MACCABAEAN LECTURE IN JURISPRUDENCE

A BILL OF RIGHTS FOR BRITAIN? THE MORAL OF CONTEMPORARY JURISPRUDENCE

By J. M. FINNIS

Read 30 October 1985

I

MANY poor reasons are advanced for entrenching the European Convention on Human Rights in our law.[1]

After incorporating the Convention, it is said, we would no longer struggle to anticipate the developing *jurisprudence*[2] of the European Court of Human Rights; no longer be embarrassed internationally by frequent declarations that we violate the rights progressively identified by that court; no longer be so immediately and regularly subject to the rule of a far-away tribunal of which we know little.

But after incorporation, just as today, the final arbiter would remain the European Court; nor would it reverse our highest courts less freely than they reverse the courts below them. Diplomatic embarrassments, then, would be little fewer—if

[1] For a review of many arguments for and against incorporation and/or entrenchment of the Convention (or some similar instrument), and for a bibliography of the British political and legal discussions since 1968, see Michael Zander, *A Bill of Rights?* (London: Sweet and Maxwell, 3rd edn., 1985). Zander's study makes it clear that many consider the Convention unsatisfactory, but equally that there is no prospect of sufficient political support for any alternative instrument, imported or home-made.

[2] The scope, and dubious character, of these developments may be gathered from the dissenting judgments of Judge Sir Gerald Fitzmaurice in *Golder* v. *United Kingdom* (1975) 1 EHRR 524 at 562–7 (paras. 32–9); *National Union of Belgian Police* v. *Belgium* (1975) 1 EHRR 578 at 601–6 (paras. 1–11); *Ireland* v. *United Kingdom* (1978) 2 EHRR 25 at 125–7 (paras. 12–18); *Marckx* v. *Belgium* (1979) 2 EHRR 330 at 366–77 (paras. 6–31). All references hereafter to the 'European Court' are to the European Court of Human Rights, not to the Court of Justice of the European Communities.

anyone really thinks that fear of such pinpricks should determine our constitution and forms of life.[1] And is it apparent why anticipating European *jurisprudence* should be for our courts, rather than for Parliament?

Equally poor, however, are many arguments against entrenchment of the Convention. Would conservative judges stymie Parliament's progressive initiatives (past or future) touching property, industrial relations, or education? I assume, but do not in this lecture defend the assumption, that our constitution would be found sufficiently flexible to absorb a mutation in conceptions of Parliamentary sovereignty, so that in accordance with solemn statutory provisions[2] the Bill of Rights would be enforced even against Acts of Parliament—at least against those not protected by special procedures of enactment (such as enhanced majorities, or approval by referendum) or by some politically unpalatable formula of derogation, such as 'notwithstanding the Bill of Rights'. I shall assume throughout, then, an incorporation with a measure of entrenchment and judicial review of legislation (for short, 'judicial review'). On this basis, I accept that judicial decisions might sometimes hinder some legislative goal. But governments whose main projects fell before the courts would in time contrive to secure enough sympathetic judges.

Nor would the reshaping of the legal profession, or at least of its cursus honorum, need heroic transplant surgery. As Ronald Dworkin's 1977 Maccabaean Lecture said: 'If law had a different place here, different people would have a place in the law;' 'men

[1] Moreover, '. . . experience has shown that incorporation may not result in a drastic reduction in the number of applications submitted to and judgments given against an incorporating state': J. A. Andrews, 'The European Jurisprudence of Human Rights', *Maryland L. Rev.*, xliii (1984), 463–517 at 487; see also Zander, op. cit., p. 37, n. 31.

[2] Even the submerged and strangled tones of s. 2(4) of the European Communities Act 1972—a subsection carefully modelled on provisions (Acquisition of Land (Assessment of Compensation) Act 1919, s. 7(1)) authoritatively interpreted (*Ellen Street Estates Ltd.* v. *Minister of Health* [1934] 1 KB 590 (CA)) as incapable of affecting either the construction or the effect of future statutes—have been judicially regarded as perhaps capable of so affecting the 'construction' of post-1972 statutes that nothing short of 'an express positive statement in an Act . . . that a particular provision is intended to be made in breach of an obligation . . . under a Community treaty would justify an English court in construing that provision in a manner inconsistent with a Community treaty obligation . . . however wide a departure from the prima facie meaning of the language of the provision might be needed in order to achieve consistency': *Garland* v. *British Rail Engineering Ltd.* [1983] 2 AC 751; [1982] 2 All ER 402 at 415d–e per Lord Diplock (obiter).

and women who would [now] never think of a legal career, because they want a career that will make a difference to social justice, will begin to think differently' about a legal career, and so the profession would change, 'as it did dramatically in the United States earlier in this century.'[1]

Lacking in the debates on incorporation is any lively sense of the difference it would make, not simply to the practice of law (and the prosperity of lawyers), but to the national life in many matters outside the 'big politics' of wealth and poverty, and national security. Only in extraordinary circumstances would Parliament be looked to for the decisive public answer to questions such as the permissibility of the closed shop, the lawfulness of incest, abortion, and the artificially assisted generation of children by or for single women,[2] the validity of polygamous or homosexual marriages, the legal protection of reputation, the admissibility of confessions or of evidence obtained fairly but in some way unlawfully, the convict's right to conduct business or litigation from his prison, the legality of single-sex sports and of motor-cycling without a helmet . . . and many other issues of personal existence within politically ordered society. And all would be determined (and re-determined) by stylized manipulation of relatively few specialized terms, above all, perhaps, 'privacy', 'discrimination', and 'proportionality'. Legal learning would be *necessary* to participate in these litigious determinations; whether it would be *sufficient* to justify, authentically, the particular dispositions (either way) is for consideration.

Am I implying that the courts' dispositions would be worse than Parliament's? By no means. That is another poor objection to a justiciable bill of rights. True, the English-speaking North Atlantic courts which invalidate legislation under bills of rights have a record disfigured with unjust or malign and ill-reasoned decisions, overthrowing statutory protections against dismissal for joining a union (*Adair* v. *US* 208 US 161 (1908)), against child labour (*Hammer* v. *Dagenhart* 247 US 252 (1918)), against exploitation by excessive hours of work (*Lochner* v. *New York* 198 US 45 (1905)), against being aborted for convenience (*Roe* v. *Wade* 410 US 113 (1973)), and others. But legislatures, too, fail in justice, or promote injustice; anyone who thinks *Roe* v. *Wade*

[1] Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass. and London: Harvard UP, 1985), p. 31 = 'Political Judges and the Rule of Law', *Proc. Brit. Acad.*, lxiv (1978), 259–87 at 285.

[2] See *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Chairman: Dame Mary Warnock), Cmnd. 9314 (1984), para. 2.9.

unjust had better recall the priority of our own Abortion Act 1967. And it is absurd to seek an 'overall balance' sheet, identifying possible worlds with and without judicial review of legislation as better and worse states of affairs all things considered.

'Judicial review is undemocratic': another unimpressive objection. It is put in two ways, asserting an (improper) reduction in the power, either (i) of the majority, or (ii) of individuals. Dworkin concedes the minor premise of the first (though not its major premise, that reducing the power of the majority is improper):

> Any constraint on the power of a democratically elected legislature decreases the political power of the people who elected that legislature. . . . the argument that the present majority has no right to censor opinions is actually an argument for reducing the political power of any majority. . . . the majority's political power will be decreased by the constitutional protection of speech.[1]

But the concession, I think, was premature. Talk of the power of 'the majority', as 'the people who elected the legislature', needs clarification. Think of election time, with its absurd claims that the nation or the people (or the majority?) have voted for, say, a hung Parliament—when perhaps almost every voter wanted a clear majority for his party. And before one speaks of 'the power of a majority' within Parliament (or within the governing party or its inner circles), one might recall that in any deliberative body (of more than four) deciding issues by majority vote, the majority can be in the minority on a majority of the issues voted upon.[2] That possibility in no way depends upon tactical voting; when the varieties of tactical voting are recalled, the notion that determinations by majority are exercises of 'the power of the majority' (or of 'the people who elected the legislature') will be recognized as a hazardous equivocation on the adjectival term 'majority', transposed into the personified substantive supposed to 'have power'. I dwell on this, not to deny that majority voting fairly resolves many issues, but because indiscriminate use of the collective term, 'majority', foreshadows other confusions about collectivities,

[1] *A Matter of Principle*, p. 62. See also p. 111: 'Once it is conceded that the question is only one of the common interest—that no question of distinct majority and minority interests arises— . . . the majority rather than some minority must in the end have the power to decide what is in *their* common interest' (emphasis added).

