues that a utilitarian system, starting from equality of concern, would need to incorporate such a right in order to achieve its own ends. This is, in effect, to operate a two-level utilitarian system of the kind I have been advocating. Utilitarianism or, as I have

euphemistically called it, interest-egalitarianism at the critical level generates certain rights for use at the intuitive level at which most of our practical moral decisions have to be made; and at this lower level they can usefully be entrenched and used to 'trump' the more direct, but also less reliable, application of cost-benefit calculations.

Dworkin and I therefore seem to be agreed that a two-level utilitarian system could enable Williams to support his conclusions. ⁿ³⁴ The difference is that Dworkin relies, in order to get his 'right to moral independence' from his equal-concern starting-point, on somewhat abstract a priori reasoning based on hypothetical and sometimes improbable examples, ⁿ³⁵ whereas I cannot follow him in such reasoning; I would hope rather that Williams, if he were more conscious than he is of the two-level character of moral thinking, could show, by appeal to the contingent facts of our present society, that the entrenchment of such a right is more likely than its denial to conduce, all in all, to the maximal satisfaction of people's preferences, considered impartially. If, instead of speaking of preferences, he thought it more tasteful to use the elusive expression 'human flourishing', I should not object on any but stylistic grounds.

[*645] Some time after the Williams Committee had been set up and had asked for evidence from the public, on the instigation of a friend who had been at the seminar, I wrote to Bernard Williams sending him my own material from the seminar and asking if he would like me to put it into a form suitable for submission to his Committee as evidence. He did not reply, and did not, as I heard from another member of the Committee, show it to the Committee as it stood. I think he had good reason for this; not only had I left it rather late, but the deliberations of the Committee had almost certainly, by that advanced stage, reached the conclusions set out in the report, which are, in most particulars, similar to those which Dworkin the anti-utilitarian and I had both reached, and on the same grounds.

I mention all this because I think you will find it as striking as I did how three philosophers, one of them a utilitarian and the other two quite the reverse, when they come to discuss a practical issue like this, arrive at the same utilitarian conclusions and give utilitarian reasons, even if not quite the same utilitarian reasons, for them. I will not give you the conclusions because there is not time; but you can see them in the Report, with which I agree in almost every particular.

There are two possible retorts which I think Williams might make. The first is that there is something special about the question of obscenity law which makes utilitarian arguments alone relevant to it; and that in other fields of morality they may be less relevant. Even this would not accord with the tone of his other writings, in which he has hardly a good word for utilitarian arguments of any kind. And it is not easy to see how he is going to confine the scope of utilitarian arguments so narrowly. Will they not also be relevant in all fields of public policy (which were Bentham's and Mill's chief interest)? And will they not have a bearing on all moral questions where the interests of other people are affected, for the same reasons as on questions of public policy? Where others' interests are not affected, I myself have no wish to employ utilitarian arguments. ⁿ³⁶

[*646] The second retort is this. He might say that I have left out of my account of the arguments of the Committee a very crucial premiss which is not utilitarian. The basis of the argument, he might say, is this. There is a right which we all have, namely the right to freedom of expression. This means that we have a right to say, publish, buy, read or look at anything that we want to, provided that reasons are not adduced why we should not say, or publish, it, etc. So what he has done is to take for granted this fundamental right, which is not based on utilitarian grounds, and to look for and assess arguments for denying it in particular sorts of cases (e.g. that to publish certain things will be so harmful that the right ought to be overridden). All these secondary arguments may be utilitarian, but the original right is not. So the argument of the Committee is after all based most fundamentally on a right, not on utility.

However, it is easy to demolish this retort. For the alleged fundamental right of freedom of expression turns out to have a utilitarian ground after all. It is one of the most basic tenets of utilitarianism that preferences, likings, or, to use the general word I have been using, interests, are what count in making moral judgments. It follows from this that if someone prefers or likes to do something, he ought to be allowed to do it in default of reasons why he should not. For the utilitarian, these reasons will have to do with conflicts with the preferences or interests of other people. Now the right of freedom of expression is simply a particular case of the right to do what one wants in default of reasons why

one should not. It too, therefore, can be established on utilitarian grounds. Williams may have dug it out of his intuitions, but he did not have to. And the reasons or alleged reasons for denying this right in certain cases which were so admirably discussed in the report were avowedly all utilitarian. So if the whole report was not utilitarian, it was only because Williams neglected to give utilitarian reasons for his fundamental premiss (and for one or two other less important contentions), but relied on the intuitions of the Committee. Whether he could have given any other reasons I shall not ask; but he did not need to.

I hope I have shown that even anti-utilitarians, when they have a practical job of work to do, tend to argue like utilitarians. This is [*647] in support of my general point that there is a utilitarian way (or, as I euphemistically put it, an interest-egalitarian way) of arguing about rights, and that this way can be reconciled with the existence of strong intuitions in all of us. The point is that, valuable as these intuitions are, they are valuable only at the intuitive level. Once we are driven, as we inevitably are, to go above the intuitive to the critical level and question our own intuitions, they lose their cogency.