[2] G. E. M. Anscombe, 'On Frustration of the Majority by Fulfilment of the Majority's Will', *Collected Philosophical Papers*, iii, *Ethics, Religion and Politics* (Oxford: Blackwell, 1981), 123–9 at 128.

confusions more directly relevant to the notion of rights and thus to my theme.

Meanwhile, let the claim that judicial review is undemocratic be put in the second way, as by Judge Learned Hand in his 1958 Oliver Wendell Holmes lectures, *The Bill of Rights*:

> Democracy supposes equality of political power, and if genuine political decisions are taken from the legislature and given to courts, then the political power of individual citizens, who elect legislators but not judges, is weakened, which is unfair.[1]

One reply to Hand is Dworkin's: while transfer of all political power to judges would be unfair, 'we are now considering only a small and special class of political decisions', of which only 'some' are assigned to courts.[2] But this reply will not do. As Dworkin elsewhere remarks, the issues entrusted to judges under a bill of rights are 'the most fundamental issues of morality',[3] and virtually all serious moral or political issues are justiciable constitutional issues.[4]

A better reply might be this: in a North Atlantic type of political order, the free citizen's power over judicial appointments is not less than his influence on legislation. Justice Roberts's 'switch in time', in December 1936, cannot be proved to have 'followed the election returns' of November;[5] but certainly, without his switch from principled opposition to the New Deal, the Supreme Court's nine would promptly—and to the satisfaction of many voters—have been afforced, to achieve the same result. The vulgar campaign to 'impeach Earl Warren' petered out, but may not have been quite barren. The campaign to secure that all new federal judges will oppose the *Roe* v. *Wade* 'right to an abortion' seems to be going smoothly. There is no special public provision for these initiatives, but nothing antecedently inequal, or covert, or otherwise irregular about each citizen's opportunity to join them.

[1] Dworkin, *A Matter of Principle*, p. 27 = *Proc. Brit. Acad.*, lxiv (1978), at 280. I quote Dworkin's clarifying transposition of the argument which Hand puts, rather opaquely, in his *The Bill of Rights* (Cambridge, Mass.: Harvard UP, 1958), p. 73.

[2] *A Matter of Principle*, p. 27.

[3] Ibid., p. 70.

[4] See Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978), p. 208.

[5] Compare *Morehead* v. *New York, ex rel. Tipaldo* 298 US 587 (1936) with *West Coast Hotel* v. *Parrish* 300 US 379 (1937); Felix Frankfurter, 'Mr Justice Roberts', *U. Pa. L. Rev.*, civ (1955), 311–17 at 313–15; L. Friedman and F. L. Israel (eds.), *The Justices of the United States Supreme Court 1789–1969*, iii (1969), 2261–2.

Perhaps you feel uneasy about this reply? Isn't there something distasteful, or even contrary to principle, about subjecting the judiciary to popular opinion? Doesn't this treat the judiciary as if it were a kind of legislature?

But here we have left the objection from democracy, and enter a more fruitful zone of reflection.

II

Your unease stems from an assumption: that the courts should offer a forum different in kind from the legislatures which we appropriately subject to popular election. And in some form, that constitutional assumption is surely reasonable. But in one version—some of whose terms are central to recent jurisprudential debate and have been taken up at the highest judicial level[1]—the assumption has been advanced as a premise for welcoming judicial enforcement of a bill of rights against Parliament. This version is sketched (though without explicitly concluding to a justiciable bill of rights) in the 1977 Maccabaean Lecture: judicial review offers each individual citizen

> an independent forum of principle . . . in which his claims about what he is entitled to have will be steadily and seriously considered at his demand.[2]

Since then, this version of the constitutional principle, with the full conclusion about judicial review of legislation, has been set out in a paper entitled 'The Forum of Principle' (note the definite article). In a passage I have already quoted from, Dworkin says:

> judicial review insures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not political power alone, a transformation that cannot succeed, in any case not fully, within the legislature itself.[3]

So: the hierarchical division of powers and functions between institutions—legislatures and courts, the latter reviewing and in some measure controlling the former—is constitutionally appropriate because it corresponds to a division between the types of reason or justification characteristically employed in the respective types of constitutional institution. Courts justify their

[1] *McLoughlin* v. *O'Brian* [1983] 1 AC 410, [1982] 2 All ER 298 at 310 f–h per Lord Scarman; *Emeh* v. *Kensington AHA* [1985] Q.B. 1012, [1984] 3 All ER 1044 at 1051 c–e per Waller LJ. But cf. Dworkin, *Taking Rights Seriously*, p. 180.

[2] *A Matter of Principle*, p. 32 = *Proc. Brit. Acad.*, lxiv, at 287.

[3] Ibid., p. 70.

decisions by appeal to principle, and arguments of principle are defined as arguments about 'the rights of individuals'. Legislatures (it is said) justify their decisions in another way, in which principle plays a lesser role when it has a role at all.

The *form* of this strategy for explaining and justifying the constitutional division of responsibilities is rightly congenial to contemporary jurisprudence. For jurisprudence has progressed mainly by attending, not merely to the externals of structure, practices, or even feelings, but rather to the characteristic *reasons* people have for acting in the ways that go to constitute distinctive social phenomena, such as law and the various sorts of legal rule, standard, and institution. Jurisprudence attends to types of justifications for decision.

But I have not yet fully reported the proposed division. *Courts*, it is said, can be opposed to *legislatures* because *rights and principles* can be opposed to . . . what? Two candidates seem to be proposed for the missing final term in that four-term analogy.

The first candidate appears in the contrast I quoted, between issues or arguments of principle and issues or arguments of 'political power alone'.[1] And that reference to issues of political power takes its meaning from the context, identifying certain arguments and political decisions as unfair, and as denials of equal representation, because they 'count the majority's moral convictions about how other people should live' as the *ground* for political decision, and thus yield 'legislation that can be justified only by appealing to the majority's preferences about which of their fellow citizens are worthy of concern and respect',[2] i.e. legislation that imposes 'constraints on liberty that can be justified only on the ground that the majority finds [such and such] distasteful, or disapproves the culture it generates'.[3]

In all this there is a confusing ambiguity inimical to the main lines of its author's own jurisprudence. For that rests on a strict adherence to an 'internal' point of view, whereas the analyses just quoted, about 'issues of political power alone', saddle 'the majority' with a curiously 'external' argumentation.

From an 'internal' viewpoint, reasons are understood as reasons,

[1] NB: what is in question is issues *of* political power, not the fact that issues will be decided *by* political power alone. Courts wield political power, and justiciable issues are decided by the brute facts of authoritative determination, majorities, and so forth—as litigants and counsel are keenly aware. The question is rather the 'internal' question, how the issues are framed and considered within the respective forums.

[2] Ibid., p. 68.

[3] Id. See also ibid., p. 67.

not merely reported as psychological phenomena. Thus: the claim that there can be a right answer in a hard case is not confuted by the fact that well-informed and honest lawyers disagree about what that answer is. Very vigorously and effectively, Dworkin presses his argument that the correctness or otherwise of a legal answer to a legal question can be determined only by one who enters into the legal arguments and uses legal criteria to judge one answer better than another. From within the practice of legal argument, the disagreements noted by the external critic or sceptic are simply irrelevant.[1] Capitalizing on, and effectively explaining, the manifest failure of forty years' meta-ethical scepticism, Dworkin has urged a similar philosophical defence of the objectivity, or *truth*, of moral judgments. Arguments for the truth of a moral judgment are moral arguments; arguments against are going to have to be moral arguments.[2] In particular, the observation, external to the practice of moral reasoning, that some disagree with a moral argument or conclusion is simply no *ground* for denying that argument or conclusion.

But of course, if the fact of disagreement is normally no ground for the disagreement, nor is the fact of agreement a ground for agreeing. From an observer's 'external' viewpoint, the fact that I or we believe that *p* (is true) is an important fact, quite distinct from the fact (if fact it be) that *p* (is true). But in one's own thinking about whether or not *p* (is true), the fact that one thinks it is not in focus; save in the idiomatic sense in which 'I think' signals uncertainty, the assertion 'I think that *p* (is true)' is *transparent for*[3] the assertion '*p* (is true)'.

So too: legislation enacted by majority vote, and imposing constraints on liberty, is characteristically justified not: 'only by appealing to the majority's [sc. of the citizenry's] preferences', nor: 'on the ground that the majority find' such-and-such deplorable, nor: by appeal to the '"rights" of the majority as such'.[4] Indeed, what the majority is believed to think does not, characteristically, figure much (let alone exclusively) in the grounds by

[1] *A Matter of Principle*, pp. 137–42; Ronald Dworkin, 'A Reply . . . ' in Marshall Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence* (London: Duckworth, 1984), pp. 277–80.

[2] *A Matter of Principle*, pp. 171–7.

[3] See J. M. Finnis, *Fundamentals of Ethics* (Oxford: Clarendon, 1983), pp. 3, 23, 71.

[4] Dworkin, *Taking Rights Seriously*, p. 194. In some other contexts, Dworkin has clearly recognized and stated the distinction between reliance on the truth of *p* and reliance on the fact that one holds that *p*, or that the majority hold that *p*: ibid., pp. 123–4.

which a voter justifies his vote, a vote which will help enact law only if more than a minority of voters happen to vote likewise. For the deliberating majority-voter, 'we find that such-and-such is deplorable' is transparent for 'such-and-such is deplorable'. (All this is clearer when one speaks not about that illusory collective, the personified majority and 'its preferences', but about the reasoning and action of the real individuals whose actions turn out to count as the majority deciding. But if you insist on speaking of the majority as subject, let us say that what the majority characteristically do is *express* their views about what is (say) deplorable; in doing so, they are *not* 'appealing to the majority's preferences'.)[1] Similarly, royal commissions, law reform commissioners, and participants in parliamentary debate about capital punishment, abortion, homosexual intercourse, reproductive surrogacy, police powers, and the like, rarely make serious appeal to the fact that their view commands majority support in the legislature, or give centrality to the claim or fact that their view is supported by a majority in the country.[2] (The political scientist, from a relatively external viewpoint, will rightly identify ways in which the outcome of legislative deliberations is affected by factors the debaters would not advance as good reasons for choosing that outcome. But he will do the same for the higher judiciary, and for the process of choosing its members. So the present consideration does neither, but remains, like Dworkin's, a jurisprudential consideration of the character of the arguments properly justificatory in the respective forums of deliberation and decision.)

So I return to the initial characterization of the constitutional division, between courts, as the forum in which issues are treated as issues of principle, and Parliament, as the forum in which they are treated, ultimately, as 'issues of political power alone'. I have argued that it is no division. Arguments of principle are the very stuff of many arguments proposed to and in legislatures, especially on the matters indicated in bills of rights.

[1] Cf. Dworkin in Cohen (ed.), pp. 287–8.

[2] Appeals to the fact that a view is supported by 'most' people or 'few' people are, of course, common enough in these contexts; but usually they are merely intended (often pardonably) to exempt the speaker from supplying argument, in just the same manner as Dworkin's dismissal of 'platonism': see n. 1, p. 317, below. As for MPs, each doubtless cares about his seat. But will he calculate what the majority of his constituency think? Or will he, more likely, be careful (if at all) about the views (if any) of a small minority, the floating voters?

III

Before considering the second and more interesting characterization of the proposed constitutional division, I want to point out a different but very relevant neglect of transparency, and substitution of an external for an internal viewpoint.

Five articles of the European Convention (Arts. 6, 8, 9, 10, and 11) provide that certain measures otherwise unjustifiable or a violation of rights can be justified if necessary for the protection of (*inter alia*) 'morals'. In dealing with these provisions, the European Court says it 'is not concerned with making any value-judgment as to the morality of'[1] any activities subjected to national laws 'for the protection of morals'. Accordingly, it treats the term 'morals' ('*la morale*') as referring to a mere fact about opinion widespread in a given community.[2]

Thus the Court interprets the Convention as if it embodied what I venture to call the cardinal error of the 1959 Maccabaean Lecture. The error—no slip or oversight but very deliberately embraced by Lord Devlin as the *right* position, at least for us[3]—consists in bracketing out the question of truth (here, moral truth). The proper justification of laws for protection of morals is thus not the vice of the prohibited conduct, nor its tendency to degrade, deprave, or corrupt and in these ways to *harm*, but rather the sheer

[1] *Dudgeon* v. *United Kingdom* (1981) 4 EHRR 149 at 165.

[2] *Handyside* v. *United Kingdom* (1976) ECHR Series A, vol. 24, 22 (para. 48); *Dudgeon* at pp. 163–6 ('moral standards obtaining in' the community (para. 46), the 'moral ethos or moral standards' of that society 'as a whole' (paras. 47, 49), 'the moral climate' in that community (para. 57), 'the vital forces' of the country (para. 52)). See also *Sunday Times* v. *United Kingdom* (1979) 2 EHRR 245 at 276 (para. 59) (morals a far less objective notion than the authority of the judiciary).

[3] Patrick Devlin, *The Enforcement of Morals* (London and New York: Oxford, 1965), p. 89: 'The State may claim on two grounds to legislate on matters of morals. The Platonic ideal is that the State exists to promote virtue among its citizens. . . . This is not acceptable to Anglo-American thought. It invests the State with power of determination between good and evil, destroys freedom of conscience and is the paved road to tyranny. . . . The alternative ground is that society may legislate to preserve itself. . . . What makes a society is a community of ideas . . . about the way its members should behave and govern their lives. . . . under the second theory the law-maker is not required to make any judgment about what is good and what is bad. The morals which he enforces are those ideas about right and wrong which are already accepted by the society for which he is legislating and which are necessary to preserve its integrity.' These statements, from a lecture given two and a half years after the Maccabaean Lecture, state more crisply ideas to be found ibid., pp. 5, 9, 10 = *Proc. Brit. Acad.*, xlv (1959), 129–51 at 133, 137–40.

fact that many *believe* the conduct vicious. The concern which Devlin thought capable of justifying legal prohibitions is not that individuals will thus harm and be harmed by their own conduct, but that society's morale and cohesion will suffer if deeply held moral *beliefs* widespread in that society are left to be flouted, unsupported by law.

Now this is an understandable concern, like that of minorities for their language, and of nations for their war effort. But if one substitutes it for the concern for truth, one does more than abandon, as Lord Devlin did, the doctrine of the old common lawyers: that besides the law of God (unavailable—as that Maccabaean Lecture stressed—to legal thought in a pluralist society), and the posited law of our land, there is a law of reason. One also denatures the modern bill of rights.

For a bill of rights purports to identify certain interests as truly fundamental aspects of human flourishing: to neglect or trespass on them really is unjust. A bill of rights purports to make a reasonable, a justified selection amongst competing conceptions of human flourishing and of justice, and to pick out one which, by its approximation to the truth about these matters, *warrants* the commitment made on its adoption. If that commitment is expected to help sustain morale and *esprit de corps*, it is precisely by its *appropriateness* as an identification of truly worthwhile grounds for individual and social choices, strivings, and self-restraints.