Legal Topics:

For related research and practice materials, see the following legal topics:
 Copyright Law Owner Rights Moral Rights

FOOTNOTES:

n1 J. RAWLS, A THEORY OF JUSTICE (1971). See Hare, Critical Study: Rawls Theory of Justice, 23 PHIL. Q. 144, 144-55, 241-52 (1973), reprinted in READING RAWLS at 81 (N. Daniels ed. 1975).

n2 Hampshire, A New Philosophy of the Just Society, N.Y. Rev. Books, Feb. 24, 1972, at 37.

n3 R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974). His recent PHILOSOPHICAL EXPLANATIONS appeared too late for discussion in this paper.

n4 R. BRANDT, A THEORY OF THE GOOD AND THE RIGHT 16-23 (1979).

n5 R. HARE, MORAL THINKING: ITS LEVELS, METHOD, AND POINT (1981).

n6 See generally H.L.A. HART, THE CONCEPT OF LAW 181-207 (1961) (distinguishing moral from legal rights by their source).

n7 W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 36-38 (1963).

n8 See Rawls, *The Two Concepts of Rules*, 64 *PHIL. REV.* 3, 3-13 (1955); see also J. RAWLS, *supra* note 1, at 4.

n9 See R. HARE, *supra* note 5, at 25; see also R. HARE, *PLATO* 47-51 (1982).

n10 J. RAWLS, *supra* note 1, at 4.

n11 *Id.* at 198-204.

n12 See Hare, *supra* note 1.

n13 See *id.* But see Harsanyi, *Can the Maximin Principle Serve as a Basis for Morality? A Critique of John Rawls' Theory*, 69 *AM. POL. SCI. REV.* 594 (1975). The crucial point is that Rawls' denial that his contracting parties would treat their occupation of any one of the affected roles as equiprobable is based on no rational ground and is insisted on simply in order to make his system conform to his anti-utilitarian intuitions.

n14 See E. CARRITT, *ETHICAL AND POLITICAL THINKING* 65 (1947) (the case of hanging an innocent man); J. SMART & B. WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 98-99 (1973) (the "Pedro" case of shooting an innocent man); Foot, *Abortion and the Doctrine of Double Effect*, 5 *OXFORD REV.* 5 (1967) (the cases of harvesting the organs of a hospital visitor, and the run-away trolley).

n15 R. DWORKIN, *TAKING RIGHTS SERIOUSLY* XV (1977).

n16 *PUBLIC AND PRIVATE MORALITY* 10 (S. Hampshire ed. 1978) (reprint of his Leslie Stephen Lecture, 'Morality and Pessimism,' Cambridge, 1972).

n17 See, R. DWORKIN, *supra* note 15, at 180-83.

n18 There is a 'numerical' difference between two people if when counting people we have to count them as two, not as one. A merely numerical difference is one unaccompanied by any difference in universal properties.

n19 R. HARE, *supra* note 5, at 87-129.

n20 R. DWORKIN, *supra* note 15, at 180-83, 272-78.

n21 I. KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 22, 27, 29-30, 32-33, 36 (H. Paton trans. 1948).

n22 See R. HARE, *supra* note 5, at 230-32 (bibliography of the author's significant articles).

n23 ARISTOTLE, *NICOMACHEAN ETHICS* 1137b 19-32.

n24 See, e.g., R. HARE, *supra* note 5, at 47-51, 131-42; see also cases cited *supra* note 14.

n25 See R. HARE, *supra* note 5, at 47-51, 131-42.

n26 E.g., *Williams v. Hathaway*, 400 F. Supp. 122 (D. Mass. 1975) (contest between nude bathers and residents of Cape Cod resort); *Eckl v. Davis*, 51 Cal. App. 3d 831, 124 Cal. Rptr. 685 (1975) (suit to enjoin enforcement of ordinance controlling nude bathing); Los Angeles, Cal., Ordinance 146,360 (July 11, 1974) (municipal regulation of nudity on beaches and in city parks).

n27 COMMITTEE ON OBSCENITY AND FILM CENSORSHIP, *OBSCENITY AND FILM CENSORSHIP* (B. Williams ed. 1979) (reprinted by Cambridge University Press 1981).

n28 COMMISSION ON OBSCENITY AND PORNOGRAPHY, *THE REPORT OF THE COMMISSION ON OBSECENITY AND PORNOGRAPHY* (Comm. Print 1970).

n29 See, e.g., J. SMART & B. WILLIAMS, *supra* note 14, at 99-100; see also Hare, Ethical Theory and Utilitarianism, 4 CONTEMP. BRITISH PHIL. 113, 120 n.11 (H. Lewis ed. 1976).

n30 Dworkin, Is There a Right to Pornography, 1 OXFORD J. LEGAL STUD. 177 (1981).

n31 *Id.* at 194.

n32 *Id.* at 199-206.

n33 E.g., *id.* at 202-03.

n34 Dworkin himself acknowledges that a two-level theory could escape his main argument against Williams' utilitarian method; but he strangely claims that 'the neutral utilitarian theory we are now considering' would not avail itself of this escape route. In fact, a utilitarian who knew the ropes would say that we should be impartial at the critical level between good and evil preferences, but that this same impartial treatment of preferences at the critical level would lead us to adopt, for use at the intuitive level of everyday practical decisions, principles which are partial towards good preferences, and bid us thwart the bad ones. This is because the disposition to do this is one the cultivation of which, because of its consequences, conduces to the maximal satisfaction of all preferences weighed impartially in proportion merely to their strength. See R. HARE, *supra* note 5, at 140-46.

n35 Dworkin, *supra* note 24, at 194.

n36 See, e.g., R. HARE, *supra* note 5, at 53-55.