Just so, however, those who hold to moral standards enforced by legislation affecting (say) free speech, or 'privacy', very commonly rest their approval of such legislation on grounds quite other than the fact that they do hold those standards, or that they are in the majority, or that society coheres around those standards. A necessary premise of their case is that these are true standards, whose violation is *per se* harmful—harmful perhaps in the ways recognized by even the Williams Committee on Obscenity and Film Censorship: 'cultural pollution, moral deterioration and the undermining of human compassion . . . disregard for decency . . . a taste for the base, a contempt for restraint and responsibility . . . '[1]

Founding one's case thus, one need not support the defining of offences *in terms of* unspecified 'corruption of (public) morals', or even 'tendency to deprave and corrupt'. The European Convention has not hastened the desirable replacement of the rule in

[1] Cmnd. 7772 (1979), para. 6.73; see also paras. 5.30, 6.76.

Shaw's Case.[1] But under the principles of the European Court's emerging jurisprudence, an incorporated Convention might well promote the undesirable elimination of even closely drafted laws against specifiable activities which do tend to deprave and corrupt.

A court's refusal to consider the truth of moral standards might, of course, be premised on grounds much narrower than Devlin's (which were addressed to citizen, court, and legislature alike). But however understandable the court's reluctance to venture beyond legal learning into an acknowledgment of moral standards (other than honesty, fidelity, respect for property, and due care), the refusal exacts a price: the court is bound to misconceive the significance of those other standards. Sometimes, though not, I think, in Devlin's work, the protestation that their truth is irrelevant is simply a sign that their falsity (or, at least: the falsity of the view that they are true) is being covertly presumed. Thus the European Court's disclaimer of 'any value judgment' as to the morality of a certain prohibited activity was followed, after a page or two, with the following value-judgment (central to the Judgment):

> as compared with the era when that [impugned] legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of [the behaviour in question].[2]

Those who hold to the standards enforced by the law which the Court condemned may well demur: what the Court thought a better understanding is really a more restricted and superficial understanding, a misunderstanding (to say the least) of a whole domain of human integrity and well-being—so that the 'consequent' increase in tolerance thus may well have lacked the justification (and the justifying force) so casually ascribed to it by the Court's value-judgment.

IV

These reflections on judicial reluctance to give due weight to certain matters of principle may help assess the second, more

[1] *Shaw* v. *DPP* [1962] AC 220; *Knuller* v. *DPP* [1973] AC 435; Criminal Law Act 1977, s. 5(3). The judgments in *Shaw* can be seen as attempting a synthesis of Viscount Radcliffe's appeal, in *The Law and Its Compass* (London: Faber, 1960), pp. 52–3, to the judge's 'fundamental assessment of human values and of the purposes of society' with Lord Devlin's appeal to the standards of the man in the jury box.

[2] *Dudgeon* (1981) 4 EHRR 149 at 167 (para. 60).

well-known and beguiling characterization of the constitutional division: courts can properly review legislation because courts are the forum of principle, whereas legislatures, though not unconcerned with principle, are *the forum of policy*. Arguments of principle identify rights; arguments of policy assert that some decision or law will promote some conception of the general welfare, the public interest, the collective good. And a defining feature of rights is that they 'trump', prevail over, policies—not every policy, or every consideration of general welfare or collective good, but at least some. In any contest between principle and policy, i.e. between right and collective good, the presumption, rebuttable but real, will favour the right.

Thus the moral-political primacy of rights grounds the constitutional supremacy of courts. Such a conception marries easily with one of the European Court's most significant doctrines: rights enumerated in the European Convention will be broadly construed, and broadened by implying unstated rights, whereas the limiting grounds mentioned in the Convention, such as health or morals, will be read narrowly, without expansion by implication, and allowed application only for 'pressing social need'.[1] The presumption, rebuttable but real, will favour the Convention *rights*.

This presumption is still somewhat, though less and less, qualified by the Court's doctrine that national legislatures and governments have a 'margin of appreciation', within which their judgments, though doubted by the Court, will not be disturbed.[2] But that doctrine would have no hold on national courts empowered to enforce Convention provisions as bills of rights; for it rests on the European Court's peculiar status as organ of a treaty between states which retain full sovereignty.

The fate of the 'presumption of constitutionality' in American civil rights cases since 1937 suggests that our courts, too, might well come to allow little or no 'margin' for legislative or executive 'appreciation' in any case involving a 'preferred freedom' (in a modern bill of rights, presumably all rights named or enumerated therein). Instead, our courts would, I think, apply unqualified the

[1] Ibid., at p. 164 (para. 51).

[2] See e.g. *Handyside* (1976) ECHR Ser. A, vol. 24, 22 (para. 48); *Sunday Times* v. *United Kingdom* (1979) 2 EHRR 245 at 275–6 (para. 59). The scope of the 'margin of appreciation' is diminishing under the impact of a conception (not yet fully admitted) that the Court can take into account 'progressive' changes in social and legal norms in Europe, and require backward countries to catch up or get into line: see Andrews, n. 1, p. 304, at pp. 496–510.

doctrine which the European Court holds in a still qualified form and which is stated more frankly in America: the presumption (procedural matters aside) that laws qualifying or restricting an expressly or even an impliedly specified right are *un*constitutional.[1] In November 1977, before the European Court's interpretative doctrines had become quite so evident, Lord Scarman offered a reassurance to the Lords Select Committee:

> if Parliament prescribed a limitation upon the right under consideration, then it would be enough for the judges and it would be presumed... that Parliament in enacting the limitation had had in mind requirements of a democratic society, the interests of public safety, the protection of public order, health and morals.[2]

I venture to think it improbable that that would long remain 'enough for the judges'.

The presumption of the unconstitutionality of laws delimiting preferred or specified rights is obviously supported by the theory we are considering, that rights are matters of principle, the province of the courts, and (save where the public need is sufficiently grave) prevail over policy and collective welfare, the province of the legislature. What, then, should we say of this theory?

It rests on an incomplete analysis and justification of rights, and trades on an unwarranted assumption that utilitarianism is a moral-political theory sufficiently coherent to yield results which

[1] See Frankfurter J.'s critical history of the emergent doctrine of preferred freedoms in *Kovacs* v. *Cooper* 336 US 77 at 90–4 (1949). For the established doctrine, see *Roe* v. *Wade* 410 US 113 at 155–6 (1973); L. Tribe, *American Constitutional Law* (New York: Foundation Press, 1978), pp. 564ff. On the presumption of constitutionality applied by the Judicial Committee of the Privy Council in appeals from Commonwealth countries with bills of rights, see *A-G* v. *Antigua Times* [1976] AC 16 at 32; *Hinds* v. *R.* [1977] AC 195 at 224. For the reversal of the presumption, by virtue of an onus of proof on parties relying on an 'exception' under the Canadian Charter of Rights and Freedoms, see e.g. *Quebec Protestant School Board* v. *A-G Quebec* (1982) 140 DLR (3d) 33 at 59 (SC, Que.), upheld in result, *Quebec Protestant School Board* v. *A-G Quebec* (1984) 54 NR 196 (SC, Can.).

[2] *Minutes of Evidence taken before the Select Committee on a Bill of Rights*, House of Lords paper no. 254 of 1976–7, 370 (Q. 807). Lord Scarman restricted his reassurance by the hypothesis that parliamentary legislative sovereignty had been undisturbed by the (extremely weak form of) incorporation discussed by the Committee. But it is hard to see why judges who knew that their judgments would cause no impediment to the legislative will should be *more* deferential to that will than judges charged with the heavy responsibility of overturning it for repugnance to the (more strongly incorporated) bill of rights.

need to be, and can be, trumped by considerations of individual rights.[1]

V

Two versions of utilitarianism figure in these jurisprudential debates. One I can call the special theory; Dworkin calls it 'neutral utilitarianism', and thinks that it 'has for some time been accepted in practical politics [and] . . . supplied . . . the working justification of most of the constraints on our liberty through the law that we accept as proper'.[2] This 'takes as the goal of politics the fulfilment of as many of people's goals for their own lives as possible',[3] and is 'neutral toward all people and preferences',[4] so that preferences are to be given full weight even when they 'combine to form a contemptible way of life'.[5]

Special or neutral utilitarianism is, I believe, both flatly unacceptable, and regarded as such in every civilized community.[6]

[1] Admittedly, in its most abstract statements, the theory treats the idea of rights as the following *formal* idea: of a consideration which provides a political justification for an individual's decision or action even when the 'general background' goals and justifications for political decisions and actions would (but for the trumping right) justify impeding or preventing that individual's decision or action—and the 'general background' goals and justifications need not be utilitarian. See Dworkin in Cohen (ed.), p. 281; also Dworkin, *Taking Rights Seriously*, pp. 169, 364–5, and *A Matter of Principle*, pp. 370–1. But in practice, the theory treats utilitarianism, in one form or another, as the only background justification to be found in Western political practice, and certainly as the only political theory which needs to be met by the theory of rights. The most obvious and (if developed) eligible alternative background theory, having been labelled platonist, is brushed aside: 'I doubt that it appeals to many people': *A Matter of Principle*, p. 415. See also *Taking Rights Seriously*, pp. 272–3 ('I presume that we all accept [that] government must not constrain liberty on the ground that one citizen's conception of the good life . . . is nobler or superior to another's.')

[2] *A Matter of Principle*, p. 370.

[3] Ibid., p. 360; also *Taking Rights Seriously*, p. 364.

[4] Dworkin in Cohen (ed.), p. 282.

[5] *A Matter of Principle*, p. 360.

[6] Cf. Dworkin, *A Matter of Principle*, p. 360: 'Suppose some version of utilitarianism provided that the preferences of some people were to count for less than those of others in the calculation how best to fulfill most preferences overall . . . because the preferences in question combined to form a contemptible way of life. This would strike us as flatly unacceptable, and in any case much less appealing than standard forms of utilitarianism.' In making this unplausible statement plausible to its author, how important are the words 'of some people' and 'combined'? Consider the following, from Cohen (ed.), p. 284: 'The good utilitarian, who says that the push-pin player is equally entitled

As our practical politics broadly accepts, certain preferences are not merely outweighed by the competing preferences of others; rather, if there were to be a counting, weighing, and aggregating—or, more pertinently, whenever opportunities and restraints are to be distributed—these preferences should not be included at all. A few examples: the preference for seeing other human beings or animals suffer, for copulating with one's own infant children, for getting one's way *by trickery*, for getting more than one's fair share (just as such, regardless of one's desire or need for the object being shared out), and for a lifetime of self-immolation in slavery, sexual bondage, or drug-induced fantasy and oblivion. You will supply other examples.[1]

The other prevalent version is so general, or vague, that one may doubt its utilitarian identity. It asserts that law and government are to advance 'the general interest', 'the general welfare', 'the public interest', and 'the interests of the community as a whole'; it further asserts that those terms are synonymous with 'the collective good', 'the collective welfare', 'greater benefit overall, in the aggregate', and 'aggregate collective good'. In the pursuit of any such goal, 'in each case distributional principles are subordinate to some conception of aggregate collective good'.[2]

Now claims of right are certainly claims to exclude, override, or be immune from, some competing interest or claim of one or many other persons. But we should not seek to explicate the 'trumping' or 'exclusionary' capacity of rights by a contrast with 'aggregate collective good'. Concerning all these notions of a collective good supposedly specifiable prior to the specification of distributional

to the satisfaction of that taste as the poet is entitled to the satisfaction of his, is not for that reason committed to the proposition that a life of push-pin is as good as a life of poetry. Only vulgar critics of utilitarianism would insist on that inference. The utilitarian says only that nothing in the theory of justice provides any reason why the political and economic arrangements and decisions of society should be any closer to those the poet would prefer than those the push-pin player would like. It is just a matter, from the standpoint of political justice, of how many people would prefer the one to the other and how strongly.' The critic of utilitarianism is driven to the 'vulgar' inferential imputation by the extreme implausibility of the alternative inference: that the utilitarian thinks a 'theory of justice' can do without any theory of human good. (Does not this sort of utilitarian trade on the idea that a 'preference', as distinct from a mere desire, has at least the worth of having been *chosen*? If so, does he have any *reason* for not counting other aspects of human good as relevant in determining the demands of justice?)

[1] Some relevant further examples are mentioned by Vinit Haksar, *Equality, Liberty, and Perfectionism* (Oxford: Clarendon, 1979), pp. 260–1.

[2] *Taking Rights Seriously*, p. 91.

principles, we ought instead to say what Philippa Foot recently said concerning the corresponding notions in personal ethics:

> . . . we have no reason to think that we must accept consequentialism in any form. . . . there is simply a blank where consequentialists see 'the best state of affairs' . . . the concept of 'the best state of affairs' should disappear from moral theory.[1]

The notion of a determinable 'aggregate greater collective welfare' turns out to be no more coherent than the (quite different, but similarly illusory) notion of 'the biggest natural number'. The incoherence results from the incommensurability of the goods that make up individual welfare, and of the individual states of well-being (in the broadest sense of 'well-being') that make up the well-being of some 'collectivity'. There is a generic verification of this incommensurability whenever an unbiased and intelligent chooser, confronted with a state of affairs claimed to instantiate greater collective welfare than alternative states of affairs, *could choose* one or more of those alternative states of affairs. There is the proximate mark of incommensurability when alteration of the goods or bads in one or more of these various states of affairs leaves them all eligible; for that shows that the original multiple eligibility was not a mere tie between commensurable aggregate quantities of good.[2]

Thus the contrast between 'collective' good and 'individual' right cannot make good the contrast between policy and principle, legislative and judicial domains. The collectivity is of individuals, and the good (or well-being) of each individual and of their community involves, as an intrinsic aspect, that he or she is treated with fairness. Moreover, the good of each individual involves incommensurable aspects: there is a sense in which one's life-and-health is always better than one's death, a sense in which it is better to risk death on the Marylebone Road than abandon participation in normal affairs and responsibilities, and a sense in which one were better dead than be a betrayer of friends or a corrupter of children.[3] Reasonable choice, personal and social, is regulated not by the attempt to 'aggregate' goods, but by the attempt to foster or at least respect every basic human good

[1] Foot, 'Utilitarianism and the Virtues', *Mind*, xciv (1985), 196–209 at 209; and 'Morality, Action and Outcome' in Ted Honderich (ed.), *Morality and Objectivity* (London: Routledge and Kegan Paul, 1985), pp. 23–38 at 36.

[2] See Finnis, *Fundamentals of Ethics*, pp. 89–90; J. M. Finnis, Joseph M. Boyle, jun., and Germain Grisez, *Nuclear Deterrence, Morality and Realism* (Oxford: Clarendon, forthcoming), chap. ix, section 6.

[3] Cf. Matt. 18: 6; 26: 24.

according to criteria of fairness, respect (in every choice) for every basic good of every person, fidelity to commitments, creativity in pursuit of human good(s), and so on.

But are there not plain cases of preferring collective to individual good, or at least collective good to individual right? No, not in any strict sense. We loosely talk thus, of course, when (say) one man's house is blown up to save the suburb from burning. But what will burn is the houses of other individuals, each with a claim to be protected from fire. The plan is to protect these individuals by clearing combustibles from the fire's path. *This* combustible is a man's house. Can he complain of unfairness if we raze it? Well, he retains all his rights—genuine rights, properly specified—unimpaired.Genuine, carefully specified rights are not mere fair-weather friends. So he can complain of unfairness, injustice, if our action is pointless because as much will be lost as will be saved, or if our motives are mixed with favouritism or hostility unrelated to the menace of the fire, or if we will not compensate him by contribution from all whose interests are preserved by our fire-fighting measures, or if we choose to prefer any amount of other people's *property* (after all, an instrumental good) to his children (whose good is personal, not instrumental) by blowing them up with the house. Beyond that his rights do not go (and, properly understood, never did). And we do all this practical moral-political reasoning the more clearly if we avoid the mistiness of 'collective' or 'aggregate' good.

But what about the fire-brigade? Is not that the instrument of a collective goal? Yes, but only in the following sense. The protection of individuals from fires is one of the purposes we share, and whose sharing constitutes us a community. Protection from fires is thus an aspect of a good which you could call 'collective' but might do better to call 'common' or 'communal': shared. And the instruments for pursuing the various aspects of that good—instruments such as taxation systems, drainage, fire-fighting, police, courts, currency, and so forth—are irreducibly communal: public, not private, if not in ownership then in utility and dedication. But nowhere here do we find a collective welfare determinable apart from the individual rights which define, shape, and constitute the common good, the public interest. As our courts regularly and rightly say, the protection of individual rights is in the *public* interest.[1]

[1] See e.g. *Dumbell* v. *Roberts* [1944] 1 All ER 326 at 329 per Scott LJ; *Mohammed-Holgate* v. *Duke* [1984] AC 437; [1984] 1 All ER 1054 at 1059a per Lord Diplock.

In the 1977 Maccabaean lecture, it was said that in Britain

> political debate centers on the . . . idea of the general welfare or collective good. When political debate talks of fairness, it is generally fairness to classes or groups within the society (like the working classes or the poor), which is a matter of the collective welfare of these groups.[1]

But is it not widely understood that the 'collective welfare' of the poor is simply the welfare of indigent individuals, and that any unfairness involved in their inadequate welfare is simply unfairness to each and all of the individuals within the (logical) class 'the poor'? In relation to the welfare of the poor, don't the words 'general' and 'collective' merely idle? May not the confusion they signify be in the beholder, rather than in the British political debate?

But more: the contrast between rights and collective welfare does mischief to rights themselves. While teaching that (all) rights are trumps, it also teaches that (all) rights must give way to so-called collective welfare. Each right's presumptive priority (it is said) can be rebutted, and is rebutted whenever the threat to this 'collective welfare' is sufficiently great. This grand picture, then, gives the utilitarian or consequentialist what he needs for his purpose of setting aside the truly inviolable rights.

To hold fast to these rights, one must hold fast to a distinction fundamental to Western moral thought, perhaps increasingly though still only very hesitantly acknowledged in the explicit doctrine of our criminal law,[2] but ignored in the theory of rights which we are considering. The distinction, which I cannot here explore, is that between what one chooses (or: intends, whether as end or as means, and whether as act or omission) and what one merely accepts (rightly or wrongfully) as a side-effect of one's choices. For if there are truly inviolable rights which, when precisely specified, do trump, and not merely presumptively, *all* competing considerations, that is because the correlative wrong (or breach of duty) is the *choosing* to destroy, damage, or impede some basic aspect of a human person—which is always wrong. The utilitarian,[3] denying any significant distinction between

[1] *A Matter of Principle*, p. 31 = *Proc. Brit. Acad.*, lxiv, at 286. See also *A Matter of Principle*, p. 65: '. . . a group interest in having the same opportunities as those of other races.'

[2] See *Hyam* v. *DPP* [1975] AC 55; [1974] 2 All ER 41 at 52 per Lord Hailsham; contrast p. 63 per Lord Diplock, and *R.* v. *Lemon* [1979] AC 617; [1979] 1 All ER 898 at 905 per Lord Diplock.

[3] Not, of course, every utilitarian. It goes without saying that utilitarians (and other sorts of consequentialist or proportionalist) differ among themselves;

choosing death and accepting it as a side-effect of what one chooses (say, as a means of alleviating pain), urgently wishes our law to permit choices to kill, e.g. handicapped babies. His projects of reform get aid and comfort, willy-nilly, from the claims much heard in contemporary jurisprudence: that (all) rights are trumps but (all) are outweighed by *some* 'collective goals', and that the paradigm case of a fairly weighty right is 'the right to free speech'—which, as everyone admits, is rightly qualified in scores of ways and whose elevation to the rank of a paradigm therefore teaches, subliminally, that rights need not be taken too seriously.[1]

VI

I return, once more, to the proposed constitutional division. Its proponents have never denied that legislation properly goes beyond 'policies' of pursuing 'collective goals', and gives principled effect to rights. Rights mentioned as proper objects of legislative concern include the 'right to a decent level of medical care',[2] the right to protection against the 'moral harm' of being convicted (however accidentally) when innocent,[3] the right of the young to social provision of resources to avoid the 'moral harm' of neglect of education,[4] and so on.

The utilitarian models which were meant to give sense to the presumptive priority (and the exceptional though not infrequent subordination) of rights have lately been departed from yet more

for their 'method' *cannot* (in morally significant issues) amount to more than a rationalization of opinions formed on some basis other than the method (e.g. convention, sentiment, self-interest): *Fundamentals of Ethics*, ch. IV. 3. Moreover, since utilitarians characteristically want to get things done, they usually are loath to allow their calculations to take them too far from the consensus of their society and era.

[1] At one point, Dworkin entertains the category of 'absolute rights'; but he immediately renders it ridiculous by giving as his only hypothetical example 'a right to freedom of speech as absolute': *Taking Rights Seriously*, p. 92. His own teaching is that 'even the grand individual rights are not absolute, but will yield to especially powerful considerations of consequence': ibid., p. 354.

[2] Dworkin in Cohen (ed.), pp. 268, 270–1 [1983].

[3] *A Matter of Principle*, pp. 80, 92–3 [1981]. NB: 'The injustice factor [moral harm] in a mistaken punishment will escape the net of any utilitarian calculation, however sophisticated, that measures harm by some psychological state along the pleasure-pain axis, or by the frustration of desires or preferences or as some function over the cardinal or ordinal rankings of particular people, even if the calculus includes the preferences that people have that neither they nor others be punished unjustly': ibid., p. 81.

[4] Ibid., p. 84. NB: This moral wrong, if it exists, is 'not captured in any ordinary utilitarian calculation'.

widely. Concern for general welfare, it is said, includes concern for moral welfare.[1] Now moral welfare is the welfare of individuals. And the preservation of their own and their children's moral welfare is a task which individuals undertake as an essential exercise of their freedom. Suppose a court decides that the Convention's 'right of privacy' requires that use of pornography in private be permitted. Such a decision, as Dworkin says, would

> sharply limit the ability of individuals consciously and reflectively to influence the conditions of their own and their children's development. It would limit their ability to bring about the cultural structure they think best, a structure in which sexual experience generally has dignity and beauty . . .[2]

So interpreted, a right to privacy 'limits choice':

> those who wish to form sexual relationships based on culturally supported attitudes of respect and beauty, and to raise their children to that ideal, may find their plans much harder to achieve if pornography has taken too firm a hold in popular culture, which it may do even without public display.[3]

Suppose, then, that a court decided disputed questions about 'privacy' without due regard to the fact that its decision to favour the 'right of privacy' would impose limitations on individual choice, self-determination, and parental capacity, in a matter which so affects human dignity, respect, and beauty of action. Would it not be doing an injustice or, if you prefer, violating *rights*?

Why, then, should anyone hold that a right such as privacy (embodied in the European Convention, and imaginatively inferred from the US Constitution by the Supreme Court) should trump a concern for 'morals'? That concern, we can now say, is no mere concern for continuance of the *mores* and *esprit de corps* of the tribe. It is a rational concern for human goods, not only beauty

[1] *A Matter of Principle*, p. 29: 'the general welfare (Viscount Simonds called it the "moral welfare") of society'. Here 'of society' means just what 'public' means in 'conspiring to corrupt public morals': the moral welfare to be protected, preserved, or corrupted, is the moral welfare not merely of this individual or his household intimates, but of other individuals too; what matters is not that these other individuals be many, but that they be ascertained otherwise than by their private association with the individual in question: thus, any passer-by, any reader of an advertisement exposed to 'the public' in a 'public place', and so on.

[2] *A Matter of Principle*, p. 349 [1981]. See also ibid., p. 350: recognition of a right of privacy of that sort 'gives most people less rather than more control over the design of their environment'.

[3] Ibid., p. 415.

and respect in most significant relationships, but also the self-determination of those individuals who strive for an environment which enhances, not corrodes, such relationships, a milieu which they consider they have a right to create and preserve, in the interests of, at least, their children's rights.

VII

To the question, why *certain* rights (or certain exercises of certain rights) trump moral welfare (and, indeed, many other rights and interests), two types of answers are given, the one pragmatic, the other philosophical. The philosophical answer, offered by several contemporary jurisprudents,[1] is that to override these rights, in favour of worthwhile forms of life and in opposition to 'demeaning or bestial or otherwise unsuitable' forms of life, is to deny equality of concern and respect to those whose freedom of speech or 'privacy' (life-style) is overridden.

A first version of this claim was that legislative protection of morals manifests official or majority contempt for those whose preferred conduct is proscribed or impeded. That version was untenable because, on the contrary, such legislation may manifest precisely a sense of the equal worth and human dignity of those people, whose mistaken conception is impeded precisely on the ground that it misunderstands and betrays human worth and dignity (and thus their worth and dignity, along with that of others). So the new version relies instead on the idea of a hypothetical loss of, or incompatibility with, *self*-respect (one's own sense of one's equal worth):

> liberalism based on equality . . . insists that government . . . must impose no sacrifice or constraint on any citizen in virtue of an argument that a citizen could not accept without abandoning his sense of his equal worth. . . . no self-respecting person who believes that a particular way to live is most valuable for him can accept that this way of life is base or degrading. . . . So liberalism as based on equality justifies

[1] See, e.g. Neil MacCormick, *Legal Right and Social Democracy* (Oxford: Clarendon, 1982), p. 36 (enforcing morality treats others as 'not capable of morally proper choice'). Likewise Joseph Raz, 'Liberalism, Autonomy, and the Politics of Neutral Concern' in Peter A. French, Theodore E. Uehling, and Howard K. Wettstein (eds.), *Midwest Studies in Philosophy*, vii (Minneapolis: Minnesota UP, 1982), 89–120 at 113 ('. . . coercion . . . normally is an insult to the person's autonomy. He or she is being treated as a nonautonomous agent, an animal, a baby, or an imbecile.') These defenders of autonomy here seem simply to overlook the category of the autonomous individual who is capable of living rightly, but through temptation, bad example, and so forth, wrongly chooses to live otherwise (and who could be discouraged from doing so).

the traditional liberal principle that government should not enforce private morality . . .[1]

But this too fails. To forbid someone's preferred conduct does not require him to 'accept an argument'. And if he did accept the argument on which the law is based, he would be accepting that his former preferences were indeed unworthy of him (or, if he had always recognized that, but had retained his preferences none the less, it would amount to an acknowledgment that they had been unconscientious preferences). The phenomenon of conversion or, less dramatically, of regret and reform, shows that one must not identify the person (and his worth as a human being) with his current conception of human good. In sum: either the person whose preferred conduct is legally proscribed comes to accept the concept of human worth on which the law is based, or he does not. If he does, there is no injury to his self-respect; he realizes that he was in error, and may be glad of the assistance which compulsion lent to reform. (Does this sound unreal? Think of drug addicts.) And if he does not come to accept the law's view, the law leaves his self-respect unaffected; he will regard the law, rightly or wrongly, as pitiably (and damagingly) mistaken in its conception of what is good for him. He may profoundly resent the law. What he cannot accurately think is that the law does not treat him as an equal; for the justifying concern of this law, as an effort to uphold morality, is (may we not suppose?) for the good, the worth, and the dignity of everyone without exception.[2]

VIII

The philosophical argument for priority of 'free speech' and 'privacy' failed because it sought to identify rights without proceeding from an understanding of human good (which feeds and is fed by an understanding of human nature). With the failure of that argument, there remains a pragmatic one: free speech and

[1] *A Matter of Principle*, pp. 205–6 [1983].

[2] Sometimes Dworkin distinguishes between the worth of people and of their preferences (e.g. *A Matter of Principle*, p. 360); but usually he thinks that (to use the old jargon) to condemn the sin is to manifest contempt for the sinner—a mistake encouraged by his ambiguous phrase 'people of bad character' (ibid., p. 357). He thus overlooks another aspect of transparency: what is transparent for me, viz. the quality of *my* choices for the quality of *my* character, is not transparent when I am making judgments about other people, their choices and their character. Since I do not know the deepest grounds of their choices, I can condemn those choices without condemning (the character of) those who made them.

privacy are rights declared in the European Convention and other standard bills of rights, the fruits of historical experience. Specified and 'enshrined' in a public commitment, and protecting the individual against the state, they must extensively prevail over the competing considerations which have usually found a place in bills of rights only, if at all, in vague mention of 'morals' or 'public morals'.

The European Convention is indeed a product of historical experience. The draftsmen of 1950 had before their eyes the Nazi and Fascist lawlessness (often under cloak of legality), with its withdrawals of all human rights from unfavoured categories of person within the jurisdiction, on grounds such as race, language, religion, political opinion, association with a national minority, and so forth (Arts. 1 and 14); its exterminations (Art. 2), tortures (Art. 3), forced labour (Art. 4), arbitrary and indefinite detentions (Art. 5), mock trials (Art. 6), retroactive criminal laws (Art. 7), arbitrary searches and seizures and disruption of families and family bonds (Art. 8),[1] repression of religious freedom (Art. 9), censorship, jamming and persecution for transmitting opinion or information (Art. 10), destruction of unions and other intermediate or voluntary associations (Art. 11), and suppression of marriage and procreation by some categories of persons (Art. 12). Hence the selection of enumerated rights for protection.

The draftsmen were aware that there are many other ways in which human good can be affected by the conditions of life in community. These they referred to only compendiously, by such phrases as 'national security', 'public safety', 'prevention of disorder and crime', 'protection of health', and 'protection of morals'. Some of the named rights were not to be derogated from or qualified, even in the states of emergency which the Convention envisages, whether by reference to national security or anything else; these, being inviolable and (mostly) sufficiently specified, really do deserve the name *rights*; their unqualified identification is the European Convention's cardinal (though not unflawed)[2] virtue. But the Convention stipulates, as I have said, that 'the exercise of' other named rights (privacy, Art. 8, and

[1] Graphically sketched by Judge Sir Gerald Fitzmaurice (diss.) in *Marckx* v. *Belgium* (1979) 2 EHRR 330 at 366 (para. 7).

[2] When the time comes, judges will, I expect, be found who will read 'deprived of his life', in Art. 2.1, as significantly different from 'deliberately killed' (or cognates such as 'intentionally hastening death'); and thus the Convention may provide no great obstacle to killing certain handicapped persons for whom 'termination of life is no deprivation', etc.

freedom of expression, Art. 10) can be subjected to interferences, restrictions, and penalties of a certain kind.

This uncraftsmanlike language of 'interference' with exercises of the right carries an inappropriate implication: that when I am arrested in my cellar for making drugs, bombs, or freeze-proofed wines down there, the unwelcome irruption is not merely into my privacy but also into my exercise of my right. Would it not be more accurate to say that in such use of my cellar, I take myself outside the true ambit of my right? The limitations indicated by the Convention's references to public health, prevention of crime, and so on, are limitations which specify the limits of my right; they are in fact a part—or at least a compendious reference to an intrinsic part—of the right's own definition.

More important than its conceptual inelegance is the Convention's fundamental remission of responsibility: a court must delimit various tersely named but undefined rights (or their exercise) by reference to what is 'necessary in a democratic society for the protection of' health or morals or reputation or national security or maintaining the authority and impartiality of the judiciary, and so forth.

'Necessary . . . for'—not merely appropriate, fitting, justifiable in view of . . . Now American constitutional analysis can help clarify this matter. The necessity that must be shown is twofold: the law under challenge must be necessary for the public purpose it purports to protect (say public health, or morals), *and* that purpose must be a 'compelling state interest',[1] one whose importance outweighs, in a democratic society, the importance of the right (or: exercise of the right) which the challenged law restricts. As the European Court says, that law must be 'proportionate'. The significance of this opaque term emerges from the Court's use of it: the law must be proportionate not only to its own goal but also to the restriction it imposes on the right (a right treated in the Convention's conceptual structure, as we have just seen, as embracing the prohibited activity). The Court weighs the value of the relevant exercise of the right, against the value of the good secured by the challenged law.

What metric, what scales, are provided? The Convention refers us only to the concept of 'a democratic society'. How, you may ask, does the concept of democracy bear on the scope of the Convention's protection afforded to security, reputation, morals, judicial authority . . . ? (Surely it is not a matter of the sort of things

[1] See, e.g. *Roe* v. *Wade*, loc. cit., n. 1, p. 316.

that came to mind when we heard the complaint that judicial review is undemocratic?) The European Court thinks it largely a matter of 'tolerance and broadmindedness'.[1] Thus, superficiality and the short view are read into the Convention.

Is it the task of our judges to take another view? Is it *their* role to do what every legislature has, in any case, the responsibility to do? I mean: to hold in mind the good of autonomous and authentic choice, the evil of hypocrisy, bribery, blackmail, and police corruption, the costliness and scarcity of investigative and prosecutorial resources, the clumsiness of the legal process in analysing and resolving human character and relationships, the dignity of helping others to identify and choose consistently for the worthwhile amongst peddlers of decay, the importance of compulsion to education, the elusiveness of consensus in a pluralistic society, the fragility of allegiance in a society seeming to honour none but formal principles (such as the mysterious equality of immunity—for the safely born, and healthy—from interference) . . . Is it the proper role of judges to hold in view all these (and similar) goods and evils, opportunities, and perils, and to *choose commitments*, backed by legal compulsion, in relation to education, public or social means of communication, and recreation (newspapers, cinemas, videos, amusement arcades, bath-houses), research (human embryo banks, human embryo and fetal clearing-houses, human and humanoid genetic manipulations), family life (incest), institutional ideals, symbols and structures (marriage, and its simulations in bigamy and homosexual unions) . . . ?

A good citizen's sense of allegiance may be wounded, of course, when Parliament determines to permit, organize and fund abortions of convenience, or to approve and fund the conditional proposal and dedicated systems for destroying millions of foreign citizens in nuclear city swaps and final retaliation. One may indeed wonder how far to be concerned about the constitutional order, let alone the morals, of a society which sponsors such wrongs of thought and deed. But there is, I suggest, a special humiliation when the judiciary is originating sponsor of wrongs. Why so? And if so, must there not be some deep difference in function and character between courts and legislature, a difference so much of my argument may have seemed to deny?

I have denied only one version of the constitutional division of responsibilities. I deny that courts are the uniquely appropriate

[1] *Handyside* v. *United Kingdom* (1976) ECHR Ser. A., vol. 24, 23 (para. 49); *Dudgeon* v. *United Kingdom* (1981) 4 EHRR 149 at 165 (para. 53). Tolerance is one thing; 'tolerance and broadmindedness' has a different ring.

forum for practical judgment about those rights and principles which comprise the bulk of manifestos like the European Convention and which extend their (defeasible, fair-weather) protection far beyond traditional common law protections against slavery, wrongful imprisonment, torture, and the like. The legislator, I have argued, has a high responsibility for the human goods which modern 'manifesto rights' and 'principles' pick out as basic goods to be shared in by all. His responsibility is to enact his laws (which can only rarely be *deduced* from principle) so as to give every relevant principle due practical acknowledgement in every legislative act.

The special responsibility and competence of courts I can here scarcely even sketch. Is it not to ensure that their decisions are consistent with (i.e. 'fit') the derivative, *institutional* rights and principles created by the public commitments already made by the relatively determinate sources which can be the subject of legal *learning*: legislation, custom, and judicial precedent? What is 'necessary in a democratic society for the protection of (say) morals' is, it seems to me, an issue not to be mastered by legal learning or lawyerly skills. Perhaps, recalling my criticism of the European Court's protestations of moral neutrality, you will say that, on my view, courts that venture on these issues are damned if they do embrace moral neutrality and damned if they don't. And that is my point.

When a legislator considers human interests in terms of rights and principles, such as the right to privacy or the right of children and their progenitors and guardians to a decent milieu, his judgment may well be corrupted by false beliefs, passion, ineptitude, horse-trading, and all the other vices of political process. A community living without judicial review of legislation lives dangerously. How dangerously? That depends on the political community, its composition and its history. The political horizon of many American constitutional lawyers has been dominated by the simple judgment that the racial desegregation accomplished by judicial programmes, such as that of *Brown* v. *Topeka Board of Education* 347 US 483 (1954), could not soon have been accomplished otherwise (say by Congressional legislation under the post-civil war amendments). But not every society has to unravel its own formerly entrenched injustices under the legal and political constraints of federalism. And the horizon of other constitutional lawyers is dominated by a gloomy spectacle: the analytical confusion and bad legal history, the doctrinal pieties and the moral evasions of an 'improvident and extravagant'

exercise of 'raw judicial power',[1] to strike down the laws of fifty jurisdictions: *Roe* v. *Wade* (1973).

IX

Courts are a forum of principle. But when a judge has to determine, not what rights and principles have been established by the existing law as a whole, but whether existing laws measure up to the 'inspirational' terms of a novel constitutional instrument, may not his judgment, too, be deflected—say, by a narrow concern for precedent, the formulae of the text, the bounds of the pleadings and arguments addressed to it, and the parties' special circumstances, and by the political vices (more discreetly indulged), and mistaken political theories (such as utilitarianism, neutral liberalism, or social-cohesion conservatism), which enjoy a wider success amongst the sophisticated?

Here, perhaps, is the special insult added to the injury done when courts, in the name of rights, have overturned statutes and thereby sustained, abetted, or even imposed child labour, widespread pornography, and abortion.[2] It is not so much that the constitutional status of the bill of rights impedes prompt remedies for these injustices. Rather, it is the inauthenticity of the appearances which the courts in these cases kept up—the appearance of doing what courts characteristically do when doing justice according to law. Only out of court will the judge say what Mr Justice Kenny of the Irish Supreme Court recently said, reflecting approvingly on twenty years of 'active' interpretation of the Irish bill of rights: 'Judges have become legislators and have the advantage that they do not have to face an opposition.'[3]

Yet this was not mere usurpation. The constitutional text, by confusing education and inspiration with government, has required or at least invited judicial excursions beyond legal learning. The exigencies of federation virtually oblige the constitution-maker

[1] *Roe* v. *Wade* 410 US 113 at 222 (1973) per White J. (diss.).

[2] In the view of the British member of the European Commission on Human Rights, the Convention creates a right to abortion on demand at least until the unborn child is 'capable of independent life': *Bruggeman and Scheuten* v. *Federal Republic of Germany* (1977) 3 EHRR 244 at 255–7 (Fawcett, diss.). The Commission disagreed; the Court has not pronounced.

[3] John Kenny, 'The Advantages of a Written Constitution incorporating a Bill of Rights', *NILQ*, xxx (1979), 189–206 at 196. As J. M. Kelly, *The Irish Constitution* (2nd edn., 1984), p. 475, n. 29, points out, Kenny J.'s 'have become' refers to the epoch inaugurated by his own judgment in *Ryan* v. *A-G* (1965) IR 294.

to impose extraordinary responsibilities on the courts who must supervise the distribution of powers between co-ordinate central and local legislatures. One must ask oneself whether some comparable exigency suggests that we should impose on our courts the task of confronting either legislation or common law with the uncharted 'necessities of a democratic society'.

X

Have I been arguing against a bill of rights for Britain? Is there a grand balance sheet to be drawn up? No. Does either option, for or against a justiciable bill of rights, require us to choose to wrong someone? Not yet, or not certainly. I am suggesting just this. Forgoing a justiciable bill of rights means accepting some real risks of injustices. But adopting a bill of rights, in any form now practicable, means accepting a time-bound text which downgrades some human rights by its flawed craftsmanship and its failure to envisage more recent challenges to justice—flaws magnified by the European Court's interpretative methods. It also means accepting into our country's institutional play of practical reasoning and choice a new, or greatly expanded, element of make-believe, and new or ampler grounds for alienation from the rule of law.